



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority v Owino; Director of Public Prosecution
(Interested Party) (Miscellaneous Criminal Application
E005 of 2025) [2025] KEHC 5588 (KLR) (5 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5588 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CRIMINAL APPLICATION E005 OF 2025**

DKN MAGARE, J

MAY 5, 2025

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

KELVIN ODHIAMBO OWINO RESPONDENT

AND

DIRECTOR OF PUBLIC PROSECUTION INTERESTED PARTY

RULING

1. You cannot give what you don't have, *Nemo dat quod non habet*. This is an old maxim that has served the common law jurisdictions for a long time. However, this case turns the maxim on its head. The Applicant, who was the complainant in the court below, invoked the court's revisionary power to challenge an order for the release of motor vehicle Registration Number KCR 254 P, Toyota Voxy. The motor vehicle was impounded by the Applicant carrying what they described as uncustomed goods. The said motor vehicle had not, and had not as at the time of the decision, been produced in evidence.
2. The Respondent was charged with two counts. The first charge was an offence of being in possession of uncustomed goods contrary to section 200 (d)(iii) as read with section 210(c) of the East Africa Community Customs Management Act, 2004. The goods were 359,000 sticks of Super Match King Size cigarettes valued at Ksh. 7,000,000= . The second charge was conveying uncustomed goods contrary to section 199(b) of the East Africa Community Customs Management Act. The said goods were allegedly conveyed in a motor vehicle Registration Number KCR 254 P, Toyota Voxy. The complaint in the matter was the Kenya Revenue Authority. They protested the order releasing motor vehicle Registration Number KCR 254P, Toyota Voxy. They stated that the release was erroneous.



3. The Respondent sought the release of motor vehicle Registration Number KCR 254P, Toyota Voxy. The prosecution objected to the release and requested a special hearing before release. When the matter came to court, the prosecutor indicated that the vehicle was broken and the Applicant's warehouse was vandalized. They needed time to conclude the ongoing inquiry. The prosecutor stated that photographs had been taken, and the vehicle may be released. The court directed that the car be released as prayed.
4. This resulted in the complainant, Kenya Revenue Authority, filing the current application for a stay of the said orders and for the court to review, reverse, or set aside the orders given in Nyeri Criminal Case Number E1201 of 2024. They also sought a preservation order of the exhibits until the matter is heard and determined.
5. The Respondent and interested parties filed responses and submissions. The interested party, the director of public prosecution, supported the application, while the Respondent opposed it. The Respondent stated that the motor vehicle Registration Number KCR 254 P, Toyota Voxy, was vandalized while in the actual custody of the Applicant. He also stated that there was a second vandalism, where 200,000 sticks of cigarettes were stolen. He noted that the issue of the motor vehicle being vandalized was settled, as the DCIO had already taken pictures. They annexed a report by the Directorate of Criminal Investigations indicating that the photographs of the exhibits were taken. The exhibits were uncustomed cigarettes. The vehicle is not one of the items examined in the report by Directorate of Criminal Investigations. The Respondent blamed the Applicant for their recklessness. The applicant was not heard on the application.
6. The Respondent filed submissions relying on the authority of Director of Public Prosecution v Ibrahim Asala Mahangwa & 2 others [2022] eKLR, where Justice Muriithi posited as follows

18. I think that the possibility of loss of the benefit of the exhibit by way of interference with the chain of custody and the possibility of damages wear and tear through accident is a compelling factor, which in the circumstance of this case call for the presentation of the vehicle before the court in evidence before an order for release. It is the question of forfeiture which must await in determination of the trial which does not require the physical custody of the vehicle with the court, and it may be released to the owner subject to the orders of the court upon the end of the trial, the restrictions on dealings thereof securing at least the physical loss. The court cannot insure against loss of the vehicle by loss of value on account of accident in the course of use, and the comparative benefit of use of the vehicle for the innocent until proven guilty accused or owner of the vehicle, as the case may be, would in my view out weight the loss of value of forfeiture of the motor vehicle in the end.
7. The interested party supported the application. The court reserved the ruling for today. The lower court file was returned for fixing a hearing date before being returned to me. There are three interrelated issues that I must deal with, whether or not they are raised:
 - a. The place of the victim in the criminal proceedings.
 - b. The power of the lower court to release materials not produced in evidence.
 - c. The procedure for challenging the detention of properties in police custody.
 - d. Reliefs sought.
8. In the case of *Waswa v Republic (Petition 23 of 2019)* [2020] KESC 23 (KLR) (4 September 2020) (Judgment) Joseph Lendrix Waswa v Republic [2020] eKLR Neutral citation: [2020] KESC 23 (KLR), the Supreme Court stated as follows:



