

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. NO.166 OF 2020

REPUBLICAPPLICANT

VERSUS

RASHID MOHAMED ECHESARESPONDENT

RULING

The Director of Public Prosecution was aggrieved by the decision of the Senior Principal Magistrate (Hon. Kenneth Cheruiyot) rendered on 4th June 2020 directing the police to release two firearms to wit P-Barreta FO 92 Serial No.Axxxx and Ceska CT Serial Nol.0xxxx and motor vehicle registration No.KCR 786H make Range Rover to the Respondent. The order was made in **Nairobi CMC.Criminal Case No.271 of 2020 (Milimani)** where the Respondent is facing several charges. In the notice of motion filed on 8th June 2020, the Director of Public Prosecution seeks to revise that order on the grounds that the same was being detained pending the trial of the criminal case, and further, pending further investigations by the police. The application is supported by the grounds stated on the face of the application and the supporting affidavit of PC John Munjama, the investigating officer in the case.

The application is opposed. The Respondent swore a lengthy replying affidavit in opposition to the application. In the affidavit, the Respondent averred that the detained property had no connection with the charges that he is facing before the trial court. He pointed out that the High Court sitting at Kakamega had issued an order restraining the police from seizing his firearms pending the hearing and determination of the application for Judicial Review that he had filed before that court. He annexed a copy of the referred order in the said affidavit. The Respondent pointed out that the motor vehicle that is the subject of the application was not seized at the time of his arrest. He was arrested while he was within the Central Business District of Nairobi while the motor vehicle was later seized from his house. He attached documents which showed that he had purchased the same from one Rashida Shabbir Maloo, who swore a supporting affidavit confirming the sale. In essence, the Respondent was saying that there was no basis in law for the continued detention of the said properties by the prosecution.

During the hearing of the application, this court heard oral rival submission made by Ms. Nyamosi for the State and by Mr. Ombeta for the Respondent. This court has carefully considered the said submission. It has also benefited from perusing the affidavits filed by the parties in support of their respective opposing provisions. The Director of Public Prosecutions asserts that the continued detention of the firearms and the motor vehicle is justified and is in accordance with **Section 26(1)(c)** of the **Criminal Procedure Code** which provides that:

“A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain –

(a) ...

(b) ...

(c) Any person who maybe reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.”

From the submission made, and the affidavits sworn by the parties to this application, it was clear to the court that the detention of the firearms and the motor vehicle by the police is unconnected with the pending criminal case before the trial court. According to the investigator, the police suspect that the motor vehicle was unlawfully acquired hence justification for its continued detention. On the other hand, the investigator explained that it was seeking the detention of the firearms to enable the Chairman, Firearm Licensing Bureau to verify the particulars of the said firearms before releasing the same, if at all, to the Respondent. On the other hand, it is the Respondent’s contention that there is no legal justification for the police to continue holding the said firearms since he is lawfully in possession of the same.

This court, upon evaluating the facts of this application, formed the view that the Senior Principal Magistrate did not err in law when he ordered the police to release the said property to the Respondent. In respect of the two firearms, the High Court sitting at Kakamega did in **Kakamega High Court Judicial Review Case No.3 of 2020** restrained the police and the Chairman, Firearm Licensing Board from seizing the firearms from the Respondent, and further, from cancelling the firearm licence issued to him pending the hearing and determination of the application for Judicial Review. The Director of Public Prosecutions did not dispute the existence of this order. The Senior Principal Magistrate therefore had no choice but to comply with the order issued by the High Court. The continued detention of the said firearms by the police is therefore, *prima facie*, in contempt of the orders issued by the said court. Nothing prevents the Director of Public Prosecutions or the police from making an appropriate application before the Kakamega High Court to have the said decision reviewed or set aside. So long as that order is still in force and has not been discharged, the police has no option but to comply with the same and release the two firearms to the Respondent.

As regard the motor vehicle, the Respondent has annexed documents in the affidavit in opposition to the application which *prima facie*

establish that he purchased the said motor vehicle from one Rashida Shabbir Maloo. The said Rashida Shabbir Maloo swore an affidavit before the trial court. She confirms that she sold the said motor vehicle to the Respondent. She has been paid the full purchase consideration. She has therefore no claim whatsoever over the same. The investigating officer contends that the continued detention of the said motor vehicle is justified in light of the trial of the pending charges before the magistrate's court. Again, as correctly observed by the trial magistrate, there is no nexus or connection between the said motor vehicle and the pending charges before that court. There is no legal justification for the continued detention of the said motor vehicle. The same should therefore be returned to the Respondent without further ado.

In the premises therefore, this court holds that the Senior Principal Magistrate correctly and properly exercised his judicial discretion when he allowed the application for the release of the Respondent's property. There is no legal justification for the continued detention of the said property. The application by the Director of Public Prosecutions for the said order issued by the Senior Principal Magistrate to be revised therefore lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 8TH DAY OF JULY 2020

L. KIMARU

JUDGE