



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NANYUKI**

**CRIMINAL REVISION NO.94 OF 2020**

**MOSES WANJALAL LUPAO .....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(Revision from original Ruling dated 25/11/2019 in Maralal PM Misc. Criminal Application No. 27 of 2019 – R Koech, PM)***

**JUDGMENT ON REVISION**

1. The Applicant herein, **MOSES WANJALA LUPAO**, applied to the lower court by notice of motion dated 18/10/2019 for release to him of **motor vehicle Registration No KBZ 505N** held by the police and the **Director of Public Prosecutions** at **Maralal Police Station** for use as an exhibit in **Maralal PM Criminal Case No. 204 of 2019**. In that case a number of persons are charged with various offences, including **trafficking in narcotic drugs** contrary to **section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act, No. 4 of 1994**; **having suspected stolen property** contrary to **section 323** of the **Penal Code**; and **theft of motor vehicle parts** contrary to **section 278A** of the **Penal Code**. There are also charges directly concerning the motor vehicle in question, including **failing to maintain parts thereof in good working condition** contrary to **sections 55(1) and 58(1)** of the **Traffic Act, Cap 403**.

2. Hearing of that criminal case is on-going. The Applicant is not an accused in the case.

3. At the hearing of the application before the lower court the Applicant orally extended the application to another **motor vehicle registration No KCB 949D**, which had in the meantime also been impounded and held at **Maralal Police Station**, and was also featuring in the charges facing the accused persons in **Maralal PM Criminal Case No. 204 of 2019**.

4. The prosecution did not oppose the application in the lower court. In a considered ruling dated 25/11/2019 that court declined the application and dismissed it. The Applicant did not appeal, as he could have; instead he applied to this court for revision under **sections 362 and 364** of the **Criminal Procedure Code** by letter dated 8/04/2020. Having not appealed, it is doubtful that the Applicant can properly apply for revision in view of **sub-section (5) of section 364** of the Criminal Procedure Code, which states –

***“When an appeal lies from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”***

However, as this point was not canvassed before this court, the application will be determined on merit.

5. The application for revision was canvassed by way of written submissions. The Applicant’s submissions were filed on 29/06/2020. The Respondent’s reply was filed on 21/07/2020. The Republic has opposed the application. I have considered the submissions and the cases cited.

6. The main grounds for the application before the lower court were that the Applicant was the registered owner of the two motor vehicles **KBZ 505N** and **KCB 949D**; that he had duly leased the motor vehicles to **Ngaya Expeditions Limited**, which had in turn hired out the motor vehicles to one **Harisson Kamoko Wachuma**, the 1<sup>st</sup> accused in **Maralal PM Criminal Case No 204 of 2019**, where the main charges related to trafficking in narcotic drugs using the motor vehicles; that the Applicant had fully co-operated with the police investigations and had provided all necessary documentation; that in the circumstances it was unjust for his motor vehicles to continue to be held, particularly as they were his main means of livelihood and were prone to wastage and vandalism at the police station; and that if released to him he would be prepared to produce them to court as and when they may be required.

7. In his application before this court for revision the Applicant has faulted the ruling of the trial court as follows: that the court failed to properly exercise its discretion; that the court erred in disregarding the registration documents that proved the Applicant’s ownership of the

motor vehicles, the motor vehicle lease agreements, and the hiring out agreements between *Ngaya Expeditions Limited* and the 1<sup>st</sup> accused in the criminal cases; and that the court interfered with the mandate of the prosecution by holding that release of the motor vehicles would adversely affect the prosecution cases and that there was not before the court any tangible evidence exonerating the Applicant, notwithstanding that the Applicant had not been charged with any offence concerning the trafficking in narcotics.

8. The jurisdiction of this court in criminal revision, as set out in **sections 362 and 364** of the *Criminal Procedure Code* extends to calling for and examining the record of any criminal proceedings before any subordinate court –

**“...for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”**

9. I have indeed called for and examined the original record of the lower court herein in *Maralal PM Miscellaneous Criminal Application No 27 of 2019*. This record refers extensively to *Maralal PM Criminal Case No.204 of 2019* and other criminal cases where a number of accused persons face charges of, *inter alia*, trafficking in large quantities of narcotic drugs using the motor vehicles in question. If the accused persons, or any of them are eventually convicted, the motor vehicles used in conveying the narcotic drugs would be liable to forfeiture under **section 20(2)** of the *Narcotic Drugs and Psychotropic Substances (Control) Act*, which states –

**“20. (1)...**

**(2) Every conveyance used for the commission of any offence under this Act or for carrying any machinery, equipment, implement, pipe, utensil or other article used for the commission of any offence under this Act, or any narcotic drug or psychotropic substance, shall be forfeited to the Government.**

**Provided that where, an application made by the person who was the owner of the conveyance to the court in which any prosecution for any offence under this Act or before which any proceedings under this Act for the forfeiture and condemnation of any conveyance, not being a proceeding under Part IV is pending, the court is satisfied beyond reasonable doubt that –**

**(a) the person who was the owner of the conveyance; and**

**(b) in the case of an aircraft or ship, every person who was a responsible officer thereof,**

**when it was made use of for such conveyance, was not concerned in or privy to such use, the conveyance shall be restored to the owner by the court.”**

10. As can be seen above, there must be substantive proceedings before the lower court to establish the innocence of the owner of the motor vehicles **beyond reasonable doubt**. So, it is not merely a matter of discretion of the court; it is a matter of proper production of evidence by the owner of the vehicles to establish to the high criminal standard of proof beyond reasonable doubt of his innocence in the use of his motor vehicles in the trafficking of the narcotics.

11. Such proceedings, in my view, need not be separate from the trial of the criminal case. But it seems to me that the owner must testify under oath before the trial court, and also produce such other evidence as would be necessary, to prove his innocence to the required standard. Affidavit evidence may thus not be sufficient to discharge the high standard of proof beyond reasonable doubt.

12. Bearing in mind the above provisions of **section 20(2)** of the Act, and given the misgivings that the lower court had over the lease agreement, I cannot find any fault in the court’s refusal to release the motor vehicles to the Applicant at that stage. The Applicant needed to do more to establish his innocence to the required standard, as has been demonstrated above.

13. Condemnation and forfeiture of the motor vehicles, at the discretion of the court, is also possible under **section 78** of the Act upon conviction of the accused persons or any of them. In that case, the court would have to first serve the owner of the motor vehicles with notice to show cause (under **section 389A** of the *Criminal Procedure Code*) why forfeiture should not be ordered.

14. It is also to be noted that the lower court was not bound by the prosecutor’s support of the Applicant’s application. The main function of any court is to ensure that justice is ultimately done to all parties concerned; if in its view, as was the case here, release of the motor vehicles to the Applicant, would jeopardize that ultimate goal, it was within its mandate to refuse the application, notwithstanding that the prosecution did not oppose it. This would certainly not amount to interference with the prosecutor’s constitutional prosecutorial mandate and independence.

15. In the circumstances, I do not find any fault with the ruling of the lower court. The application for revision has no merit and is hereby refused. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 12<sup>TH</sup> DAY OF OCTOBER 2020**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 15<sup>TH</sup> DAY OF OCTOBER 2020**