76. We agree with this view and adopt it as the correct position in law. We are of the view that the victim has no active role in the decision to prosecute or the determination of the charge upon which the accused will finally be tried. This is the sole duty of the DPP. While the victim of a crime can participate at the stage of the proceedings as deemed appropriate by the trial Judge, a victim or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP. The DPP must at times retain control of, and supervision over, the prosecution of the case. As such, the constitutional and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process.

77. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accordance with section 9(2)(a) of the VPA, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to take into account. Victim participation should meaningfully contribute to the justice process. It must be noted, however, that this does not mean that the court's judgment will follow the wishes of the victim. The trial Judge will, of course, take into account the law, facts, all the different interests, and concerns, including the rights of the defence and the interests of a fair trial to arrive at a sagacious decision.

9. The role of a complainant in criminal cases is circumscribed. However, in this case, motor vehicle Registration Number KCR 254 P, Toyota Voxy is yet to be produced in evidence. It is thus not clear on what basis the directorate of public prosecution was conceding to a vehicle not in their possession to be released without hearing the person in possession. This is crucial because, even where the court has the power to release, the release is done to the owner and not the accused. Sometimes, the owners and accused are the same persons or different. Serious procedural and substantive issue arises.
10. Who was best placed to make this application? In normal circumstances, it is the directorate of public prosecution that makes the application to protect the integrity of the exhibits. However, the said motor vehicle is not an exhibit that has been produced.
11. It is important, then, to hear the person in possession of the goods proposed to be given as exhibits, where there is proposed release. We may never know whether or not the said motor vehicle is subject to forfeiture proceedings or is an exhibit. It may be true that the Applicant is cognizant of Section 211 of the East Africa Community Customs Management Act, 2004 which provides as follows:
 - (1) A vessel of less than two hundred and fifty tons register, and any vehicle, animal, or other thing, made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall itself be liable to forfeiture.
 - (2) An aircraft or any vessel of two hundred and fifty tons register or more made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall not itself be liable to forfeiture but the master of any such aircraft or vessel commits an offence and shall be liable to a fine not exceeding ten thousand dollars; and such aircraft or vessel may be seized and detained until the fine is paid or security given.
 - (3) Where any vessel, vehicle, animal, or other thing is liable to forfeiture under this Act, then the tackle, apparel, furniture, and all other gear used in connection therewith shall also be liable to forfeiture.
12. The purpose of detention of the said motor vehicle cannot be known unless the applicant was heard. No man should ever be condemned unheard, as expressed in the truism that *audi alteram partem* principle. In *Rex vs Deferral* 1937 AD 370 and 373, the court posited that:



The audi alteram partem principles literary means, “hear the other side’. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity to express their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal representation, the right to adduce and challenge evidence in cross examination and the right to present ones evidence to the dispute or claim”.

13. The court frowns upon the issuance of what was essentially civil remedies against the Applicant, without the Applicant being heard. The power to revise a sentence arises from the court’s powers under Article 165(6) of *the Constitution* of Kenya, which states that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

14. The revisionary powers of this court are for purpose of satisfying itself as to the correctness, legality, or propriety of any finding by the subordinate court as set out under Sections 362 and 367 of the *Criminal Procedure Code*, that:

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.

