



**Petroleum Institute of East Africa v Republic & 5 others (Criminal
Revision E001 of 2024) [2024] KEHC 8612 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8612 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E001 OF 2024
DKN MAGARE, J
JULY 10, 2024**

BETWEEN

PETROLEUM INSTITUTE OF EAST AFRICA APPLICANT

AND

REPUBLIC 1ST RESPONDENT

GEOFFREY KINYUA MWANGI 2ND RESPONDENT

PATRICK KARIUKI WACHIRA 3RD RESPONDENT

SAMMY KARIUKI WACHIRA 4TH RESPONDENT

STELLAMARYS KYATHA MWONGELI 5TH RESPONDENT

CHARLES GITONGA WAMBUGU 6TH RESPONDENT

RULING

1. This is a Ruling over a Notice of Motion Application dated 8/1/ 2024. The Application seeks the following orders:
 - a. Spent
 - b. Spent
 - c. The Honourable Court be pleaded to call for and examine the record, proceedings, ruling and order of Hon. E. Kanyiri, PM in Karatina SPMCR Case No. E730 of 2021.
 - d. The Honourable Court be pleaded to correct and set aside the Ruling of Hon. E. Kanyiri, PM in Karatina SPMCR Case No. E730 of 2021 that Ordered for (1); the conditional discharge of the accused persons under Section 35(1) of the [Penal Code](#), (2); the release of all exhibits to wit Motor vehicle Registration No. KBU 552C and LPG Cylinders to the Accused persons,



(3); cash bail was refunded to the depositor and (4); the Accused persons were granted 14 days to Appeal.

- e. That this Court do regularize the sentence passed against the Accused persons to align with the minimum sentence provided by the [Petroleum Act](#), 2019 and the attendant Regulations.
 - f. That the Court do direct that Motor vehicle Registration No. KBU 552C be forfeited to the state as provided under the [Petroleum Act](#), 2019.
 - g. That this Court do direct that the LPG Cylinders be returned to their respective brand owners as provided by the [Petroleum \(Liquefied Petroleum Gas \(Regulations\)\)](#), 2019.
 - h. Any other orders deemed fit
 - i. Costs be provided for.
2. The Application was filed by the Complainant and is supported by the Affidavit of Clive Cetewayo Mutiso, the Investigations and Enforcement Officer of the Applicant. It was deposed in material as follows:
- a. The Accused persons pleaded guilty to offences of (1) illegally refilling the Applicant's LPG Gas without authorization and (2), trading and dealing with LPG Cylinders of another licensee for gain without the said licensee's prior written consent contrary to the [Petroleum Act](#), 2019 and the [Petroleum \(Liquefied Petroleum Gas \(Regulations\)\)](#), 2019.
 - b. Upon conviction, the Accused persons were discharged under Section 35 (1) of the Penal Code. Such sentence has no place in the [Petroleum Act](#), 2019 and Regulations as the rightful sentence ought to have been a fine of not less than Ksh. 20,000,000/= or imprisonment for a term not less than 10 years.
 - c. The lower court erroneously ordered for the release of the motor vehicle and the LPG Cylinders to the accused persons.
 - d. The LPG Cylinders would under Regulation 26(1) of the [Petroleum \(Liquefied Petroleum Gas \(Regulations\)\)](#), 2019 remain the property of the brand owner.
 - e. That under Section 120(a) and (b) of the said [Act](#), in addition to any other penalty imposed, an order shall be made for the forfeiture of any vehicle used in the commission of the offence.
3. The Complaint was made in respect of the following 12 members of the Complainant:
- i. Rubis Energy Kenya – K-Gas
 - ii. Hashi Energy Limited- Hashi Gas
 - iii. Total Energies Kenya Limited- TotalGaz
 - iv. Oil Libya Africa Limited (OLA)- Mpishi
 - v. National Oil Corporation – Supa Gas
 - vi. Lake Gas Limited- Lake Gas
 - vii. Vivo Energy Kenya Limited- Afrigas
 - viii. Galana Oil Kenya Limited- Delgas
 - ix. Tosha Petroleum- Tosha Gas



- x. Excellent Logistics Limited- E-Gas
 - xi. Hass Petroleum- Hass Gas
 - xii. BOC Kenya- Handi Gas
4. The Respondents do not appear to have filed a response to the Application. There are also no submissions on the court's record.

