



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CRIMINAL REVISION NO. E012 OF 2020

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION.....1ST APPLICANT

KENYA WILDLIFE SERVICE2ND APPLICANT

OCS. KYUMBI POLICE STATION.....3RD APPLICANT

VERSUS

RESIDENT MAGISTRATE, MACHAKOS LAW COURTS.....1ST RESPONDENT

JAMES KATULE ILUVE.....2ND RESPONDENT

ADRIANO MWANZIA.....3RD RESPONDENT

RULING

1. The Applicant herein filed a Notice of motion dated 28/10/2020 seeking for an order of revision of the **Machakos Chief Magistrate's Court Criminal Case No. E063 of 2020** and direct that motor cycle registration number KMCT 145 B be detained at Kyumbi police station as an exhibit to be produced in court when needed until the finalization of the case.

2. The application is supported by the grounds on the face thereof and the affidavit of No.92382 Pc (W) Marianne Serem sworn on even date. The applicant's case is that Kenya Wildlife Service officers on normal patrol around Kyumbi area spotted a motorcycle registration number KMCT 1145 B ferrying suspected wild game meat and stopped it and later arrested the rider and pillion passenger and recovered the game meat. The applicant went on to aver that the suspects were detained at Kyumbi police station as well as the motor cycle and that the suspects were later charged before Machakos Chief Magistrate's court. It is the applicant's case that the trial court ordered the release of the said motorcycle to the 2nd respondent and that the applicant is aggrieved in that the search reveals that the motorcycle is registered in the name of Captain Motorcycle Manufacturing Limited and not the 2nd respondent. The applicant seeks review of the orders and direct that the said motorcycle be detained at Kyumbi police station to be produced in court during the hearing.

3. The 2nd respondent filed a replying affidavit sworn on 20/01/2021 where he deposed inter alia; *that he had purchased the motorcycle in question from one Jonathan Mbithi as a sale agreement annexed to the affidavit; that the provisions of section 110(d) and 105 of the Wildlife Conservation and Management Act 2013 is not couched in mandatory terms and does allow him to have possession of the item; that he uses the motorcycle to earn a living by using it in doing transport business; that he will not dispose of the motorcycle as per the orders issued and will avail it to court whenever needed; that photographs have already been taken and are to be availed to court; that the motorcycle if detained will be vandalized or damaged to his detriment; that no prejudice will be suffered if he is allowed to take possession of the motorcycle; that the applicant is in breach of the order by the trial court for refusing to release the motor cycle; that the revision application should be dismissed with costs.*

4. Parties agreed to canvass the application by way of written submissions. The respondent's submissions are dated 21/01/2021 while those of the applicant are dated 16/02/2021.

5. Miss Njeru learned counsel for the Applicant submitted that the application was necessitated when the applicant upon carrying out a search established that the suit motorcycle is registered in the name of a third party and not the 2nd respondent who ought to have ensured transfer of the ownership to him from the seller one Jonathan Mbithi. It was submitted that the 2nd respondent is likely to dispose the motorcycle just

like he did with the previous seller and which will lead to the applicant losing the crucial exhibit. Counsel urged the court to grant the request for revision in order to safeguard the exhibit for the purposes of the criminal case now pending.

6. Mr Andrew Makundi for the 2nd respondent submitted that the provisions of the law relied upon by the applicant are not couched in mandatory terms as the word “may” is used. It was submitted that the 2nd respondent has been given the right to possess the motorcycle and who has undertaken not to dispose it during the pendency of the case. It was also submitted that the 2nd respondent relies on the motorcycle for his livelihood and hence the applicant should obey the court order first before rushing here for discretionary relief. Counsel sought reliance in the case of **Francisca Akinyi Vs Republic [2018] eKLR**. Finally, it was submitted that the applicant’s application does not cite any orders to be given and as such it is not precisely drawn and should be dismissed with costs.

7. I have given due consideration of the application as well as the rival affidavits. I have also considered the submissions of the learned counsels. It is not in dispute that the suit motorcycle registration number KMCT 145B had been intercepted by KWS officers on patrol and that the 2nd respondent has been charged before the Chief Magistrate’s court at Machakos vide criminal case number E063 of 2020. It is also not in dispute that the 2nd respondent and another have been charged with two counts namely; dealing in meat of wildlife species contrary to section 98(1) as read with section 105 of the Wildlife Conservation and Management Act 2013 and secondly; possession of wildlife trophy without permit contrary to section 95(d) of the Wildlife Conservation and Management Act 2013. It is also not in dispute that the trial court on the 19/10/2020 ordered that the suit motorcycle be photographed and released to the 2nd respondent. It is also not in dispute that the trial is yet to proceed in earnest. That being the position, I find the only issue for determination is whether the applicant’s request for review has merit.