367. When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

15. A decision made contravening the rules of natural justice cannot be said to be lawful. An unlawful or null order cannot be a basis for any further order. The prosecution had initially started well with the request that a special hearing be conducted to facilitate the release of the vehicle. This was not done. The court then proceeded to issue an order for the release of an exhibit that had not been produced. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

16. Further, had the exhibit been produced in court, I would have insisted that the application be made by the Director of Public Prosecution. However, the exhibit ordered release was not in court. The court could not release of an exhibit that was not with it. In the case of *Director of Public Prosecutions v Marias Pakine Tenkewa ta Naresho Bar Restaurant* [2017] eKLR, Nyakundi J, posited as follows:

The exhibits subject matter of the impugned order were to be used in the intended prosecution against the accused persons. In the instant case the assorted alcoholic beverages were ordered to be released to an interested party whose interest would be to ensure a fair trial does not take place against the accused person. It is equally important to note that the accused person in Cr. Case No. 99 of 2017 is an employee of the applicant. In this case the court had before it what one will describe as a primary evidence in the form of the seized drinks from the bar. Why temper with this evidence by releasing it and have the case prosecuted by way of production of photographs. I say so because in practical terms the learned trial magistrate had the opportunity of admitting the evidence to enable the accused to



have reasonable access at that stage of the proceedings. Once that bit of evidence is sorted out would then on application for release be canvassed for consideration. The release was premature in absence of them not being marked, identified and admitted in evidence.

17. In the case of *Madegwa v Republic & 4 others* (Criminal Miscellaneous Application E005 of 2022) [2023] KEHC 18163 (KLR) (Crim) (24 May 2023) (Ruling) L. N. MUTENDE posited as hereunder regarding the power to release an item not yet produced in evidence:

32. In the case of *Everline Wamuyu Ngumo* (2016) eKLR it was held that: “I find that the trial court was not entitled to direct that the motor vehicle be released to the respondent accused in order as the court put it, “to save it from wear and tear due to immobilization of the engine. The reason for this is that the motor vehicle has not been produced as an exhibit. It is only when some property including a motor vehicle have been produced as an exhibit in court that that court is then seized with the jurisdiction to order for its disposal.” (Emphasis mine.)

33. The decision is persuasive. What therefore transpired was an irregularity. The court granted release of a motor vehicle, an exhibit that was to be preserved prior to being produced in evidence. The court did not have power to release an exhibit it was not in control/possession of.

34. For these reasons the consent between the Prosecutor and the complainant in criminal case No E098 of 2021 was marred by an illegality and against the court process.

18. The court thus committed an illegality by releasing motor vehicle Registration Number KCR 254 P, Toyota Voxy, that was impounded by the Applicant without the same having been admitted as evidence in court. Such an order is amenable to revision to quash the illegality.

19. Before I depart, I note that the arrest occurred in Kagumo within Kirinyaga County. There is no reason why the lower court matter was filed in the Nyeri Chief Magistrate’s court. Section 4(1) of the Magistrate’s Court Act provides that the objective of the Act is to facilitate just, expeditious, proportionate and accessible judicial services in exercise of the criminal and civil jurisdiction in this Act or any other written law.

20. Section 71 of the *Criminal Procedure Code* provides for the place of trial to be the place where the act was done or where the consequence of the offence ensues. It states:

When a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued.

21. This court is bound by Section 76 to decide where in doubt. For good order, it is imperative that the court where the alleged offence occurred to try the same. This court will therefore transfer the matter to the Kirinyaga Law Courts for hearing and determination.

Determination.

22. I therefore make the following orders: -

- a. The application dated 29.01.2025 is allowed. The order of 23.01.2025 is set aside.
- b. I direct that the issue of the release of motor vehicle Registration Number KCR 254 P, Toyota Voxy, can only be dealt with after production in evidence or upon a specific application to the High Court for release. The lower court matter, E1201 of 2024, is transferred, suo motto, to Kirinyaga Magistrates’ Court, where the matter arose, for hearing and determination.



- c. The matter be heard on a priority basis to enable the issue of release of motor vehicle Registration Number KCR 254 P, Toyota Voxy be dealt with, and appropriate orders will be made after production after hearing the Applicant, who is the complainant, but within the limited scope in law provided.
- d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF MAY, 2025.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

