



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI COURT

CRIMINAL REVISION NO. E109 OF 2021

PETROLEUM INSTITUTE OF

EAST AFRICA.....APPLICANT

VERSES

REPUBLIC.....1ST RESPONDENT

BUSH AND BEACH TRAVEL

& SAFARIS LIMITED.....2ND RESPONDENT

PETER KAMAU MWAURA.....3RD RESPONDENT

RULING

1. **Petroleum Institute of East Africa**, the Applicant, has moved this court by way of Notice of Motion dated 3rd May 2021, seeking revision of the order of Hon. S.O. Opande, PM, dated 12th March 2021 which allowed release of motor-vehicle registration number KCZ 143 P Isuzu NKR Lorry (subject motor-vehicle) an exhibit and consequently order the detention and preservation of all physical and documentary evidence in the Chief Magistrate's Court Case No. E236 of 2021 including exhibits namely gas cylinders and the subject motor vehicle.
2. The application is premised on grounds that the 2nd and 3rd Respondents were found in possession of and dealing with assorted liquified petroleum gas cylinders, including those owned by the members of the Applicant in a manner that was contrary of the Petroleum Act, No. 2 of 2019, about 170 pieces of assorted liquified petroleum gas cylinders and motor-vehicle registration number KCZ 143 P (Isuzu NKR lorry) recovered and preserved as prosecution exhibits to be adduced at the trial before the Chief Magistrate's Court; the 2nd Respondent, a registered owner of the subject motor-vehicle applied and obtained from the trial court an order to the effect that the vehicle be released to it; the Applicants and its members were not informed of and neither did they participate in the proceedings in violation of their constitutional and statutory rights as victims of the alleged crimes; exhibits are an integral part of the prosecution's evidence necessary for discharge of evidentiary burden of proof and their release will break the evidentiary chain of custody and negate their probative value.
3. That should there be conviction of the accused person, exhibits are the subject of a mandatory statutory forfeiture pursuant to the provisions of **section 120 (a) and (b)** of the Petroleum Act; and, release of the exhibit is incorrect, illegal, irregular and improper.
4. **Clive Cetewayo Mutiso**, the Chief Investigations and Compliance officer of the Applicant swore an affidavit in support of the application where he reiterated inter alia what was stated in the body of the application.
5. The application is opposed by the 2nd Respondent through an affidavit deposed by **Milka Wambui Mwaura**, its Managing Director, who avers that the release of the subject motor vehicle was subject to conditions attached that included release of the vehicle after taking photos of the vehicle within 14 days; the court to conduct a minitrial for purposes of production of the motor-vehicle and issuance of a caveat against the vehicle to be served upon and be registered by NTSA.
6. She called upon the court not to review the said order as it is correct, proper and amenable to revision and no prejudice will be suffered if the vehicle is released.
7. Further, that the subject motor-vehicle risks being repossessed by Co-operative Bank where she is servicing a loan acquired to finance the acquisition of the motor-vehicle; It is not the 2nd Respondent who was engaged in the alleged illegal activities; The Accused has not been found guilty and it is in public interest that the motor vehicle be released.

8. The application was canvassed through written submissions. The Applicant referred the court to a myriad of cases that establish the jurisdiction of the court that can be invoked by an aggrieved party or by the court suo moto while exercising revisionary authority in order to correct an irregularity. That the court would only be seized of jurisdiction to order disposal of the property when it is produced (**See Republic versus Everline Wamuyu Ngumo (2016) eklr**)

9. That the court cannot release exhibits that are not produced in evidence unless the State makes an application that exhibits are part of the particulars of the charge sheet and it is clear that they were meant to be produced during the prosecution's case.

In this regard it relied on the case of **Proto Energy Limited v Republic & 7 Others (2020)** where Lessit J. (As she then was) stated as follows;

“17. The accused persons were charged of violating section 99 (1) (l) of the Act. Section 120 of the Act provides that anyone convicted of an offence under the Act shall have an order of forfeiture of any vehicle or equipment used in the commission of the offence as well as any petroleum recovered in the course of the commission of the offence. The offences the accused persons faced in the trial court were subject to the provisions of this section of the Act. The case was yet to be heard. The exhibits, as listed in the charge were yet to be identified in court and produced as evidence. Any order of release was clearly premature.

18. I hold that a trial court cannot make an order releasing exhibits which have not been produced in evidence. Secondly the court cannot release summarily exhibits which have not been produced by the State unless the application is by the State. The exhibits were cited in the particulars of the charge, making it clear that to be able to successfully prosecute the case they had to be produced in court as evidence.”

10. It is also urged that: the trial Magistrate failed to interrogate the provisions of **section 120** of the Petroleum Act; Release of the motor vehicle led to miscarriage of justice and/or potential miscarriage which ought to be rectified. That placing the motor vehicle in the hands of a third party who denies that the vehicle was seized while transporting gas cylinders was perilous; and, that the order of the magistrate directing that photographs are to be taken to substitute the physical evidence in form of exhibits was incorrect, improper and issued without jurisdiction.

11. The 1st Respondent submitted on points of law that according to **Article 165 (b)** of the Constitution and **Section 362** of the Criminal Procedure Code (CPC) this court is vested with jurisdiction to grant appropriate orders to meet ends of justice; that **Section 121 of CPC** empowers the court to detain property seized until conclusion of the case, but **section 177 (a) of the CPC** empowers the court to restore property to one entitled to it after arraignment and charging of the person with an offence. She faulted the order of the trial court for releasing the exhibit before trial commenced, circumstances that may lead to tampering with the exhibits that would render the trial nugatory. That according to **section 120** of the Petroleum Act, mandatory forfeiture of exhibits is provided for therefore release was done without regard to the provisions of the law hence improper and irregular.

