REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIMINAL APPL NO. 18 OF 2020

DIRECTORATE OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

LELI JULO NTONDO.....1ST RESPONDENT

PAUL MUTHUI MBALULA.....2ND RESPONDENT

FAITH MBITHE MUINDE.....3RD RESPONDENT

AND

ROBA HUKA GABRO..... INTERESTED PARTY

Coram: Hon. Justice R. Nyakundi

Ms. Sombo for the Applicant

Respondents in person

Abdiaziz Advocate for the interested party

RULING

The state moved this Court vide notice of motion filed in Court on 16.3.2020 pursuant to Section 362 of the Criminal Procedure seeking the following orders:

> ***(1). That motor vehicle registration number KBC 837Y make Isuzu canter white in colour being an exhibit in Criminal Case No. 94 of 2020 was ordered released by Learned trial Magistrate Hon. Sitati (RM) on 6.3.2020.***
>
> ***(2). That in terms of the order there is a likelihood of prejudice and harm to be suffered by the applicant as the subject motor vehicle is a crucial exhibit in the pending criminal case.***
>
> ***(3). That the release of the motor vehicle would compromise any further application that may be applied for to forfeit it to the state as a vessel used in the commission of the offence.***

The application therefore challenges the judicial discretion of the Learned trial Magistrate to have the motor vehicle at this early stage of the proceedings released to the owner. In support of the application, is an affidavit sworn by **No. 86290 PC. Patrick Biwott,** who is involved in the investigations of the crime against the accused persons.

In addition to the state motion seeking the order of the Learned trial Magistrate reviewed, one **Roba Huka Gabro** the complainant in the criminal case applied and did join the proceedings as an interested party. According to the interested party, the motor vehicle is owned by the 3rd respondent who has failed or refused to co-operate with the police by availing her employee and driver to answer the charge alongside his accomplices already before Court.

In his further submissions, Learned Counsel for the interested party argued that the Learned trial Magistrate acted in excess of jurisdiction

when he released the subject motor vehicle to the owner without taking into account the failure of justice it could occasion the trial.

In order to persuade this court to exercise revisionary jurisdiction to interfere with the impugned order of the trial Court Learned counsel relied on the principles in **R v Everlyne Wamuyu Ngumo HC Misc Rev No. 138 of 2016, R v Mombasa Development Limited & 4 others Criminal Revision No. 112 of 1988.**

Background

From the trial Court record on 24.2.2020, the accused persons **Leli Julo Ntondo** and **Paul Muthui Mbalula** were arraigned before **Hon. Kituku (SPM)** facing a charge of stealing stock contrary to Section 278 of the Penal Code. The particulars of the offence were that on the 18.2.2020 at Ndarako area, in Ganze Sub-county, within Kilifi, the accused persons with others not before Court stole ten (10) heads of cattle of Borana breed valued at Kshs.450,000/= the property of **Roba Huka Gabro**. In the alternative the accused persons also faces a charge of handling stolen property contrary to Section 322 (1) (2) of the Penal Code. On taking plea, each of the accused pleaded not guilty to both counts as premised in support of the prosecution case.

Thereafter, an application was made by **Faith Mbithe Muinde** as the registered owner of motor vehicle Registration No. KBC 837Y to have it released from the custody of the O.C.S – Bamba. She further covenanted to have the motor vehicle availed for purposes of the trial once notified in advance by the prosecution counsel.

The Learned Magistrate appreciating the facts and circumstances of that application acceded to the request and made an order for conditional release of the motor vehicle in question to the registered owner. It is quite clear that the contention behind the applicant's motion is to have the release order of the vehicle stayed for the O.C.S to continue detaining it until the hearing and determination of the Criminal charge.