8. Revision is provided for under section 362 and 364 of the Criminal Procedure Code. Section 362 provides 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.”

Section 364 provides as follows:

“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 in the case of any other order other than an order for acquittal, alter or reverse the order.”

9. The applicant herein contends that the 2nd Respondent is not the registered owner of the suit motor cycle and that there is a possibility that he might sell the same to the detriment of the applicant who has a legitimate expectation on the outcome of the criminal case now pending. The 2nd respondent on the other hand maintains that the trial court has already given him the order to possess upon conditions which he is ready to abide. The applicant is relying on the provisions of sections 105 and 110 of the Wildlife Conservation and Management Act 2013. The same provides as follows:

105-(forfeiture)

The court before which a person is charged for an offence under this Act or any regulation made thereunder may in addition to any other order-

(a) Upon the conviction of the accused; or

(b) If it is satisfied that an offence was committed notwithstanding that no person has been convicted of an offence,

Order that the wildlife trophy, motor vehicle, equipment and appliance, livestock or other thing by means whereof the offence concerned was committed or which was used in the commission of the offence be forfeited to the Service and be disposed of as the court may direct.

110-powers of authorized officers

(1) An authorized officer may-

.....

(c) Search any vehicle or vessel and seize and detain any wildlife specimens’ in respect of which there is reason to believe that an offence has been committed, together with any tools, equipment, vessels or vehicles used in the commission of the offence:

Provided that the authorized officer detaining the person and seizing such property shall forthwith take the person and the seizure to the Magistrate having jurisdiction over the area where the offence takes place within twenty-four hours:

10. From the above provisions, it is clear that the applicant’s officers duly arrested the 2nd respondent together with another person who already have been charged and released on bond pending trial. The trial court has already ordered the release of the vessel to the 2nd respondent on certain conditions. Indeed, the trial court is empowered to release exhibits as and required. The applicant seems to be worried

that the 2nd respondent might dispose the vessel before the conclusion of the matter and that in the event of conviction the applicant's expectation to have it forfeited to them *will not be realized*. *The applicant is entitled to have some worries in that regard. In fact, the applicant's main concern is that the vessel is not even in the names of the 2nd respondent. The trial court is in charge of its cases and has discretion to make orders as are expedient in the dispensation of justice. The conventional wisdom has always been that a court should release items or property that has been produced as exhibits. It can be seen in the cases of **Elijah Nyakebondo Vs Republic [2017] eKLR and Republic Vs Everlyn Wamuyu Ngumo [2016]** the High Court held that until property or properties are produced before the subordinate courts as exhibits, the court will not have the jurisdiction to order release of the same.*

However, in the case of **Muigai Mucheru Vs Kenya Forest Service & Another [2012]** the High Court held that there is no requirement that the court should first receive the property before releasing it.

It is my considered view that a trial court should be allowed to exercise discretion to release exhibits or items brought before it in the determination of cases. The court's hands should not be hamstrung in its role to do justice to the parties. A court has powers to issue orders which must be obeyed by the parties in the case. These powers can be seen in section 177 of the Criminal Procedure Code which provides as follows:

“Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order-

a) That the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored to him or to such other person as he may direct; or

b) That the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.”

11. I have seen the order issued by the trial court. The same is clear that the 2nd respondent is barred from disposing the suit motor cycle registration No. KMTC 145 B until the determination of the case. I find the said order to be sufficient as the 2nd respondent is bound by the order aforesaid. Hence, the applicant's worries that the motor cycle might be sold does not arise. As to the claim that same is registered in the name of a third party, there shouldn't be any problem since the 2nd respondent is bound by the terms of the court order regarding his possession of the same as he can be ordered by the trial court to avail before it as and when it is needed. Further, the said trial court still has powers to make further orders as are necessary upon application by the parties. That being the position, the applicant should now proceed to comply with the trial court's order dated 19/10/2020 by releasing the subject motorcycle to the 2nd respondent. The applicant's right to seek for forfeiture will be realized upon conclusion of the matter in the event the 2nd respondent is found guilty of the offence.

12. In view of the foregoing, it is my finding that the applicant's application for review lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this **9th** day of **June, 2021**.

D. K. Kemei

Judge