



**Republic v Kinyanjui (Miscellaneous Criminal Application
E097 of 2024) [2024] KEHC 14112 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CRIMINAL APPLICATION E097 OF 2024
DKN MAGARE, J
NOVEMBER 13, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

JOHN KANGETHE KINYANJUI RESPONDENT

RULING

1. This is a ruling over an application dated 29/10/2024 in which the office of the director of public prosecution seeks to review an order of the lower court, issued on 28/10/2024 by the Honourable D.N. Bosibori, Senior Resident Magistrate, in Mukurweini Criminal Case No. E254 of 2025- *Republic v Kevin Kamau Waitthaka and John Kangethe Kinyanjui*.
2. The lower court file was transmitted to this court vide an order which this court made on 30/10/2024 under the supervisory powers of this court to call for and examine the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of the order that was issued on 28/10/2024 for the release of motor vehicle Registration No. [Particulars Withheld].
3. The accused in the lower court had taken plea on 4/10/2024, charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars were that on 3/10/2024 at Kiahungu township in Mukurweini subcounty jointly with others not before court, robbed Cynthia Chebet and Caroline Nyawira of 5 bales of pioneer 3812 maize seeds valued at Ksh. 47,500 while armed with a knife and an object imitating a firearm and immediately before/ immediately after the time of robbery assaulted the said Cynthia Chebet and Caroline Nyawira.
4. The said motor vehicle is believed to have been directly involved in the commission of the offence against the Respondent. According to the Applicant, the motor vehicle was used in ferrying the accused



person to Mukurweini from Kagio in circumstances that portend to the commission of robbery with violence, for which the accused is charged.

5. The accused in the lower court case pleaded not guilty and were released on bond on 4/10/2023 and subsequently requested for a pro bono lawyer to be appointed. This was in the next date when they were in court on 23/10/2023. The second accused prayed for release of motor vehicle Registration No. [Particulars Withheld] held by the police.
6. The matter was deferred to 28/10/2024. The 2nd accused made an application for release of the vehicle which the office of the director of public prosecution opposed as the vehicle was an exhibit. In spite of the protestations, the court ordered release by close of business on 30/10/2024 as the 2nd accused was using the same to eke out a living. Photographs were to be taken before release.
7. Applicant made this application on 29/10/2024 for review under certificate of urgency. I found the application as urgent and stayed the order of release in the interim and set matter for hearing today. The prosecutor and the respondent both agree that the vehicle has a bullet hole inflicted on that day. The vehicle has not been produced in evidence. Indeed, no witness has been heard in the matter and as such the court cannot know the evidence related to the vehicle. The vehicle is not before the lower court as at the time of writing this ruling.
8. Recently, on 25/10/2024, while addressing the issue of interference with the mandate of the Director of Public Prosecutions in the case of *Jan Ramin Langer & 43 others v Director of Public Prosecutions & another; Isaac Mwaura Rodrot (Intended Interested Party)* Malindi Petition No. 10 of 2020 As Consolidated With Petitions 6 of 2019, 12 of 2020, 13 of 2015 And Miscellaneous Application No. 1 of 2021, we stated as follows:

80. It is well settled that constitutional and statutory bodies such as the DPP and the IG must be given the space to discharge their mandate and to exercise their discretion in doing so. A court will only intervene where it is demonstrated that they have acted ultra vires or in breach of the *Constitution* or the law. This was the holding of Ngugi, J. (as she then was) in the case of *Kipoki Oreu Tasur v Inspector General of Police & 5 others* [2014] eKLR. The learned Judge stated:

20. The criminal justice system is a critical pillar of our society. It is underpinned by the *Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.

On its part, the Court of Appeal addressed its mind to this issue in *Tom Dola & 2 others v Chairman, National Land Commission & 5 others* [2020] eKLR and stated:

In *Pevans East Africa Ltd & Another v. Chairman, Betting Control & Licensing Board & 7 Others* [2018] eKLR, this Court emphasised, and we reiterate, that where the *Constitution* has vested specified functions in a state institution or organ, the courts will not readily interfere with the discharge of that mandate unless it is demonstrated that the institution or organ in question has acted ultra vires or in breach of the *Constitution* or the law.

9. Director of Public Prosecutions postulates that the said vehicle is an exhibit. The court has not heard the evidence. It is preposterous to presume that the identification of the vehicle is the only part that



the prosecution was dealing with. It is neither the duty of this court or the court below to direct the prosecution on how to produce evidence. The only rider is Article 157(11) of the *Constitution*, which enjoins the Director of Public Prosecutions, in exercising the powers conferred under that Article, to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

10. I am alive to the holding of superior courts that, in criminal proceedings or, indeed, any other court proceedings it is important if not necessary that the exhibit being referred to in evidence be physically presented in court. However, it is important to have the holder of the exhibits produce the same in a case before release. In a case involving robbery with violence, while deliberating on the doctrine of recent possession, the Court of Appeal in *Andrea Nabashon Mwarisha v Republic* (2016) eKLR and stated that:

“.....Ideally, in criminal proceedings or, indeed, any other court proceedings it is important if not necessary that the exhibit being referred to in evidence be physically presented in court. However, like every ideal situation, there are exceptions. There could be circumstances which make the availability of such an exhibit in court impossible. For instance, the exhibit may be immovable, perishable or on transit, a tool of trade as in the circumstances of this case; exhibit which may pose logistical or health challenges, for instance, a dead body. The list is endless. In such circumstances, another method ought to be devised to counter the above pitfalls. One such method is by taking of the photographs of the intended exhibit and tendering them in court....”

