



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CRIMINAL REVISION 065 OF 2021

REPUBLIC.....ODPP

VERSUS

GEORGE MBOGO CHEGE.....1ST RESPONDENT

JAMES GACHANGO KINYAR.....2ND RESPONDENT

RULING

1. The Respondents are charged with;

COUNT I

CHARGE

Trafficking in Narcotics Drugs Contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (control) Act No. 4 of 1994.

PARTICULARS

GEORGE MBOGO CHEGE: On the 28th day of April, 2021 at around 0800 hours at Section 58 area in Nakuru East Sub-County within Nakuru County, you were found trafficking by conveying narcotic drug namely Cannabis to wit to wit 379 grams with an approximated street value of Kshs. 18,950/= in motorcycle registration number KMFB 051Q make Boxer in contravention of the said Act.

COUNT II

CHARGE

Trafficking in Narcotics Drugs Contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances (control) Act No. 4 of 1994.

PARTICULARS

JAMES GACHANGO KINYARI: On the 28th day of April, 2021 at around 0800 hours at Section 58 area in Nakuru East Sub-County within Nakuru County, you were found trafficking by conveying narcotic drug namely Cannabis to wit to wit 432 grams with an approximated street value of Kshs. 21,600/= in motorcycle registration number KMFB 051Q make Boxer in contravention of the said Act.

2. They took plea on 29th April, 2021 before the Hon. Chief Magistrate J. B. Kalo. They pleaded not guilty to the charge.

3. On 21st May, 2021 the 2nd accused made the following application:

“2nd accused: I pray that my motor cycle be returned to me. We use it to generate income for daily upkeep. I am also paying a loan on the same. It is registration number KMFB 051Q registered in the name of James Gachango.”

4. The record shows that in response the learned prosecution counsel Ms Serling stated:

“Ms Serline: The motorcycle may be released on condition to enable the 2nd accused earn a living.

J. B. KALO,

CHIEF MAGISTRATE,

21/5/2021.”

5. The learned Chief Magistrate then gave the following directions;-

“Court:

- 1) Motor cycle registration number KMFB 051Q to be released to the 2nd accused person not later than seven (7) days from the date of this order.
- 2) The police to photograph the motorcycle before release, if they deem it necessary.
- 3) The 2nd accused to file a written undertaking not to sell or transfer the motorcycle before the hearing and determination of this case.

J. B. KALO,

CHIEF MAGISTRATE,

21/5/2021.”

6. Thereafter the order was extracted in the following terms;-

“REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT NAKURU

TRAFFIC CASE NO. E 1502 OF 2021

REPUBLICPROSECUTOR

VS

GEORGE MBOGO CHEGE.....1ST ACCUSED

JAMES GACHANJA KINYARI.....2ND ACCUSED

21st May, 2021.

To: OC Narcotic

ORDER

This matter coming up before Hon. J.B. Kalo, Chief Magistrate, Serling state counsel, Wanyoike court assistant and accused person.

IT'S HEREBY ORDERED:-

THAT: Motorcycle registration number KMFB051Q to be released to the 2nd accused person not later than 7 days from the date of this order.

THAT: The OC Norcotic(sic) to photograph the motorcycle before release if the(sic) deem it necessary.

THAT: The 2nd accused to file a written undertaking not to sell or transfer the motorcycle before the hearing and determination of this case.

.....

J.B. KALO

CHIEF MAGISTRATE.

21st May, 2021.”

7. On 26th May 2021 the learned prosecution filed this application for revision under certificate of urgency seeking orders: For this court

i. to call for and examine the record of the proceedings in CMCRC no E1502 of 2021 R vs George Mbogo Chege & Anor for the purpose of satisfying itself and pronouncing the correctness , legality or propriety of the order dated 21st May 2021

ii. to review vary reverse and /alter the orders dated 21st May 2021 above

iii. to order that the motorcycle reg. no KMFB 051Q not be released to the 2nd accused person until and unless the Criminal Case no E1502 of 2021 is hear and determined.

8. Pending the availing of the lower court file I stayed in the Chief Magistrate’s order of 21st May 2021.

9. The application is brought under Section 362 and 364 of the Criminal Procedure Code which provide;

“S. 362. Power of High Court to call for records 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.”

and

“S. 364. Powers of High Court on revision

(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.”

10. The grounds for the application are that the learned trial magistrate made the order for release of the motor vehicle KMFB 051Q “contrary to the interests of justice”.

11. In the Notice of Motion dated 26th May 2021 the prosecution counsel sought that the motorcycle be detained by the police until the criminal case facing them was heard and determined.

