



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CRIMINAL APPLICATION NO. 11 OF 2020

JOSEPH KINGORI M' IKAMITI.....1ST APPLICANT

KENNETH MWAKI NDEREVA.....2ND APPLICANT

VERSUS

THE SUB COUNTY CRIMINAL

OFFICER IGEMBE SOUTH.....1ST RESPONDENT

THE DPP.....2ND RESPONDENT

RULING

1. **Joseph Kingori M' Ikamiti and Kenneth Mwaki Ndereva** (*the applicants herein*) filed an application dated 25th January 2020 seeking the following Orders;

a. That the honourable court be pleased to order the respondents herein to release motor vehicle registration number KCQ 869T make probox to the 1st applicant herein.

b. That the honourable court be pleased to order the respondents herein to release the motor vehicle registration number KCV 073C make Toyota voxy to the 2nd applicant herein.

c. That the honourable court be pleased to order the respondents release Kshs. 20,000/= (Kenya Shillings twenty thousand only) to the 2nd Respondent herein.

2. The application was supported by the sworn affidavit of Joseph Kingori M' Ikamiti who averred that he is the registered owner of Probox Saloon KCQ 869T and had leased motor vehicle KCV 073C from the 2nd applicant both of which he uses to conduct his miraa business. That on 4/10/2019 as he drove the Voxy to his farm in Kianda Sub location he and his neighbours were attacked by an irate mob. That he used the motor vehicle to ferry the injured neighbours to Maua Methodist Hospital. He would later take the car to his home to be cleaned, took the pro box which was on duty and drove back to Maua Methodist hospital to collect his injured neighbours so that they would report to Maua Police station.

3. It was his averment that on his way to Maua Police station he was called by an officer known to him named Tony who told him to report to the 1st Respondents offices at Maua. That on arrival at the 1st Respondents office he was arrested and they demanded the keys to Probox m.v. Reg No. KCQ 869T. That he subsequently called the 2nd applicant and told him the Voxy Motor vehicle was needed by the 1st Respondent. The 2nd applicant obliged and brought the same to Maua Police station where the 1st Respondent impounded it to date.

4. He later learnt that the mob continued to attack his neighbours who fought back and in the confrontation one of the attackers was fatally wounded. He was ultimately charged with the murder of the deceased i.e. **George Mithika Malinya in Criminal Case No. 83 of 2019.**

5. He also averred that he instructed his advocates on 3/12/2019 to demand for the motor vehicles which demand was duly received by the 1st Respondent but to date they have not received any reply. That the continued impounding of the motor vehicles have caused unjust suffering especially to his business which made at least Kshs. 30,000/= profit each day. He also used to pay Kshs. 4,000/= each day for the hire of the 2nd applicants vehicle which amount he has not paid from the day the vehicle was impounded.

6. The application was opposed by the Respondents vide Replying affidavit dated 17/2/2020 sworn by **Cpl Christopher Njue** who averred that the motor vehicle were detained for purposes of investigations as they had reasonable belief that the said motor vehicles were involved in

connection of the murder incident that occurred on 4th October 2019 at Kianda Sub location in Igembe South. That they have completed investigations and have since charged three (3) accused persons in **Hcr No 83 of 2019, Republic v Joseph Kingori M' Ikamati**.

7. That from the investigations they did not find clear links between motor vehicle 896T Toyota Probox and the murder incidence and therefore they will not object to it being released to the rightful owner. But, with regard to motor vehicle Reg No. KCV 073C Toyota Voxy he has reservations in the sense as he believes that the motor vehicle actively participated in the commission of the crime and investigators have every intention of producing the same as an exhibit in court.

8. He averred that in the event that the said vehicle is to be released to avoid being wasted away, he proposed the following conditions thereof;

- a. That the investigators be allowed to do forensic analysis including taking of photographs.**
- b. That the title documents be deposited either in court or DCI Igembe South for safe custody.**
- c. That the said motor vehicle be presented in court or Dci's office Igembe South whenever it is needed as exhibit.**

9. The application was canvassed orally on 19/2/2020. The applicant conceded to the conditions for release set out by the Respondent except he cannot satisfy the condition requiring deposit of ownership documents as the motor vehicle is on car hire agreement.

ANALYSIS AND DETERMINATION

10. It is now gaining notoriety and favour from the courts; to release a motor vehicle which is intended to be an exhibit to the owner but on specified conditions which ensures that the exhibit is preserved for use in the trial whilst the owner uses the vehicle. Most common conditions include availing the vehicle whenever it is required in court. It bears repeating that, the practice resonates with reality of things; it averts wasting away of the vehicle in police stations; allows use of the vehicle by the owner; but preserves the exhibit for purposes of trial. See the decision by **Muchemi J in R V. John Nganga Mbugua (2014) eKLR** that: -

“It is the practice in criminal cases that photographs will be taken by the scene of crime personnel of exhibits and scenes of crime which will be produced in evidence during the hearing. It is possible to avail the exhibit itself, the photographs may also be produced. If the vehicle is released after its photographs are taken, no miscarriage of justice will be occasioned during the trial. It is not the duty of the complainant to take photographs of his vehicle and submit them to the police. Instead, it is the duty of the investigating officer to have exhibits photographed and ensure the photographs are processed in the manner authorized by the relevant regulations.”

11. Parties have agreed to have one of the vehicles released without any conditions. Parties have also agreed on the terms for the release of the other vehicle except the applicant stated that he cannot meet the condition requiring deposit of ownership documents. His reason was that the vehicle is on hire purchase agreement. It be known that any property, other than real property, the use of which contributes directly and materially to the commission of a **crime** or is used in connection with the commission of a crime, is an instrumentality of crime which may be seized for purposes of use as an exhibit in a trial and may even be confiscated under the law. A vehicle may be such instrumentality of crime. And, it matters not the type of ownership of the vehicle or whether it is owned by the suspect or not as long as it has been used in the commission or in connection with the commission of a crime and is required as an exhibit in a trial. Accordingly, after considering the arguments presented and the circumstances of this case, I allow the application to the extent and on the terms and conditions stated below:

- i. Following agreement of parties, Motor vehicle Registration No. KCQ 869T Toyota Probox shall be released forthwith to the 1st Applicant.**
- ii. The 1st Respondent shall take photographs of the motor vehicle KCV 073C Toyota Voxy within seven (7) days of today's date. The photographs to adhere to governing regulations thereto.**
- iii. The original log book of motor vehicle KCV 073C Toyota Voxy shall be deposited in court within 14 days of today.**
- iv. The said vehicle shall be released to the 2nd Applicant immediately upon compliance with (ii) and (iii) above.**
- v. The Applicants or any other person shall not sell, or dispose of or cause the wasting away of motor vehicle KCV 073C Toyota Voxy, and the applicants shall produce the said motor vehicle in court whenever required in Criminal Case No. 83/2019.**
- vi. This ruling be placed in MERU HCCRC NO. 83 OF 2019.**

12. It is so Ordered

Dated, signed and delivered Milimani Nairobi this 21ST day of APRIL 2020

F. GIKONYO

JUDGE

Representation:

1. Mbogo & Muriuki Advocates for the Applicants.

kenmuriuki1@gmail.com/kenmuriuki69@yahoo.com

2. Director of Public Prosecution- Meru for the Respondent

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