



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Revision Case 95 of 2005

REPUBLIC.....APPLICANT

VERSUS

JOTHAM MWEMBIJA.....RESPONDENT

ORDER ON REVISION

On the 30th of June 2005, the Assistant Deputy Public Prosecutor on behalf of the State made an application seeking to invoke the revisionary jurisdiction of this court under the provisions of **Sections 362 and 364** of the **Criminal Procedure Code**. The complaint by the State related to an order which was issued by the Senior Resident Magistrate on the 29th of June 2005 ordering the Provincial Police Officer to release motor vehicle registration number KAG 426U to the respondent Jotham Mwembia. On the material part, the said application states as follows:

“... earlier prior to investigations and trial of the two convicts, they had entered into an agreement for the sale of the said motor vehicle with one Jotham Mwembia in consideration for a sum of Kshs 250,000/= (Two hundred and fifty thousand only) which sum was duly paid in full. The purchaser was then issued with a duplicate logbook number 048101 in the name of Mehta Electricals Limited of P. O. Box 83284 Mombasa and transfer allegedly signed by the said Mehta. Following investigations it was established that motor vehicle registration number KAG 426U model B120 Chassis number B120-82797 Engine No. A12-402 792 make Nissan pickup colour white year of manufacture 1996 is currently owned by M/s Mehta Electricals Limited of P. O. Box 83284 Mombasa and the original logbook (is) number 248823. Following the subordinate’s court order dated 29th of June 2005 the Provincial Police Officer has been directed to release the said motor vehicle to the said Jotham Mwembia. It is our humble submission that:

- 1. The logbook number 048101-duplicate is fake.**
- 2. The transfer allegedly signed and stamped by M/s Mehta Electricals Limited is a forgery.”**

Upon this court perusing the said application, it made an order directing that the Attorney General and the respondent appear before this court on the 6th of July 2005 and make oral submissions as regard the application that was made by the State. The parties were further ordered to file affidavits to clarify any issue that could relate to the application for revision made to this court. Inspector Thomas Chemweno, the Officer in charge of Flying Squad Nakuru swore an affidavit basically reiterating the contents of the application made by the State. The respondent Jotham Mwembia swore a lengthy affidavit explaining the circumstances under which the said motor vehicle came to be transferred to his name.

At the hearing of the application, Mr Koech learned counsel for the State submitted that the subordinate court was wrong to order the said motor vehicle to be released to the respondent whereas the State had

established that the said motor vehicle had been stolen and the persons who sold the motor vehicle to the respondent duly convicted. He submitted that during the trial, the owner of the motor vehicle could not be traced. He submitted that the respondent had been charged with forgery. It was his further submission that there existed another motor vehicle of the same registration number and of the same colour which the police had established was properly registered. He submitted that the police had investigated the case and established that the respondent had had himself registered as the owner of the said motor vehicle after forging the transfer documents from the legal owner Mehta Electricals Limited. Inspector Chemweno attached a copy of the original logbook in his affidavit.

He further submitted that the said forgery was perpetrated to enable the respondent acquire a duplicate logbook. He submitted that the chassis number and the engine number of the said motor vehicle had been defaced to conceal the true identity of the said motor vehicle. He therefore submitted that since investigations had established that the logbook issued to the respondent was a forgery and further since it was established the chassis number and the engine number had been defaced, this court should not release the said motor vehicle to the respondent pending establishment by the police of its true owner.

Mrs Omwenyo learned counsel for the respondent opposed the application for revision. She submitted that the motor vehicles which were involved in the case where the two persons were convicted in the criminal case in the subordinate court were other motor vehicles and not motor vehicle registration number KAG 426U. She submitted that the trial magistrate had found as a fact that two motor vehicles were similarly registered although the other motor vehicle was not produced in court as an exhibit. She submitted that the trial court did not establish that the respondent was not a genuine owner of the said motor vehicle. She further submitted that the police made no efforts to trace the person whom they claimed to be the original owner of the motor vehicle.

It was therefore her submission that since the respondent was the registered owner of the said motor vehicle, the same should be released to him as provided for under **Section 177** of the **Criminal Procedure Code**. She submitted that the police had abused the court process by charging the respondent with alleged forgery, two years after the original criminal case was filed against the two convicts, the case of which the respondent was a witness. The respondent contends that he was charged so as to defeat his claim over the said motor vehicle. She submitted that the records at the Registrar of Motor vehicles clearly showed that the respondent was the owner of the said motor vehicle. Before this court reserved this case for ruling it ordered the State to avail to this court a true copy of the records of the said motor vehicle held by the Registrar of Motor Vehicles.

