



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL (MURDER) CASE NO. 10 OF 2020

REPUBLIC.....PROSECUTOR/RESPONDENT

VERSUS

MOSES ORWA ONGOLA.....1ST ACCUSED/APPLICANT

RULING

1. The Applicant herein, **Moses Orwa Ongola**, is charged with others with the Offence of Murder contrary to Sections 203 as read with Section and 204 of the **Penal Code**, Cap 63, the allegation being that they on 31st, January, 2020 at Munyeti Farm in Athi River Subcounty within Machakos County, jointly with others not before court murdered **Joseph Mutisya Kathina**.
2. After having pleaded not guilty, the accused persons were admitted to bond of Kshs 500,000.00 each with surety of similar amounts.
3. In the instant application dated 11th May, 2020, the applicant seeks an order for release of motor vehicle registration no. KBQ 611Y Subaru Forrester owned by him. According to him for five months the said vehicle is being detained at Athi River Police Station without any reasonable grounds since no known offence touching the vehicle has been explained to him. It was his case that he requires the said motor vehicle to commute to his place of work particularly to attend to his therapy at the Hospital owing to a back ailment. The Applicant was of the view that if the Respondents intend to rely on the said vehicle at the hearing of the case, evidence may be adduced by way of photographs and he is willing to avail the same whenever required to do so. He was however apprehensive that the continued detention of the vehicle risks its being wasted due to the extremities of nature.
4. In opposing the application, the Respondent averred that on the day of the arrest of the applicant, the police searched the said vehicle which was being driven by the applicant and upon searching it, they recovered some bloodstained items therein. Accordingly, the said vehicle was detained as an exhibit and the applicant charged. It was his case that they intend to present the said vehicle as an exhibit in the case. They contended that the said vehicle was intact and was in safe custody at the Station Yard and no report of vandalism had been received from the applicant. The Respondent was of the view that releasing the said vehicle would prejudice the case and that the victims would suffer injustice.
5. I have considered the foregoing as well as the oral submissions made before me by **Mr Omingo** and **Mr Ngetich**, Learned Counsel for the Applicant and the Respondent respectively. From the foregoing it is clear that the only reason why the said vehicle is being detained is the allegation that it might have been used to ferry the weapons which were used in committing the offence. It has not been alleged that it was in fact itself a weapon in the commission of the offence. There is no doubt that the said vehicle is the property of the Applicant. Article 40(3) of the Constitution bars the State from depriving a person of property of any description, or of any interest in, or right over, property of any description. Though the Applicant is an accused person, under Article 50(2)(a) of the Constitution, he is presumed to be innocent until the contrary is proved and even if he were to be denied bond, he would still under Article 51(1) of the Constitution retain all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that he is detained or held in custody.
6. It is therefore my view that the applicant's rights to the use of the vehicle must be weighed as against the rights of the respondents to effectively present their case. Article 24(1) of the Constitution provides that:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

[Emphasis added].

7. Therefore, since the vehicle is not weapon but is alleged to have been a conveyor of the weapons, its continued detention where there are less restrictive means of achieving the purpose for which it is being detained is not justifiable.

8. In the premises the investigative agencies are hereby directed take the photographs of the said motor vehicle registration no. KBQ 611Y Subaru Forrester and complete any forensic examination of the same and have the same released to the applicant by the end of the day on 25th May, 2020 but on condition that the Applicant will not transfer the same or in any other manner whatsoever willingly dispose of or impair the same pending the hearing and determination of the case or further orders of the Court. The Applicant is further directed to avail the said vehicle whenever required to do so.

9. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22nd day of May, 2020.

G V ODUNGA

JUDGE

In the presence of:

Mr Omingo for the Accused/Applicant

Mr Ngetich for the Prosecution/Respondent

CA Geoffrey