



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. E161 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**STEFFANO UCCELI.....1<sup>ST</sup> RESPONDENT**

**ISAAC RODROT Alias MWAURA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a letter dated 2<sup>nd</sup> of September, 2021, the Office of the Director of Public Prosecutions requested that Mombasa CMC CR No. 854 of 2020 be placed before this court for revision under section 362 of the Criminal Procedure Code to examine the record on the correctness, propriety and legality of the orders granted on 2<sup>nd</sup> of September, 2021 where Hon. C. A. Ogwenyo (RM) directed that:

- i. The Director General to attend court to show cause why the passport should not be released to the 1<sup>st</sup> Accused person.**
- ii. The order (for purposes of No. 2 above) to be served upon the Director General by the court bailiff.**
- iii. Mention on 16<sup>th</sup> September, 2021 to confirm compliance and for the Director General of Immigration to show cause.**

2. I reply to the application for revision, the Respondents' advocate filed an affidavit sworn on 22<sup>nd</sup> of September, 2021 saying that the application was without any basis as the order being sought to be varied does not seek to alter the bond terms in any way but seeks to uphold the said bond terms by ensuring the passport is deposited in court. It was also averred that there is no application and/or order that the passport should be returned to the 1<sup>st</sup> Accused person.

3. The application was canvassed by way of oral submissions. The Applicant's submissions were to the effect that the Respondents obtained stay orders in Malindi High Court Constitutional Petition No. 12 of 2020 and the effect of the stay orders were that the trial Magistrate could not proceed with the matter until and unless stay orders are vacated. It was argued that any action by the trial Magistrate was *ultra vires* and that the application for revision should be allowed.

4. The Respondents' advocates- Mr. Anangwe, submitted that the application for release of the 1<sup>st</sup> Accused person's passport was withdrawn and that the order made on 2<sup>nd</sup> of September, 2021 was as a result of the prosecution and the Investigating Officer taking the court in circles and there was nothing wrong with it. It was argued that the issue of the Magistrate not having jurisdiction did not arise as the prosecution always promised to avail the passport but did not comply and the summons for the Director General was meant for the investigating team to account for the first accused person's passport. The court was urged to dismiss the application and the Applicants should be directed to comply with the orders issued on 19<sup>th</sup> August, 2020 by returning the passport to court.

5. The issue herein is whether a case has been established for the orders made on 2<sup>nd</sup> of September, 2021 to be revised.

6. The orders issued in the High Court of Kenya at Malindi, Constitutional Petition No. 12 of 2020 on 1<sup>st</sup> September, 2020 were:

- i. THAT the prayer in the Notice of Motion dated 30<sup>th</sup> of June, 2020 seeking to have the bench disqualifying itself from hearing the application and petition is dismissed.**
- ii. THAT pending the hearing and determination of the petition, conservatory order be and is hereby issued staying all proceedings in Mombasa SRMC CR. Case No. 854 of 2020 Republic v. Stefano Ucceli and Isaac Rodrot Alias Mwaura.**

iii. **THAT the petition is hereby referred to the Lord Chief Justice under the terms of Article 165 (4) for the constitution of an uneven bench for the final determination of the petition.**

iv. **THAT this court invokes its inherent jurisdiction and directs that the petition be transferred to the territorial jurisdiction of the High Court in Mombasa where the criminal proceedings in Mombasa SRMC CR. Case No. 854 of 2020 arose.**

v. **THAT save for as expressly directed herein, the other prayers in the application dated 8<sup>th</sup> June, 2020 and 30<sup>th</sup> June, 2020 are dismissed.**

vi. **THAT costs shall be in the cause.**

7. The order that is of concern in this application is order (ii) vis

**THAT pending the hearing and determination of the petition, conservatory order be and is hereby issued staying all proceedings in Mombasa SRMC CR. Case No. 854 of 2020 Republic v. Stefano Ucceli and Isaac Rodrot Alias Mwaura.**

8. The authority to revise orders is provided for by Article 165 (6) and (7) of the Constitution of Kenya, 2010 as well as section 362, 364 and 365 of the Criminal Procedure Code.

9. The objective of the authority to revise orders was spelt out in **DPP v. Samuel Kimuchu and Anor (2012) eKLR** where Odunga J. held that the revisional jurisdiction of the High Court exists in interlocutory and final orders and is part of the High Court's paternal and supervisory jurisdiction in order to correct or prevent a miscarriage of justice.

10. The orders made on 2<sup>nd</sup> of September, 2021 by Hon. Ogwen (RM) were to the effect that

**“Summons are hereby issued directed to the Director General Immigration Services to show cause why he has failed to return the 2nd Accused person's passport to court as directed by the court on 19th of August, 2020.”**

11. The order made by the late Hon. Michieka (PM) on 19<sup>th</sup> of August, 2020 was to the effect that

**“the 1<sup>st</sup> Accused person's passport be released to the Immigration Department to verify his immigration status with a rider that the same be returned to this court within 21 days from today's date is no charges will be proffered against the 1<sup>st</sup> Accused in respect to his immigration status.”**

12. The orders issued on 2<sup>nd</sup> of September, 2021 did not indicate that the passport was to be returned to the 1<sup>st</sup> Accused person. It was directing the Director General of Immigration Department to comply with an order which was supposed to be complied with within 21 days from 19<sup>th</sup> of August, 2020.

13. The stay orders made in Malindi High Court Petition No. 12 of 2020 did not bar compliance with orders that had been made prior to 1<sup>st</sup> September, 2020 and those orders cannot operate retrospectively. In any case, the 1<sup>st</sup> Accused person's passport was supposed to be part and parcel of the security that was deposited in court for his release on bond and should be in custody of the court and not with a third party. In the circumstances, this court finds that substantial justice requires that the said passport be returned to court. The Applicants have not shown how the compliance with the orders made on 19<sup>th</sup> of August, 2020 at their instance was incorrect or illegal or how it occasions miscarriage of justice.

14. The application for revision is disallowed. Mombasa Chief Magistrate's Court Cr. Case No. 854 of 2020 shall continue to be mentioned before the trial court for compliance with orders made prior to 1<sup>st</sup> of September, 2020 while awaiting determination of Malindi High Court Petition No. 12 of 2020.

15. Orders accordingly.

**Dated, signed and delivered in open court/online through MS. TEAMS on this 5<sup>th</sup> day of November, 2021**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:**

Ogwel- Court Assistant

Applicant's Advocate – Ms. Kambaga

Respondent's Advocate- Mr. Anangwe – No appearance

Mr. Kahindi hold brief for Makambo for Interested Party/Complainant

**Hon. Lady Justice Anne Ong'ino**

**Judge**