



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CRIMINAL DIVISION OF THE HIGH COURT**

**CRIMINAL REVISION NO. 544 OF 2020**

**JEREMIAH KOBIA MUNORO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The ruling herein relates to; an application dated 16<sup>th</sup> July, 2020, brought under the provisions of; section 362 as read together with sections 364, 366 and 367 of the Criminal Procedure Code, (cap 75) of the Laws of Kenya (herein “the Code”), section 8 of the Traffic Act (cap 403) of; the Laws of Kenya, sections 82, 83 and 84 of; the Proceeds of Crime and Anti Money Laundering Act, N0. 9 of 2009, and Articles; 40, 47, 48, 159 and 165 of; the Constitution of Kenya, 2010.

2. The applicant is seeking that, the order of the learned trial magistrate withholding his vehicle until the case is heard and determined, be reversed and in place thereof an order be made that, photographic evidence of the motor vehicle be used at trial. Further, the orders of the Honorable Court be served upon the learned trial magistrate.

3. The application was filed under a certificate of urgency, supported by an affidavit sworn by; Jack E. Bigambo, an Advocate of the High Court, practicing as such, in the name and style of Bigambo & Bigambo Advocates. However, I note right from the outset that, there is no formal chamber summons application filed to support the certificate of urgency.

4. Similarly, the main application for revision, is filed in rather unusual manner, as it is, neither headed as a “chamber summons application” nor “a notice of motion application.” In the same vein, the substantive application is not supported by any affidavit, sworn by the applicant and/or any other person.

5. Be that as it may, the application is premised on the following grounds: -

*a) The ruling made by the trial magistrate was made with disregard to Articles 40, 47, 48, 159 and 165 of the Constitution;*

*b) The trial magistrate failed to address himself to the exceptional circumstances surrounding the applicant’s case while making the said ruling;*

*c) The trial magistrate relied on extraneous matters such as the applicants’ motor vehicle was proceeds of crime yet the applicant well explained that, the motor vehicle in question was acquired and registered long before the crime was espoused in the case before the court was committed, explanations which were extremely reasonable and satisfactory to the court and as such could not form a basis for the ruling;*

*d) The trial magistrate failed to appreciate that the applicant is neither an accused person, person of interest or under investigations in the case before court.*

*e) The trial magistrate while exercising his discretion failed to address himself on pertinent matters such as the motor vehicle in question was registered in the name of the applicant and not the accused persons and that the 1<sup>st</sup> accused at the time of arrest had only hired the said motor vehicle for the day, information which the court disregarded;*

*f) The trial magistrates failed to judiciously weigh the reasons given by the applicant in attempt to explain that the motor vehicle in question does not fall under the prism of proceeds of crime and Anti- Money Laundering Act, and there being no preservation order or an order of impounding a motor vehicle, continuous impounding of the applicant’s motor vehicle is unfair;*

g) *The learned trial magistrate failed to appreciate applicant's proposal to deposit the log book in court to way lay any adverse effects to the case in case the motor vehicle was transferred to a third party;*

h) *The learned trial magistrate failed to appreciate that even if the motor vehicle was to be used as an exhibit, photographic evidence of the motor vehicle would be the most appropriate instead of subjecting the applicant's motor vehicle to wear and tear and waste it as it continuous being held at the police impounding yard and yet he is not party to the case;*

i) *Quite clearly the learned trial magistrate erred in holding that the motor vehicle in question can only be released after Criminal Case No. 1298/2020 has been heard and determined;*

j) *The decision by the learned trial magistrate was excessively harsh and most punitive to the applicant in the circumstances of the case.*

6. On 17<sup>th</sup> July, 2020, when this matter was first heard by the court, it was ordered that, the application be served for inter parties hearing. Further, on 8<sup>th</sup> April, 2021, the court directed the Respondent to file a response to the application within seven (7) days from the date thereof and set timelines for filing of submissions, as two (2) and five (5) days for the applicant and Respondent respectively

7. Subsequently the filed grounds of opposition stating that: -

a) *That the application is an abuse of court process as the applicant ought to have approached the Honourable Court by way of appeal and not revision;*

b) *That the application is without merit as it does not exhibit how the court's order was illegal, improper, and incorrect and or the proceedings leading thereto irregular;*

c) *That the learned trial court correctly dismissed the application as it had no jurisdiction to deal with the motor vehicle before it was produced in evidence as an exhibit before court;*

d) *That the application before the trial court was brought prematurely before the subject motor vehicle had been produced as an exhibit;*

e) *That the subject motor vehicle is a suspected proceed of crime and susceptible to forfeiture;*

f) *That the applicant did not attach the hire agreement and proof of payment of hire charges in his application before the trial court.*

g) *That, the application lacks merit and should accordingly be dismissed.*

8. The applicant also filed submissions and referred the court to the provisions of section 82 of the POCAMLA, which requires the relevant authority to apply for forfeiture of the concerned property and reinforced that submission by citing the case of; Phillis Njeru Ngirigita & 2 others vs DPP & 2 Others (2018) e KLR and implored the court to invoke the provisions of; section 165 of the Constitution of Kenya, 2010. The Respondent did not file any submissions.

9. To appreciate the issue in question I shall refer to a brief background facts of the matter. The applicant by a miscellaneous criminal application number 432 of 2020, moved the Chief Magistrate's Court, seeking for release of his subject motor vehicle, held at Industrial Area Police Station.