I have considered the application for revision made by the State. I have also considered the arguments which were made before me by Mr Koech on behalf of the State and Mrs Omwenyo on behalf of the respondent. The powers of this court to revise any order issued by a subordinate court in a criminal case is provided for under **Section 362 and 364** of the **Criminal Procedure Code**. Once it is brought to the attention of this court that an order issued was illegal, this court is mandated to examine the record of the said subordinate court to determine the correctness, legality or propriety of the said order.

In this case, the issue for determination by this court is whether the subordinate court lawfully released motor vehicle registration number KAG 426U to the respondent. According to the State the said motor vehicle is owned by Mehta Electricals Limited of Mombasa. On the other hand, it is the respondent's case that he is the owner of the said motor vehicle having purchased the same for value without notice of any defect in title. Having evaluated the submissions made before me and also having examined the record of the lower court it is evident to me that motor vehicle registration number KAG 426U was impounded by the police when they were investigating thefts of several motor vehicles by the persons whom they later charged in Nakuru **CMC Criminal Case No. 1803 of 2003** *i.e.* Humphrey Gichuki Murage and Charles Kariuki Gathura. The two accused persons were convicted for stealing motor vehicles other than the motor vehicle which is the subject matter of this application. The respondent was a witness in the said criminal case.

After the conclusion of the case, the trial magistrate found as a fact that although there existed two motor vehicles of the same registration number, of the same colour and of the same make as motor vehicle

registration number KAG 426U, the police had not been able to trace the owner of the motor vehicle which is the subject matter of this application. After the conclusion of the trial, the subordinate court ordered the said motor vehicle to be released to the respondent upon his production of a duplicate logbook of the said motor vehicle. It is apparent that the police were unhappy by the turn of events. They proceeded to investigate the respondent resulting in the respondent being charged with being in possession of a suspected stolen motor vehicle contrary to **Section 323** of the **Penal Code** and making a document without authority contrary to **Section 357(a)** of the **Penal Code**. The police charged the respondent with the charge of being in possession of a stolen motor vehicle while it was clear that for two years prior to the said charge being brought against the respondent the said motor vehicle was and is still in the custody of the police. It is the view of this court that the said criminal charges were brought against the respondent to intimidate him and to frighten him off from claiming ownership of the said motor vehicle.

I have carefully considered the application made by the State for revision and the response made thereto by the respondent. The submissions made have established that the said motor vehicle is registered in the name of the respondent. The copy of records issued by the Registrar of Motor Vehicles and dated the 28th of July 2005 established that the respondent is the registered owner of the said motor vehicle. Although the State has questioned the manner in which the respondent got himself registered as the owner of the said motor vehicle, the circumstances of this case and the action by the police show that the police had other motives when they undertook the said investigations against the respondent.

There was no complaint made to the police. There is no person claiming the said motor vehicle. For all intents and purposes, the police undertook the investigation against the respondent on their own motion and for the sole purpose of preventing the respondent from taking possession of the said motor vehicle after the conclusion of the criminal case which was the original reason why the said motor vehicle was detained. This court fails to understand why the police have advanced two reasons why the said motor vehicle should not be released to the respondent. The first reason is that although there was no person claiming the said motor vehicle, they had established that the respondent had forged the transfer of the said motor vehicle from the previous owners Mehta Electricals Limited of Mombasa. No evidence was placed before this court to establish that the said Mehta Electricals Limited had been a complaint to the police of the theft of the said motor vehicle. The second reason is that it would be improper for two motor vehicles of the same registration number and of the same make to be on the roads of this country. In my view once the police discovered that there existed two motor vehicles of the same registration number, it was their duty to inform the Registrar of Motor Vehicles so that a solution could be found. The fact of the existence of the said two motor vehicles with the same registration number should not form a basis to deprive a person who is properly registered as the owner of a motor vehicle.

In this case, it is clear that the police intend to deprive the respondent of the said motor vehicle probably so that the same could be sold thereafter having been declared to be unclaimed property. I have examined the record of the trial magistrate and it is clear to me that no other person other than the respondent claims the said motor vehicle. The trial magistrate properly exercised her powers as provided by **Section 177** of the **Criminal Procedure Code** in releasing the said motor vehicle to the respondent. The police had no business second-guessing the court where there was no rival claimant of the said motor vehicle.

I therefore dismiss the reference filed by the State and order the motor vehicle registration number KAG 426U to be released to the respondent forthwith. In view of the past conduct of the police, I hereby direct the Provincial Police Officer, Rift Valley to release the said motor vehicle to the respondent immediately and without any conditions. It is so ordered.

DATED at NAKURU this 16th day of March 2006.

L. KIMARU

JUDGE