Determination

In terms of Section 362 of the Criminal Procedure Code, the High Court is vested with revisionary jurisdiction over inferior tribunals and or subordinate courts to call for the record of any criminal proceedings to satisfy itself as regards the correctness, legality or property of any order, findings deemed or passed by that tribunal or Court. **(See also Article 165 (6) & 7 of the Constitution).**

In Section 364 (5) of the Code when the High Court exercises such jurisdiction at the instance of an applicant or a matter that has been brought to its attention, the following procedure shall apply:-

> ***"The High Court when exercising its powers of revision has discretion to hear or not to hear the parties either personally or through their advocates. However, the Court may hear any party either personally or by an advocate. This is so considering the requirement of Section 364 (2) which states "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."***

The phrases used in the code on right of appeal and revision shed some light on the nature of the distinction. The Supreme Court of India in addressing itself to the question held as follows:

> ***"That the distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of re-hearing on Law as well as fact, unless the statute conferring the right of appeal limits the re-hearing in some way as the power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to Law."***

The concerns raised here as obtainable from the motion and the record warrants seizure of the power of revision by this Court and not appellate jurisdiction. The general position regarding admissibility of a revision of a matter is as exhibited in the principles expressed by the same Court in **Amit Kapoor v Ramesh Chander & Anor {2012} 9 SCC 460:**

> ***The revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of Law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. The object of the power of revision is to set right a patent defect or an error of jurisdiction or Law or the perversity which has crept in the proceeding*****. (See also State of Rajasthan v Fatehkaran Mehdu CR Appeal No. 216 of 2017)**

After examining the affidavit evidence on record and hearing the arguments advanced by the Learned counsels for both sides one thing that clearly comes out in the submissions is that there is no mention of motor vehicle registration KBC 837Y as a vessel or vehicle used in the commission of the crime.

The statement of the respondent therefore that it's a crucial exhibit in the prosecution case cannot be allowed to stand at this interlocutory stage. That as per the averments made in the revision petition that the owner of the motor vehicle has failed to co-operate with the police to apprehend the driver, or agent or employee who was in control of the motor vehicle at the time of the offence is neither here or there.

It all depends on the quantum and quality of the evidence which necessitated the indictment of the two accused persons with the charge of stealing stock contrary to Section 278 of the Penal Code. The absence of a driver cannot be a bonafide reason to withhold the subject motor vehicle and at the same time pronounce it as a basis of the revision of the impugned order, thereby prejudicing the rights and interests of the registered owner. The quick disposal of the issue is not to ignore the concerns stated by the owner of the motor vehicle that its charged as security for a loan with KWFT which is still due and outstanding. This was the right that may have influenced exercise of discretion by the Learned trial Magistrate. The protection given by the impugned order to have the motor vehicle photographed and the registered owner to

deposit registration documents to the investigating officer was fair enough. Further, the owner was required to produce it in Court whenever it is necessary as scheduled. In substance there is absolutely nothing illegal and bad in the eyes of Law and liable to be interfered with and set aside by this Court pursuant to revisionary jurisdiction in Section 362 of the Code.

As far as the present case is concerned, the parties went further to record a consent order on the release of the subject motor vehicle adopted by the Court on 6.3.2020. Assuming for a moment for the sake of argument that the issuing order by the Learned Magistrate was illegal, irregular or incorrect, the applicant cannot bypass the consent order and approach the Court directly under Section 362 of the Penal Code by way of this revision petition. Thus viewed from any angle, this revision petition is not maintainable in this Court.

As a result, all the conditions set out by the Learned trial Magistrate remain unimpugned. The motor vehicle which has been illegally detained by the O.C.S with effect from the order of the Court be released to the registered owner to abide with the condition for non-disposal or transfer pending the hearing and determination of the criminal case.

The motor vehicle herein being private property of the registered owner under Article 40 of the Constitution shall not be unnecessarily intermeddled or interfered with without prior notice or cause being shown by the state agency involved in the stakes to do with **Criminal Case No. 94 of 2020**.

If the applicant is so desirous and passionate in making an application for its forfeiture in the future, he is at liberty to apply to NTSA to enter an encumbrance or restriction in the registration register of the owner as against the nature of the context and encumbrance.

Accordingly, my answer to the whole question referred to me is that there has been no error of Law or fact by the Learned trial Magistrate that could have forced the applicant to feel aggrieved as to seek the Courts intervention in the matter. The Constitutional right to a fair hearing under Article 50 (2) (e) for one to have the trial begin and concluded without unreasonable delay would be lost if interlocutory applications were founded on a partial or speculative presumption of the facts as it happened in the instant application.

Having disagreed with that rationale of the applicant which I find to be mere distraction and vexing of the process, the notice of motion dated 16.3.2020 lacks merit, save for what has already been stated elsewhere in this decision.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF JULY 2020

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R. NYAKUNDI

JUDGE