10. He stated in the grounds and affidavit in support of the application that; he is the registered owner of the vehicle and annexed to the affidavit a copy of the log book of the subject motor vehicle.

11. That, when the vehicle was impounded, the 1<sup>st</sup> accused in the criminal case referred to herein; had hired it and that, on 7<sup>th</sup> May 2020, he informed the applicant that he had been arrested and the vehicle impounded. Further argues that; the vehicle is not listed as an exhibit in the criminal case.

12. At the hearing of the application in the trial court, the Investigating Officer number; 67818, Corporal Daniel Wambua, informed the court that, the subject motor vehicle, KCT 811S, is an exhibit in the criminal case, as it was bought with money which was obtained from the complainant in that case, fraudulently.

13. However, the applicant argued that, section 8 of the Traffic Act, provides that, a person in whose motor vehicle is registered shall be deemed to be the owner. Further, photographs of the motor vehicle can be released and the log book detained.

14. That the vehicle was bought on 25<sup>th</sup> February, 2015. It suffices to note, the 1<sup>st</sup> and 2<sup>nd</sup> accused in the criminal case had no objection to the release of the motor vehicle.

15. By a ruing delivered on, 2<sup>nd</sup> July, 2020, the learned trial magistrate, declined to order for the release of the motor vehicle, and held that; "whether the motor vehicle is a proceed of crime herein or an exhibit is a matter of evidence and can only be determined after taking evidence".

16. However, the applicant argues that his constitutional right to property has been violated and that the vehicle is wasting away at the yard.

17. I have considered the application; and I find that, the issues to determine is whether, the court's jurisdiction has been properly invoked and whether the court can grant the orders sought. From the way the grounds in support are framed they are more of grounds of appeal than revision.

18. Be that as it were, the applicant has premised the application on the provisions, inter alia of; section 362 of the Code, which states 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”.*

19. It follows from the aforesaid that, the jurisdiction of the court is limited to satisfying itself as to the correctness, legality or propriety of the order being sought to be revised.

20. Further, the provisions above should be read together with the provisions of section 364 of the code which states as follows;

*“(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.*

*(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*

*(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.*

*(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.*

*(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed”.* (emphasis added)

21. Therefore, if the applicant intends to rely on the subject grounds, he should have appealed the decision of the trial court.

22. However, it noteworthy that, miscellaneous criminal application in the trial court was apparently transferred by the trial court to the criminal case, wherein the applicant is not a party. Thus effectively bringing it under the orbit of the criminal case.

23. In that regard, the provisions of Article 165(6) and (7) of the constitution of Kenya; 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.*

*(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.*

24. I find that, pursuant to the aforesaid provisions the court can determine this application as a revision application. To revert back to the merit of matter, I find first and foremost, by the applicant failing to swear any affidavit in support to the application, he did not avail any single document to support the alleged ownership of the motor vehicle and/or the impugned ruling.

25. Be that as it were, I note from the proceedings in the miscellaneous application in the Chief Magistrate Court, the applicant produced a log book as prima facie evidence of legal ownership of the vehicle.

26. Indeed, under article 40 (1) of the Constitution of Kenya, 2010, he has the right, to acquire and own property, of any description and in any part of Kenya. However, sub article (6) states that; the rights under Article (40) (1) do not extend to any property that has been found to have been unlawfully acquired.

27. Therefore, it needs to be established how he acquired ownership of the subject motor vehicle. It's unfortunate that evidence could not be adduced in the miscellaneous application in the Chief Magistrate Court, on how the vehicle was bought with money obtained from the

complainant in the criminal case.

28. In that regard I find that, the prosecution was rather casual, by the Investigating Officer not swearing any affidavit to rebut the averment's in the affidavit in support of the application but merely stating without taking an oath, that the subject motor vehicle was bought with proceeds of crime.

29. The law is clear that, he who alleges proves. Proof is a matter of evidence. Therefore, evidence has to be produced, orally or otherwise approved under the law. In regard, the order of the learned trial magistrate, that evidence has to be adduced; is correct. I find no illegality or impropriety therein.

30. However, it is in the interest of justice that, the trial court should hear this matter on priority basis, taking into account that, a motor vehicle parked in an open yard and unprotected from the hazards of the weather is prone to serious damage and depreciation.

31. It will not serve the interest of justice to, eventually release a "shell" to the rightful owner at the end of trial. It may even expose the state to litigation, if at the end of the trial, there is no proof of that the motor vehicle was bought with proceeds of crime or no value is given to the complainant, if it is found to have been bought as such and yet it has completely depreciated in value.

32. It is against this background that, I order that, this matter be fixed for hearing forthwith and all the parties responsible should accord the court maximum cooperation for its conclusion as soon as possible and as much as it is not in the interest of justice to fix the duration of the trial, I believe within six (6) months, or lesser period the prosecution should avail evidence relevant to the subject issue herein.

33. The upshot of the aforesaid is that, the application, the subject of this matter is not allowed in as prayed, save for the direction given

**Dated, delivered virtually and signed on this 17<sup>th</sup> day of May, 2021.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of;

Bigambo for the applicant

Ms Kimaru for the respondent

Edwin - the Court Assistant