



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.414 OF 2019

LYDIA MUKAMI NYAMBURAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Lydia Mukami Nyambura, is facing four charges relating to **conspiracy to defraud** under **Section 317** of the **Penal Code** and **obtaining false pretenses** contrary to **Section 312** as read with **Section 313** of the **Penal Code**. The charges arose from an alleged business transaction that allegedly went awry leading to an alleged loss of Ksh.15,976,000/- by the complainant. The Applicant pleaded not guilty to the charges. The trial is yet to be concluded. In the course of investigation, the police seized from the Applicant a motor vehicle Registration Number KCM 536P Mitsubishi Outlander on suspicion that it was purchased from proceeds of crime. The motor vehicle is currently detained at Kasarani Police Station.

The Applicant's application to have the said motor vehicle released to her pending trial was rejected by the trial magistrate (Hon. H. Nyaga, Chief Magistrate). At the material part of his ruling the learned trial magistrate held thus:

“In my view, there is prima facie evidence that appears to link the money paid in and the money paid out. As such, it wouldn't be just and fair to release the item which may eventually be found to be a proceed of crime. I wish to refer to High Court Criminal Revision No.509 of 2017 Sinenge Group Limited vs Republic where the High Court found that the nexus between some alleged paid out of an account and the sums allegedly stolen. It is thus my finding that it is premature for the accused to make the application. The State is entitled to (hold) the vehicle as a proceed of crime.”

Aggrieved by this finding, the Applicant filed an application before this court seeking to revise the decision by the trial court which declined to grant her application for the release of the suit motor vehicle. The Applicant complained that the trial court had taken into account other extraneous considerations before he reached the impugned verdict. In particular, the Applicant faulted the trial magistrate for making the ruling despite the fact that there was a pending application seeking his recusal from hearing the criminal case.

The Applicant urged the court to take into consideration the fact that the said motor vehicle is wasting at Kasarani Police Station storage yard. The Applicant annexed photographs of the motor vehicle's current state pointing out that the same has been extensively vandalized. As the registered owner and being a person living with disability, the Applicant urged this court to allow her application for the release of the motor vehicle into her possession. She gave the undertaking that she would not sell or part with possession of the suit motor vehicle pending the conclusion of the trial.

The application is opposed. The Investigating Officer Sergeant Ambrose Gichana swore a replying affidavit in opposition to the application. He averred that his investigations had established that the suit motor vehicle was purchased at the contemporaneous time that the complainant lost subject amount to the Applicant. It was his assertion that the motor vehicle was purchased from proceeds of crime. He annexed to his replying affidavit documents that evidence the trail of the movement of funds from the complainant to the purchase of the motor vehicle. He therefore urged the court to disallow the application. He was of the view that the application had been made prematurely since the trial has not yet been concluded to establish the innocence or otherwise of the Applicant.

During the hearing of the application, this court heard oral rival submission by Mr. Konyoko for the Applicant and by Mr. Momanyi for the State. Both counsel essentially reiterated the contents of the application and the affidavits filed in support and in opposition to the application. The issue for determination by this court is whether the Applicant has made a case for this court to order the release of the detained motor vehicle to her. This court, in making its determination, is cautious that it does not make a finding that may prejudice either the prosecution's or the defense's case in the pending trial. The court is also aware that in exercise of its revisionary jurisdiction under **Article 165(6)** and **(7)** of the **Constitution** and **Section 362** of the **Criminal Procedure Code**, it should be hesitant to intervene in ongoing trial by entertaining interlocutory challenges to decisions made by the trial court in the course of the trial.

As was held in **Republic vs John Wambua Munayo & 3 Others [2018] eKLR:**

“33. Therefore, it is my view that that jurisdiction should not be invoked so as to micro-manage the lower courts in the conduct and management of their proceedings for the simple reason thereof every ruling of the lower court and which went against a party would be subjected to the revisionary jurisdiction of this court, floodgates would be opened and the courts would be inundated with such applications thus making it practically impossible for the lower courts to proceed with any case to its logical conclusion.”

This court agrees with the above holding.

In the present application, the Applicant faults the trial magistrate for failing to favourably consider her application for the release of the suit motor vehicle during the pendency of the trial. From the affidavits filed before this court, it is not disputed that the motor vehicle is part of the prosecution's case. Indeed, the motor vehicle may be produced as an exhibit by the prosecution during trial. There is possibility that a suit may ensue after trial for the confiscation of the motor vehicle as a proceed of crime. On the other hand, the prosecution may fail to establish its case on the charges brought against the Applicant. In the circumstances, this court may not determine one way or the other the strength or the weakness of the prosecution's case. What is however clear is that if the motor vehicle is released to the applicant, the Prosecution's case may be prejudiced. The Applicant pleaded with the court to consider her disability in making the determination to return possession of the suit motor vehicle to her.

This court is of the view that the Applicant's physical disability may be a factor in mitigating (if she is convicted) and not a factor where there is *prima facie* evidence that some of the monies that are alleged to have been stolen from the complainant was used to purchase the suit motor vehicle. This court holds that in the absence of a definitive finding by the trial court on the question whether or not the motor vehicle was purchased from proceedings of crime, this court cannot inquire into the propriety of otherwise of the interlocutory decision made by the trial court.

In the premises therefore, the Applicant's application lacks merit and is hereby dismissed. As regards the alleged vandalisation of the motor vehicle which is in custody of the police, the Applicant is at liberty to make an appropriate application before the trial court to secure the suit motor vehicle pending conclusion of the trial.

It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF OCTOBER 2020

HON L. KIMARU

JUDGE