



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Revision 313 of 2006

Republic.....
.....APPLICANT

Versus

Henry Were Obuya & another.....RESPONDENT

RULING

The Deputy Registrar of this Court prompted me to exercise my Revisionary jurisdiction to peruse the proceedings taken before the Principal Magistrate’s court in Mombasa C M Cr Case No 691 of 2005, Republic =vs= Henry Were Obuya and Abdi Mohamed. In exercise of this court’s supervisory powers under Section 65(2) of the Constitution of Kenya and pursuant to Section 362 of the Criminal Procedure Code I went ahead to peruse the aforesaid proceedings to satisfy myself as to the correctness, legality and or propriety of the findings and or orders recorded therein.

The record shows that Henry Were Obuya and Abdi Mohamed Daib are before the Principal Magistrate’s court facing a charge of seven counts of various offences. The charge and particulars are reproduced as follows:

Count 1 is in respect of making a document without authority contrary to Section 357(a) of the Penal Code.

The particulars in respect of this court are that on an unknown date between 8/2/2004 and 15/2/2005 at Mombasa District within Coast Province jointly with others not before court, with intent to defraud, made without authority, a document namely Mombasa Port Release Order No 0549248 purporting to be a genuine document, made and signed by MICHAEL NGUNGA WAMBUA of FULGENT CARGO SERVICES, approved and authorised for clearing 2 x 40 feet containers Nos INKU 2873309 containing 220 packages of tyres and tubes and TGHU 8032341 containing 995 packages of automobile tyres and tubes from Kilindini Port.

The second Count relates to the offence of uttering a false document contrary to section 352 of the Penal Code.

The particulars are that on the 15th day of February 2005 at Kilindini Port in Mombasa District of the Coast Province, jointly knowingly and fraudulently uttered a forged Mombasa Port Release Order No 0549248 to PETER BWANA of Kenya Ports Authority to deliver the document for clearing from Kilindini Port 2 x 40 feet containers Nos INKU 2873309 containing 220 packages of tyres and tubes and TGHU 8032341 containing 995 packages of auto-mobile tyres and tubes.

Count III is in respect of stealing contrary to section 275 of the Penal Code.

The particulars are that on the 15th February 2005 at Kilindini Port in Mombasa District of the Coast Province, jointly stole 1 x 40 container No TGHU 8032341 containing 995 packages of Auto mobile tyres and tubes worth Kshs 2.5 million, the property of Kenya Ports Authority.

Count IV is in respect of attempted stealing contrary to section 275 as read with section 389 of the penal code.

The particulars in respect of this count are that on 15th February 2005 at Kilindini Port in Mombasa District of the Coast Province, jointly attempted to steal 1 x 40 container NO INKU 2873309 containing 220 packages of tyres and tubes worth Kshs 2.5 million, the property of Kenya Ports Authority.

Count V is in respect of forgery contrary to Section 349 of the penal code.

The particulars are that on unknown dates between 14/12/04 and 15/12/05 at Kilindini Port in Mombasa District of the Coast Province, jointly with intent to defraud, forged a document namely Mombasa Port Release Order NO 0549258 purporting to be genuine document, approved and authorised to clear from Kilindini Port, 1 x 40 feet container No TTNU 9417101 containing 205 sets of Pneumatic rubber materials.

Count six relates to the offence of uttering a false document contrary to section 353 of the penal code.

The particulars are that on 15th February 2005 at Kilindini Port in Mombasa District of the Coast Province, jointly knowingly and fraudulently uttered a forged Mombasa Port Release Order No 0549258 to PETER BWANA of Kenya Ports Authority Mombasa for the said PETER BWANA to deliver the document for clearing from Kilindini Port 1 x 40 feet container No TTNU 9417101 containing 205 sets of pneumatic rubber materials.

Count seven is in respect of attempted stealing contrary to section 275 as read with section 389 of the Penal Code.

The particulars of this count are that on the 15th February 2005 at Kilindini Port in Mombasa District of the Coast Province, jointly attempted to steal 1 x 40 feet container No TTNU 9417101 containing 205 sets of pneumatic rubber materials worth Kshs 1,745,000/- the property of Kenya Ports Authority.

On the 7th day of March 2006 the record shows that Mr Asige advocate watching brief for Vigello Food Stuffs Ltd applied for an order for the release of his clients two containers No INKU 2873309 and TGHU 8032341 containing tyres and tubes held at the Port police yard.

The court prosecutor did not object to the application on the ground that the containers had been photographed hence it may not be necessary for the court to visit the port police yard to verify the same. The defence counsels involved did not also oppose the application. Faced with situation, Miss Ndung'u the learned Principal Magistrate granted the order releasing the two containers. It would appear the order of release was extracted and served upon the relevant parties. The record shows that Maersk Shipping International instructed Mr Ndegwa advocate to apply for that order to be suspended and or stayed because his client was likely to suffer by incurring shipping demurrage charges. The proceedings indicate that the order was suspended for 14 days on 12th May 2006. It appears nothing has taken place since the orders were suspended save that the case has been fixed for hearing on 4th September 2006.

What is clear is that the 2 containers are the subject matter of the complaint or charge before the Principal Magistrate's Court. The containers have not been produced as exhibits in evidence hence they have not become the property of the court.

The learned Principal Magistrate therefore did not have jurisdiction to issue the orders releasing the

container which in essence are the intended evidence in support of the prosecution's case. The fact that the parties involved did not oppose the application for the release of the containers did not give the trial court any jurisdiction to issue to orders. In a nutshell the court had no control over the proposed exhibits until they are submitted to court as exhibits in evidence in the usual manner prescribed by law. In the end I am convinced that the learned Principal Magistrate issued the orders without jurisdiction hence the order can be dealt with on revision.

Consequently, in exercise of this court's supervisory Revision Powers, I set aside the orders on 7th March 2006. The affected containers to remain at the Port Police Yard at the discretion of the prosecution or pending the production in court as exhibits. At the moment the court has no control over the seized containers unless and until they are submitted to the court as exhibits.

August 14, 2006

Sergon, J