



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

REVISION NO 6 OF 2004

REPUBLICAPPLICANT

VERSUS

CAP VAN INTERNATIONAL LIMITED

INTERFREIGHT EAST AFRICA LIMITEDRESPONDENT

ORDER ON REVISION

The honourable Attorney General by a letter dated the 24th of August 2004 invoked the revisionary jurisdiction of this Court under the provisions of section 364 of the Criminal Procedure Code. In the said letter, the honourable Attorney General has urged this Court to call for the Chief Magistrate's Court Miscellaneous Criminal Application No 61 of 2004 in which Mssrs Cape Van International Limited and Interfreight East Africa Limited have made an application to have 288 cartons of recovered stolen goods released to them before the hearing of the criminal case filed against Alfred Nyakundi Akara and two others in Nakuru CMCCRC No 1299 of 2004 *Republic -versus- Alfred Nyakundi Akara & 2 others*. The honourable

Attorney General has urged this Court to examine the proceedings before the said subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of the said order issued by the said Magistrate's Court. The honourable Attorney-General has further urged this Court to examine and satisfy itself if the proceeding before the said Magistrate's Court were regularly conducted. The summary of the reasons in support of the honourable Attorney's application for revision is contained in page 2 of the said letter where it was stated that:

"... It is our view that the magistrate misdirected herself and acted unlawfully whilst issuing the orders sought.

First, the magistrate who issued the orders is not the trial magistrate and she lacks any jurisdiction to make orders pursuant to section 177 and 178 of the Criminal Procedure Code. Secondly, the applicants did not have *locus standi* to seek the orders which were granted, they being neither the prosecutor nor the complainant(s) in the case. Thirdly the goods ordered to be released are claimed by the third accused who claims to be his."

The honourable Attorney General therefore urged this Court to exercise its revisionary powers as provided for under section 364 of the Criminal Procedure Code and examine the said orders issued by the said Magistrate's Court with a view of quashing the same on revision. I have perused the proceeding of the learned magistrate. I have also read the application which was filed by the applicants Mssrs Cape Van

International Limited and Interfreight East Africa Limited purportedly under the provisions of section 177 of the Criminal Procedure Code. The said applicants allege that they were the owners of the consignment and the clearing and forwarding agents respectively of the goods in transit which were stolen and later recovered by the Police. It is not disputed that the complainant in the Criminal Case No Nakuru CMCCRC No 1299 of 2004 *Republic –versus- Alfred Nyakundi and others* is the Kenya Railways Corporation which was the transporter of the said goods. The accused persons in the said Criminal Case have been charged with the offence of stealing goods in transit contrary to section 279 (c) of the Penal Code. In the scheme of things therefore even though it is acknowledged that Mssrs Cape Van International Limited and Interfreight East Africa Limited may be the owners of the said goods (subject to proof) which were stolen and later recovered, they have no *locus standi* to make any application in respect of the said goods before the criminal case is heard.

Whatever application that the said applicants would wish to make, they can only make the same through the honourable Attorney General as the prosecutor of the case. In a Criminal Case there are only two parties who are recognised in law; the Republic, (which prosecutes cases) and the person who has been charged, who is known as the accused. The complainant has no right of audience before a court conducting a criminal case. The complainant can only communicate to the Court through the prosecutor. In the instance case, the said applicants seemed to have confused their position in law. They made a Miscellaneous Criminal

Application purportedly under the provisions of section 177 of the Criminal Procedure Code purposely to circumvent appearing before the trial Court in the case No Nakuru CMCCRC No 1299/2004 *Republic – versus- Alfred Nyakundi & 2 others*.

The learned magistrate thus erred in law in entertaining the said application filed by the said applicants. If the said applicants had anything to say to the Court, they ought to have made a request through the prosecutor to move the Court for an appropriate order. In any event, section 177 of the Criminal Procedure Code can only be invoked after it has been established beyond any reasonable doubt that the goods in question belong to the applicants. In the instant case, the said learned magistrate could not possibly be in a position to make a finding as to the ownership of the said goods as the criminal trial has yet to commence. It has been stated that there is a rival claimant of the said goods. In the absence of a positive determination by the trial Court in the criminal case as to the true owners of the stolen goods, the provisions of section 177 of the Criminal Procedure Code may not be invoked. The said learned magistrate thus fell into further error in law.

Further through presentations made before the Senior Principal Magistrate by the prosecutor the hearing date of the criminal case was brought forward from the 17th of September 2004 to the 2nd of September 2004. The prosecutor was without doubt acting in the interest of the owners of the goods to have the said trial date brought forward. Further the said 288 cartons of goods which were stolen and later recovered have not yet been produced in court in evidence. The said learned magistrate did not have jurisdiction to entertain the said application and order the release of goods which were not in possession of the Court or under its control.

A Magistrate's Court can only make an order restituting the property to a proved owner under the provisions of section 177 of the Criminal Procedure Code when the said goods have been produced in evidence before court. Before the said goods or property is produced in court as exhibits in evidence, a Magistrate Court cannot make an order in a criminal proceedings for the release of such goods.

In the circumstances of this case, the way the proceedings were commenced were irregular and an abuse of the established procedure.

The orders that emanated therefrom were by necessity illegal orders. I do therefore invoke my revisionary jurisdiction under the provisions of section 362 and section 364 of the Criminal Procedure Code and set aside the orders issued by the learned Principal Magistrate, Mrs Hellen Wasilwa on the 19th of August 2004. The said orders having no legal basis are ordered quashed. They will have no legal effect.

It is so ordered.

Dated and delivered at Nakuru this 25th day of August, 2004

L.K. KIMARU

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Ag JUDGE