



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL REVISION NO. 181 OF 2020

REPUBLIC.....APPLICANT

VERSUS

BILALI KIMALA NDECHUMIA alias BENEDICTO KIMALA NDECHUMIA....RESPONDENT

R U L I N G

1. By an application dated 7th September 2020 the state sought under Section 356 and 357 as well as Sections 362 to 364 of the Criminal Procedure Code that the court be pleased to issue an order for preservation of motor vehicle Reg. No. KCB 852 A Toyota Vanguard and KCM 005 D Toyota Wish and Money amounting to Kshs.4537000/= the exhibits produced in the trial court Shanzu SPM Court CR. Case No. 970 of 2017 pending *interparties* hearing of the application and appeal No. 19 of 2020.
2. It was also sought that an order do issue for storage and preservation of the exhibits i.e. motor vehicle Reg. No. KCB 852 Toyota vanguard and KCM 005 D Toyota wish and money amounting to Kshs.4,537,000/= at Regional Criminal Investigations Mombasa and at Shanzu Law Courts Deposit Account.
3. The application was supported by the grounds on the face of the application and supporting affidavit of Muthoni M. Benson prosecution counsel which we averred that the Respondent was charged at Shanzu Law Courts in CR. Case No. 970 of 2017 where judgment acquitting him was delivered on 14th July 2020. That the applicants were aggrieved by the said judgement and they preferred an appeal in Mombasa H.C. CR. Appeal No. 19 of 2020.
4. That the trial court having delivered judgment became *functus officio* and ought not to have made any subsequent orders thereafter. That the order made of the trial court on 3rd September 2020 releasing the motor vehicles and money which were exhibits in the trial court would render the appeal an academic exercise as the substratum shall have disappeared and/or extinguished.
5. It was averred that the order to release the money to the law firm of J. Magolo Advocates was a procedure unknown in criminal law on restitution. That the appeal has merit and great chances of success and stay and preservation of assets if not granted shall render the appeal nugatory.
6. It was averred further that the exhibits are proceeds of crime and therefore need to be preserved pending hearing and determination of the application and appeal as the matter is of great public interest that has attracted a major public outcry as it relates to trafficking of narcotics drugs within Mombasa County which is a menable.
7. The Respondent opposed the application through Replying affidavit shown on 30th November 2020 in which he averred that the police unlawfully broke into his premises and carried out a search and took his money Kshs.4,537,000/= and 2 motor vehicles as well as CCTV and its DVR which contents were deleted before being returned to him.
8. Subsequently, he was charged in Shanzu SPM Court CR. Case No. 970 of 2017 with the offence of trafficking drugs. The Respondent said that he was acquitted of the charge which judgment was delivered on 14th July 2020 and after delivering the judgment an application dated 17/7/2020 made for release of the exhibits to him was allowed by the trial court but Anti-Narcotics Police Unit failed to release the exhibits to him.
9. The Respondent contended that the application herein was filed after inordinate delay and should be dismissed. The Applicants counsel Ms. Mwangeka submitted that they are seeking the ruling of the trial court delivered on 3/9/2020 revised to preserve the exhibits pending the hearing and determination of appeal herein.

10. Mr. Magolo for the Respondent submitted that Section 356 and 357 of the Criminal Procedure Code under which the application was brought are not relevant as they provide for bail and stay of execution pending the entering of an appeal.

11. I have considered the application and the Sections of the Criminal Law under which the application has been brought and find that this is an application for stay of release of exhibits which should have been filed in CR. Appeal No. 19 of 2020 and the law upon which the same has been brought herein are irrelevant and inapplicable.

12. The applicant has not shown that there was an error apparent on the face of the record requiring revision. This court has not been shown that the order made by the trial Magistrate in Shanzu SPM's Court CR. Case No. 970 of 2017 was incorrect; illegal or riddled with impropriety or irregular to require revision.

13. The order of the trial court made on 3rd September 2020 was an exercise of judicial discretion based on trial conducted by the said trial Magistrate and can only be overturned by an appeal on good grounds and not through revision.

14. The application for revision is therefore dismissed.

Dated, signed and delivered at Mombasa this 04th day of February 2021.

HON. LADY JUSTICE A. ONG'INJO

JUDGE