



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Revision 11 of 2008

REPUBLIC ..... APPLICANT

VERSUS

1. KELVIN MUSAU

2. ZACHARIA JOHN NGONGO

3. BONIFACE MUTUKU

4. JOSEPH MBUVI

5. PETER MAITHYA

6. BAHATI MUTUNE ..... RESPONDENTS

RULING ON REVISION

1. By a letter dated 2/4/2008, Mr O’Mirera, Principal State Counsel seeks orders of this court i.e revision under powers conferred by Section 362 and Section 364 of the Criminal Procedure Code. The issue that necessitated that letter is the fact that on 31/3/2008, learned Senior Resident Magistrate, S.A. Okato esq. took the plea in Machakos Chief Magistrate’s Court Criminal Case Number 438/2008 in which six persons were jointly charged with the offence of conveying suspected stolen property contrary to section 323 of the Penal Code. The suspected stolen or unlawfully obtained goods, 40 bags of cement, were being ferried in motor vehicle Registration Number. KAZ 064 G Mitsubishi Pick-Up when the suspects were arrested. After the plea was taken, and I have the advantage of having called for and perused the lower court record, the 5<sup>th</sup> accused, Peter Maithya addressed the court as follows:-

**“I pray that M/V KAZ 064 G be released forthwith to myself if the prosecution shows nothing to do with it. I am the driver.”**

The prosecutor, one Inspector Cheruiyot is recorded as saying the following in reply:

**“We have no problem (with) the motor vehicle being released to the driver but the cement must remain because it is an exhibit. The vehicle to be photographed.”**

2. The court then made an order in the following terms:-

**“Order as prayed. Motor vehicle to be photographed.”**

3. In his letter, Mr O’Mirera states inter-alia as follows:-

**“...the court proceeded to order for the immediate release of motor vehicle KAZ 064 G to the 5<sup>th</sup> accused before the prosecution had opened its case and led evidence touching on the same.**

**It is trite law that destruction of an exhibit before production in court is fatal to the prosecution's case... It is instructive that the prosecution shall require the motor vehicle in question as an exhibit..."**

4. The powers of this court under Section 362 of the Criminal procedure Code is well set out therein. The Section provides as follows:-

**"Section 362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."**

5. It is clear from what I have reproduced above that Mr O'Mirera's contentions are not borne out by the record. Inspector Cheruiyot had the conduct of the prosecution case on 31/3/2008 when the application for release of the motor vehicle was made by the 5<sup>th</sup> accused. He not only failed to oppose that application but went further to apply that it be photographed before release. His application was granted. What wrong has the court committed which this court can revise? I see none and the application for a revision is misguided. Let the prosecution put its house in order without unnecessarily dragging this court in an otherwise wholly unnecessary exercise. Judicial time is precious and can be better spent.

6. In any event, no order of revision will be made and the lower court record is to be returned to the trial court for the matter to be handled in the usual manner.

7. Orders accordingly.

**Dated and delivered at Machakos this 3<sup>rd</sup> day of April 2008.**

**ISAAC LENAOLA**

**JUDGE**