Analysis

5. The court has considered the Application and the supporting Affidavit with its annexures.
6. The issue is whether the proceedings in the lower court on 7/12/2023 were illegal, null and void.
7. The revisionary powers of this court are set out under the law. Under Section 362 of the *Criminal Procedure Code* it is provided 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.

8. Further, Section 367 of the *Criminal Procedure Code*, on the other hand, provides as hereunder:

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.

9. I note that on 20/12/2023, the plea was changed from plea of not guilty to the plea of guilty. The change of pleas was occasioned on the date of hearing. This was after Hon. K.M Njalale, PM was transferred and Hon. E. Kanyiri, PM took over the proceedings.
10. Further, the plea was changed after the Investigating Officer did not turn up. This was most unusual. Where the Investigating Officer is absent and most exhibits are not produced most accused persons would insist on closure of the case to boost their chance of freedom.
11. The victims were also not informed to give their input. In this case, the Applicant was the victim. Under Section 9(1)(e) of the *Victim Protection Act* it is provided as doth:
- A victim has a right to —
- (e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;
12. Further, in *Joseph Lendrix Waswa v Republic* (2020)e KLR, the Supreme Court stated as doth:

“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 any 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 all 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. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord 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.”

13. It is clear that monkey business happened contrary to the dictates of Section 120(a) and (b) of the Petroleum Act, 2019. The motor vehicle was released instead of being forfeited.
14. The court has also perused the proceedings of the lower court. I note a marked departure from Regulation 26(1) of the Petroleum (Liquefied Petroleum Gas (Regulations)), 2019. The sentence meted out is also illegal in view of Section 99 of the Petroleum Act, 2019.
15. There were also no proceedings regarding the exhibits. In an ordinary proceedings, the court should make an inquiry into the disposal of the exhibits. Some of the goods ordered to be released were not exhibits within the jurisdiction.
16. Therefore, the court finds that there were irregularities in the sentence. Under Section 364 of the Criminal Procedure Code provides that:
 - (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -
 - (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
 - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
17. The next question is whether the court can sever the sentence from the order on the exhibits. Without the change of plea, the orders do not bring the proceedings in good light. In the circumstances, I set aside the sentence and all consequential orders and redirect that the matter be remitted to the lower court and a Court other than Hon. E. Kanyiri shall take directions on how to proceed in line with Section 200(3) of the Criminal Procedure Code, Cap 75.
18. In so doing, I am fortified by the decision in of the High Court of Malaysia in *Public Prosecutor vs. Mubari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”
19. If the guilty plea is still maintained, then appropriate sentence be meted out. An Order pursuant to Regulation 26(1) of the Petroleum (Liquefied Petroleum Gas (Regulations)), 2019 be made other than an Order to release the LPG Cylinders to the Accused persons.



20. Consequently, I find and hold that the proceedings leading to the change of plea and conviction of the accused persons were tainted with an illegality and were as such null and void. As was re-stated by the Supreme Court in Petition No. 5 of 2015 - *Republic vs Karisa Chengo and 2 Others*, where the court quoted Lord Denning M.R in *Benjamin Leonard Mcfoy United African Company Limited (UK) [1962] AC 152* in the Privy Council as opining:

“If an act is void, then it is in law a nullity. It is not only bad ...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.

21. The motor vehicles involved in this offence are hereby ordered to be forfeited to the state. Should the accused persons change plea, the said motor vehicle registration No. KBU 652C be held at the relevant police station pending the hearing of the case.

Determination

22.

- a. I therefore make the following orders: -
- a. The proceedings of 7/12/2023 are invalid, illegal, null and void. They are accordingly set aside.
- b. The sentence in the Ruling and Order dated 7/12/2023 with all consequential orders are hereby set aside.
- c. The matter shall be remitted to the lower court and a court other than Hon. E. Kanyiri shall take directions on how to proceed in line with Section 200(3) of the *Criminal Procedure Code*, Cap 75.
- d. If the guilty plea is still maintained, then appropriate sentence be meted out and an order pursuant to Regulation 26(1) of the *Petroleum (Liquefied Petroleum Gas (Regulations))*, 2019 be made other than an order to release the LPG Cylinders to the accused persons.
- e. The Motor Vehicle Registration No. KBU 652C is hereby ordered to be forfeited to the state. Should the Accused persons change plea, the said Motor Vehicle Registration No. KBU 652C be held at the relevant police station pending the hearing of the case.
- f. In the circumstances, I make no order as to costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms. Kaniu for the State

Mr. Ngarwa for 2nd-6th Respondents

No Appearance for the Applicant

Court Assistant – Jedidah

