



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL REVISION NO. 2 OF 2020

NATIONAL BANK OF KENYA.....APPLICANT

VERSUS

RICHARD CHERUIYOT & 2 OTHERS.....RESPONDENTS

RULING

1. Richard Cheruiyot Koech (“Mr. Koech”) and two others were jointly charged before the Nakuru Chief Magistrate’s Court with the offence of stealing contrary to section 268(1) as read together with section 275 of the Penal Code. It was alleged that the three stole Kshs. 18,145,161 from the National Bank of Kenya Ltd (“Applicant”) on 27th October, 2017 at the National Bank of Kenya Limited Harambee Avenue, in Nairobi County.

2. Each of the Accused Persons pleaded not guilty and a fully-fledged trial followed. The Prosecution called ten witnesses and closed its case. At the conclusion of the Prosecution case, the Learned J.M. Omido, the Presiding Magistrate, returned a verdict that the Prosecution had failed to establish a prima facie case against all the Accused Persons sufficient to put them on their defence and acquitted them.

3. After the ruling on no case to answer was delivered, Counsel for the Accused Persons made an application for the release of “the money with the bank.” The Application was made orally. Counsel wanted the money to be “deposited to the account of the defence counsel for transmission” to Mr. Cheruiyot who was, allegedly, the depositor of the amount. The Application was opposed by the Prosecution.

4. In a ruling delivered on 03/12/2019, the Learned B.B. Limo, who had taken over the matter from the Learned J.M. Omido who had left on transfer, allowed the Defence application and made two consequential orders:

a. First, he ordered that the Preservation Order dated 3rd March, 2018 be discharged.

b. Second, the Learned Magistrate ordered that “a sum of Kshs. 7,000,000 only be and is hereby released to Defence Counsel, Mr. Imbwaga S. Mukhogosi, advocate, for onward transmission to the 1st Accused.”

5. When this order was served on the Applicant, it responded by instructing its lawyer to explain to both the Court and the Defence Counsel that the Court’s order was incapable of execution because the Applicant never had the funds belonging to Mr. Koech which it could now release to his lawyers. The Applicant’s lawyer, Mr. Kiburi, appeared before the Learned Magistrate on 13/12/2019 to explain why the bank could not comply with the order and apply for the orders to be suspended. The Court ordered that the orders were to be “held in abeyance pending further directions of the Court.” It is unclear from the Court file whether the Court has ruled on the Application. The last action on the Court file indicates that a ruling was awaited on 21/01/2020.

6. The Applicant approached this Court vide a letter dated 18/02/2020 under the Court’s revisionary powers seeking the Court’s intervention to reverse the orders of the Lower Court. I ordered the Applicant to serve Mr. Koech and the DPP with the letter. Despite service neither Mr. Koech nor the DPP filed anything in the matter. Additionally, even though I adjourned the matter several times and directed that Mr. Koech’s lawyers be served with the new dates, neither Mr. Koech nor his lawyers attended Court for the hearing of the revision. In the end, Mr. Kiburi urged the Court to revise the Lower Court’s orders based on his letter dated 18/02/2020 and on the strength of the Court record.

7. It is unnecessary to go into a lot of details on the case to determine way forward in this matter. The record indicates the following:

a. During the pendency of the criminal trial, counsel for Mr. Koech filed two applications seeking, in essence, that Mr. Koech be allowed to operate the account from which he allegedly stole the money he is accused of stealing. He also sought to access the funds.

b. At the urging of Mr. Koech's lawyers, the Learned Magistrate, ruled that the "exhibit to be preserved pending ruling."

Presumably, the exhibit in question was the bank account.

c. The Applications in question were withdrawn by the Defence.

Technically, this would mean that the order "preserving the exhibits" expired with the withdrawal. I have found no application by the Prosecution to keep the orders alive post withdrawal of the Defence applications.

d. In any event, in his ruling on no case to answer dated 19/05/2019, the Learned Magistrate ordered: "As this Court had ordered that the Accused Person's account number 01285122018900 be frozen, I hereby order that the freezing order shall be vacated at the expiry of fourteen days if no appeal is preferred."

e. It is unclear if the DPP appealed against the acquittal.

f. What emerged at the trial was that the Applicant claimed that Mr. Koech masterminded the deflection of Kshs. 18,145,161.60 ("Allegedly Stolen Sum") meant for an account of Schindler Limited to Mr. Koech's account number 01285122018900.

The amount was Kenya Revenue Authority (KRA) and was in payment for services rendered to it by Schindler.

g. It is unclear how the Allegedly Stolen Sum was transferred to

Mr. Koech's account which, by the evidence adduced at the trial, had remained dormant since it was opened. Indeed, the account was inoperational for lack of proper signatures.

h. In any event, after the amount was, in the Applicant's view, fraudulently transferred to Mr. Koech's account, the Applicant immediately noticed the fraud, reversed the credit and had Mr. Koech arrested as he attempted to withdraw funds from the account.

i. In the criminal trial, the Learned Magistrate found that evidence to the requisite standard of proof was not adduced to demonstrate that it was Mr. Koech or his Co-Accused Persons who deposited the Allegedly Stolen Sum in Mr. Koech's account with the intent to steal. Indeed, the Learned Trial Magistrate found no proof that the amount which was found in Mr. Koech's account was the same amount that was destined for Schindler's account.

8. The primary question, based on these facts, is whether the order requiring the Applicant to pay sums allegedly in Mr. Koech's account to his lawyer is legally and factually sound. I have easily come to the conclusion that it was not. There are two main reasons why the order was improper.

9. First, the Allegedly Stolen Sum was never an exhibit in the criminal trial and was, therefore, never a proper subject for a release order in the criminal trial. At most, the "exhibit" referred to by the parties would be documents evidencing the opening and existence of the account – not the monies which were never deposited or brought within the jurisdiction of the Criminal Court.

10. Second, while it may be possible for a Criminal Court to order the freezing and unfreezing of an account related to the subject of criminal trial, it is not proper for the Court to order release of contested funds in the alleged account. Such a contestation can only be a proper subject of a civil trial. In the present case, the

Applicant insists that there was never any funds in Mr. Koech's bank account and that, in fact, the account was never operational. The Applicant further insists that it reversed the credit of the Allegedly Stolen Sum immediately it detected the fraud. As such, there are no funds to release to Mr. Koech. Mr. Koech, having survived the criminal trial, insists that he had the sums, by uncanny serendipity, exactly equal to the Allegedly Stolen Sum, in the account and demands that they be refunded to him. He neither attempts nor proves when and how he deposited the sums to that account. I only say this to clearly demonstrate that if Mr. Koech is serious about demanding to be paid the sums, his route is a civil claim. He will not be able to achieve it through an oblique order in the criminal trial.

11. **The result is that the request for revision is allowed. The Court recalls the ruling of the Lower Court dated 03/12/2019 and reverses the order that the amount of Kshs. 18,145,161.60 or any part thereof in Mr. Richard Cheruiyot Koech's account number 01285122018900 held at the National Bank of Kenya Limited should be released to Mr. Richard Cheruiyot Koech absent a Court Order to that effect issued in a civil suit related to the subject matter in which the Applicant, National Bank of Kenya Limited and Mr. Koech are direct parties.**

12. Orders accordingly.

Dated and delivered at Nakuru this 8th day of October, 2020.

.....

JOEL NGUGI

JUDGE