12. In the affidavit of support sworn on 26th May 2021, the investigating officer No. 92917 PC Moris Muchete deponed that following the 2nd accused’s oral application for the release of the motorcycle;

“6. THAT on the basis of the said oral application, and **without giving the prosecution any opportunity to respond thereto**, the Learned Trial Magistrate ordered that the subject Motorcycle Registration Number KMFB 051Q be released to the 2nd accused person not later than 7 days from the date thereof despite the same having not yet been produced as an exhibit in court. (annexed hereto and marked MM – 3 is a copy of the impugned order dated 21st May 2021).

11. THAT I am also advised by the said Prosecution Counsel, which advise reasonably believe to be true, **that the learned Trial Magistrate's impugned order having been made without giving the prosecution a chance to be heard on oral application for release of the subject motorcycle registration number KMFB 051Q violated Article 50(1) of the Constitution and the Rules of Natural Justice.**

12. THAT I am also advised by JOYCE SERLING, Prosecution Counsel in conduct of this matter, which advise I reasonably believe to be true, that the learned Trial Magistrate's impugned order contravened a number of provisions of the law including Sections 36, 74, 75, 77(1) and 78 of the Narcotic Drugs and Psychotropic Substance (Control)."

13. It is also the position of the investigation officer that the trial court's order will result in a miscarriage of justice if not revised.

14. I have carefully considered the application before me. The issue is whether the prayer sought is merited.

15. It is clear that the application is based on the claim that the trial magistrate did not give the prosecution the opportunity to be heard. It is also averred that the order is in violation of certain provisions of the **Narcotics and Psychotropic Substances (Control) Act, 36, 74,75, 77(1) and 78** as hereunder reproduced

36. Forfeiture of property

Subject to this Part, where **any person has committed a specified offence**, all the property owned by him on the date of the commission of that offence or acquired by him after that date shall be forfeited to the Government.

74. Seizure of narcotic drugs, etc.

Subject to this Act, all articles and things, including any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance, that are liable to forfeiture under any provision of this Act **may be seized and detained by any police officer or any other person authorized in writing by the Commissioner of Police for the purposes of this Act.**

Keeping of property seized under Act

75. All articles and things, including any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance **seized by any person under this Act shall, as soon as possible**, be delivered to the Commissioner of Police with a statement of the particulars relating to the seizure and the Commissioner of Police shall arrange for the articles and things to be kept safely until they are dealt with in accordance with any other provision of this Act, and shall ensure that all reasonable steps are taken to preserve the articles and things while they are so kept.

77. Notice of seizure

(1) Where any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or any other article or thing liable for forfeiture is seized under this Act, notice of the seizure shall be given by the person seizing the same as soon as possible to the owner or to the person in charge thereof if such person is not the owner.

78. Condemnation of seized things

Where a person is convicted of an offence under this Act and any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or any other article or thing, liable to forfeiture to the Government under this Act in respect of that offence has been seized under this Act, the court convicting him may, in addition to any other penalty imposed on him, order that the narcotic drug, psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or other article or thing be condemned and forfeited to the Government.

16. These provisions of the law were not raised by the Prosecution at the time of the order.

17. In any event some of them come into force after the conviction of the accused person. But more importantly, the record clearly states that the trial magistrate sought the views of the prosecution counsel. The record shows that the prosecution had no objection to the application for the release of the motorcycle on conditions, to the 2nd accused. In the prosecution response the record shows that the motor cycle could be released to the 2nd accused pending the trial on condition and so that he could continue earning a living.

18. From the record there is also the added twist that the subject motor cycle belongs to a third party one Margaret Wangui Mwangi who by letter received in court on 20th March 2021 states that the 2nd accused was her employee for boda boda. This is a fact not addressed by the investigation officer as it may have a bearing as to whether or not it should be released to the accused persons or the owner.

19. The trial magistrate proceeded to issue a conditional release pending the hearing and determination of the matter. It appears to me that it is only upon service of the order on the police that these issues arose.

20. Secondly, exhibits become the ward of the court only after they have been produced as exhibits. In this case the motorcycle had not been produced as an exhibit and therefore procedurally the court could not have released the motor cycle to the accused person.

21. I think therefore that the only recourse available is for the file to be remitted to the trial court to take the evidence of the investigating

officer to produce the motor bike as exhibit, and to determine whether or not the court can still release it to the accused persons.

22. I direct therefore that;

i. The matter be mentioned before the Chief Magistrate's on Tuesday 22nd June, 2021 for directions.

ii. To prevent injustice on the accused persons, should the court find that the same can be released to them, the trial court to hear evidence on the production of the motorcycle not later than fourteen (14) days after the mention of the case.

DATED SIGNED AND DELIVERED VIA ZOOM THIS 18TH DAY OF JUNE, 2021

MUMBUA T. MATHEKA

JUDGE

Court Assistant Edna

For state: Ms Murunga

1st and 2nd Respondents in Person