11. This court has been moved to revise orders of the subordinate court pursuant to the power of this court under Article 165 (6) and (7) of the *Constitution* Article 165 (6)(7) of the *Constitution* provides as doth:

“(6) 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.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.....”

12. This Court has statutory underpinning in Section 362 of the *Criminal Procedure Code* to call for and examine the record of any criminal proceedings before any subordinate court for purposes 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 proceedings of any such subordinate court.

13. The established procedure to be followed before an object becomes an exhibit is well elaborated in the criminal procedure code to warrant any discussion. It must be repeated for clarity that an object or matter has to be identified by inspection or observation before it can be produced. Prior to presentation in court, all evidence to be used during trial must therefore be preserved, not by the court or accused but by the person in whom they are entrusted, that is an investigating officer, who ordinarily is a police officer or a member of other statutory bodies vested with investigations, including the Ethics and Anticorruption commission. The exhibits cannot be in the custody of the accused. In *Petroleum Institute of East Africa v Republic & 2 others* [2021] eKLR, the court stated as follows:

17. A court has jurisdiction to restore property to an individual it believes to be entitled to it (Vide section 177(a) of the *CPC*). However, the question begging would be, under what



circumstances the property should be released? Procedurally, for an exhibit to form part of evidence, it has to be presented for purposes of identification so that the court inspects it prior to being admitted or not depending on its legality. Prior to presentation in court, all evidence to be used during trial must be preserved. This duty that is bestowed upon the investigator of a case is for the purpose of due process and fair trial. Evidence herein of the motor-vehicle was detained following investigations carried out. When the court granted the conditional orders, releasing the exhibit, it had not been introduced in evidence.

14. Therefore, the trial court acted without jurisdiction in directing for the release of an exhibit that was yet to be produced. The best the court would have done was to schedule the matter for prompt hearing, if possible from day to day, until completion so that the rights of the parties are expeditiously determined. Courts have held before me and I fully agree there that until property or properties are produced before subordinate courts as exhibits, the court will not have jurisdiction to order release of the same. The cases of *Elijah Nyakebondo v Republic* (2017) eKLR and, *Republic v Everline Wamuyu Nguro* (2016) eKLR will make a useful guide in this respect.
15. The forgoing makes me reach an inescapable conclusion that a chattel that has been seized and is presented before court to be used as an exhibit may be restored to the lawful owner following directions of the court but such an order can only be granted after the subject said chattel is identified and adduced in evidence as to discharge the burden of proof under the relevant law. To do otherwise would be to limit the powers of Director of Public Prosecutions to adduce evidence. The sky is otherwise not falling. The respondent should concern himself with disentangling himself from the main case, otherwise the vehicle may be the worst of his worries.
16. After calling and examining the record the criminal proceedings relating to the order of the lower court, issued on 28/10/2024 by the Honourable D.N. Bosibori, Senior Resident Magistrate, in Mukurweini Criminal Case No. E254 of 2024 - *Republic v Kevin Kamau Waitihaka and John Kangethe Kinyanjui*, I am satisfied that the same was issue in vacuo and without jurisdiction. It is an improper order and has an effect of curtailing the powers of Director of Public Prosecutions to adduce evidence effectively. It is not a correct order or an order capable of being issued at this stage. The holding in *Macfoy v. United Africa Co. Ltd* [1961] 3 All E.R. 1169, is apt and it is worth repeating the words of Lord Denning delivering the opinion of the Privy Council at page 1172 (1) who 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.”

17. Therefore, it was premature and without jurisdiction for the trial court to order release the motor vehicle motor vehicle Registration No. [Particulars Withheld] before it was evidence in that court. The Supreme Court had guided all courts below it. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, *the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power



upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

18. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The release order was illegal, irregular and improper, and I quash and set it aside. The motor vehicle Registration No. [Particulars Withheld] shall remain in the custody of the prosecution until it is adduced in evidence.
19. In order to maintain the sanctity of proceedings, I direct that the matter is remitted to the trial court to be heard by a court other than Honourable D.N. Bosibori, Senior Resident Magistrate.

Determination

20. In the circumstances I make the following orders: -
 - a. The application dated 29/10/2024 is merited and is accordingly allowed.
 - b. The order for the release of motor vehicle Registration No. [Particulars Withheld] is set aside.
 - c. The matter is remitted to the trial court to be heard by a court other than Honourable D.N. Bosibori, Senior Resident Magistrate.
 - d. The primary matters be listed before Court 1 in Mukurweini Law Courts on 21/11/2024.
 - e. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF NOVEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the State

Respondent – present

Court Assistant – Jedidah