12. The 2nd Respondent submitted that supervisory jurisdiction by the High Court should only be exercised in instances where there is miscarriage of justice which was not the case herein. That the court was guided by **section 177 (a) of CPC**. Justifying the court order in relation to photographs, it relied on a robbery with violence case, where the Court of Appeal deliberating on the doctrine of recent possession, in **Andrea Nahashon Mwarisha vs Republic (2016) eklr** 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....”

13. That: orders granted by the court were conditional and aimed at preserving evidence; the 2nd Respondent is not an accused person and was not engaged in illegal activities who should not be prejudiced by holding of the motor-vehicle; and, that the accused having not been found guilty it is premature for the motor-vehicle to continue remaining in custody.

14. I have considered rival submissions before me relating to the application for revision, the response thereto and the authorities cited. This court has been moved to revise orders of the subordinate court, power that is

founded on **Article 165 (6)(7)** of the Constitution and **Section 362 of the CPC** that provide as follows:

“(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.....

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.”

15. The Court’s Jurisdiction to consider the correctness, propriety and/or legality of the lower court record is invoked upon being moved by a party whose right has been impacted upon negatively or upon acting on its own accord. In this case the Applicant, whose members are victims and complainants in the lower court moved this court. The 3rd Respondent is the accused person in the lower court who was arraigned for transporting liquified petroleum gas without a valid licence, and dealing with LPG cylinders of another licensee without consent of the licensee, offences that offend the Petroleum Act and upon being found guilty there is a provision for statutory forfeiture of the equipment /vessel/ motor vehicle used in transportation.

16. Having denied charges, prior to the matter being heard, the 2nd Respondent made an application for release of the subject motor vehicle, an application that was opposed by the victim. In the impugned Ruling the court made an order releasing the motor-vehicle on several conditions. The trial court which was fully aware of the limited jurisdiction that it was seized of to deal with the alleged exhibits as they had not been availed to the court, did argue that circumstances herein may have been different as a caveat existed against the motor-vehicle.

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. I am persuaded by the decision in the cases of *Elijah Nyakebondo Vs Republic (2017) eklr* and, *Republic vs Everline Wamuyu Nguro... (2016)* where respective courts held that until property or properties are produced before subordinate courts as exhibits, the court will not have jurisdiction to order release of the same.

18. An argument has been raised that **section 120** of the Petroleum Act was an impediment that prevented the court from releasing the vehicle. This, according to the Respondent should be weighed against the presumption of innocence on the part of the accused person. **Section 120** of the Petroleum Act provides thus:

“Where a person is convicted of an offence under Orders of this Act, in addition to any other penalty imposed, an order forfeiture shall be made –(a)for the forfeiture of any vehicle, aircraft, vessel or equipment used in the commission of the offence; (b)for the forfeiture of petroleum recovered in the course of the commission of the offence;”

19. A subordinate court derives its powers from statute. In granting the impugned order, the court was aware of the provisions of **section 120** of the **Petroleum Act** which had been brought to its attention by the party who opposed the application. However, it was sensitive to the issue of the motor vehicle having been alleged to be a collateral to the bank. In a further Ruling dated 16/4/2021 the court noted thus:

“ In its Ruling of 12/03/2021 the court having considered the circumstances of the case including that indeed the motor-vehicle was a collateral to the bank and had been registered in the name of Co-operative Bank and Bush and Beach Travel and Safari’s Ltd owned by the accused’s daughter.”

The court ordered release of the said motor-vehicle on conditions as follows:

“1. The scene of crime take photos of the motor vehicle in the next 14 days.

2. Within the said period, this court do conduct a mini-trial for purposes of production of the motor vehicle.

3. That a caveat be and is hereby issued against the motor vehicle KCZ 134P which shall be served to and registered by NTSA against the particulars of the said motor vehicle to the effect that the motor vehicle being a subject of a criminal case No. Milimani Chief Magistrate Criminal Case No. E236 of 2021, the said motor vehicle shall not be subject to any sale and transfer until when such a caveat shall be lifted by the court.

4. Co-operative Bank is notified the motor vehicle KCZ 134P is subject to criminal proceedings herein and shall remain the property of the court and subject to the provision of section 120 of the Petroleum Act should the prosecution lead into a conviction.

5. That should the owner finish servicing the loan,

the Co-operative Bank of Kenya Limited shall not transfer the motor vehicle to the owner until after the case is determined and culpability of the accused and the role of the said motor vehicle is determined.

6. The motor vehicle shall be released to the owner upon fulfilment of the conditions above in 14 days from the date of this ruling and after the prosecution confirms that the conditions have been met.”

20. A motor-vehicle that has been seized and is presented before court may be restored to the lawful owner following directions of the court but such an order can only be granted after it is identified, adduced in evidence, and, following discharge of proof and the relevant law in question. A court of law would not be expected to pry into the prosecution’s case before it is presented.

21. Therefore, it was premature for the court to release the motor vehicle. The order made by Hon. S. Opande, PM was illegal, irregular and improper which I quash and set aside. The exhibits shall remain in custody of the prosecution until they are adduced in evidence.

22. Taking note of the nature of the case, the court should treat it as extremely urgent. If possible, it should be heard on a day to day basis for purposes of presentation of evidence so that their probative value is preserved.

23. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF SEPTEMBER, 2021.

L. N. MUTENDE

JUDGE