



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Criminal Revision 2 of 2008

REPUBLIC APPLICANT

V E R S U S

MICHAEL OUMA AGUNDA RESPONDENT

RULING ON REVISION

By a letter dated 4th March, 2008, the Western Provincial CID Officer, Mr. Peter Mugo James asked this court to call for the SPM Criminal Case No.6/2008, with a view to reviewing the orders which the learned trial magistrate had made therein.

The orders in issue were for the release of a tractor, which was said to be an exhibit, and which the trial court is said to have ordered released to the accused.

In moving this court, the State invoked the provisions of **section 362** of the Criminal Procedure Code, which provides as follows;

“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.”

When the matter was first placed before me on 6/3/2008, I exercised the authority conferred upon the High Court by the proviso to **section 365** of the Criminal Procedure Code, and directed the parties to address the court on the issue of the proposed revision. I also ordered that until such time as the issue was determined, the orders issued by the trial court would be stayed, so as to preserve the subject matter of the application.

The learned State Counsel, Mr. Karuri, has submitted the tractor Registration **No. KZM 691**, which is the subject matter of this application, had been seized by the police in the exercise of their authority under **section 26 (1) (6)** of the Criminal Procedure Code. He said that the tractor was seized because it was ferrying suspected stolen scrap metal.

Thereafter, the applicant was charged with the offence of stealing, contrary to **section 275** of the Penal Code. The alternative charge was of handling stolen goods contrary to **section 322 (2)** of the Penal Code.

In those circumstances, the state believes that the tractor was a key element in the prosecution case.

Meanwhile, the fact of ownership of the tractor was itself also the subject of Kakamega Inquiry File No.2/2008, in which the ownership was being investigated.

It was therefore submitted that it was in the interest of justice to revise the order for the release of the tractor, because otherwise the prosecution case would be watered down.

For now, the tractor was in the custody of the police, and the State therefore says that it was in safe hands, at the Kakamega Police Station.

The State also drew the court's attention to the provisions of **section 311 (1)** of the Penal Code, which gives to the trial court, powers to order the forfeiture of the tractor, at the conclusion of the criminal case.

Therefore, as the accused person is said to have laid claim to the ownership of the tractor, the State believes that he should wait for the criminal case to be determined, whereupon he would thereafter be given the opportunity to show cause why the tractor should not be forfeited.

In answer to the application, Mr. Getanda, advocate for the respondent, submitted that no sufficient grounds had been advanced to warrant the exercise of this court's revisionary powers.

As far as the respondent was concerned, the learned trial magistrate had exercised its powers correctly, in issuing the orders for the release of the tractor.

The respondent said that those orders were only issued after the respondent had made an appropriate application before the trial court.

In his view, he had produced documents which proved ownership of the tractor, as there was not only an Agreement for Sale, but also a copy of a logbook for the tractor. Those documents showed that the registered owner was **ABRAHAM K. TUNGANI** of P.O. Box 18, BUKURA, but from the Agreement for Sale, the tractor appears to have been bought by **JOSEPH OCHANDA AGUNDA** of P.O. Box 937 Kakamega.

The accused, **MICHAEL OUMA AGUNDA**, is said to be the brother to **JOSEPH OCHANDA AGUNDA**.

However, the State did submit that the ownership of the tractor was the subject matter of an inquiry as to the ownership thereof. That inquiry is not the subject of the Kakamega SPM Criminal Case No.6/2008.

Therefore, in my considered view, even assuming that there was such an ongoing inquiry, I hold the considered view that it would be wrong for the State to use the criminal case against the respondent herein as the medium through which to detain the tractor, unless they could demonstrate that the tractor was an exhibit in that case.

To my mind the issue at hand can be resolved very quickly, through the production of the tractor in evidence, at the earliest possible opportunity. Thereafter, the tractor may be released to the custody of **JOSEPH OCHANDA AGUNDA**, on the strength of the undertaking spelt out in his affidavit sworn on **8/5/2008**. In other words, **JOSEPH OCHANDA AGUNDA** will be required to make available the tractor, to the trial court, at any time when the court may require it, during the currency of the case.

Secondly, **ABRAHAM KEYA TUNGANI**, who has deponed that he is still holding the original logbook of the tractor is ordered to ensure that the ownership of the said tractor is not passed on to any other person until the trial court determines the issue as to the forfeiture thereof, in the event that it should arise at the conclusion of the criminal case.

This decision is informed by the fact that whereas the State alleges that it is investigating the issue

of ownership as between **JOSEPH OCHANDA AGUNDA** and **ABRAHAM KEYA TUNGANI**, on the basis of a complaint lodged by the latter, it is noteworthy that the alleged complainant has confirmed, on oath, that he had sold the tractor to **JOSEPH OCHANDA AGUNDA**.

Of course, as the learned State Counsel has pointed out, if the tractor is in use, it is subject to the normal vagaries of life, such as an accident or theft. That would imply that the tractor might not be available in its current state or at all, at the end of the criminal case. If that were to happen, and if the court were to be minded to order that the tractor be forfeited to the State, the State would then either get nothing or it might get a damaged tractor.

But as the tractor would already have been produced in evidence, the release thereof would not have prejudiced the trial of the case.

However, in the event that the tractor might be either damaged or stolen, by the time the criminal case is concluded, it is hereby ordered that **JOSEPH OCHANDA AGUNDA** shall take steps to have the tractor comprehensively insured at all times before the criminal case is concluded. It is further ordered that in the event of an accident to or loss of the tractor, before the criminal case is determined, **JOSEPH OCHANDA AGUNDA** and **MICHAEL OUMA AGUNDA** will immediately notify the trial court about such development.

The policy of insurance is to be deposited with the trial court before the tractor is released.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 4th day of June, 2008

FRED A. OCHIENG

J U D G E