



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL REVISION NO. 25 OF 2019

REPUBLIC.....APPLICANT

VERSUS

SUSAN SEIN PARAKUO.....RESPONDENT

(Being an application arising from the order of Hon Wakahiu, CM, issued on 8/11/2019 in Misc Application in the Chief Magistrate's Court at Narok in Misc Case No. 60 of 2019, Susan Sein Enole Parakuo v Republic)

JUDGEMENT

1. The applicant applied for the release to her of motor vehicle registration No. KAA 141L, in the magisterial court.
2. The magisterial court after arguments by the applicant and counsel for the respondent (Mr. Karanja), made an order which was coaxed in the following language:

“Upon hearing the state counsel (for KFS) and upon hearing counsel for applicant, I do hereby order that motor vehicle KAA 141L now held by at Ngoben police camp be released to owner Susan Sein Parakuo forthwith upon production of ownership documents.”
3. The Director of Public Prosecutions (DPP) through her counsel Mr. Anthony Ndungu, applied for revision of the above order citing in support thereof, article 165 (6) and (7) of the 2010 Constitution of Kenya, sections 362 and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya; on the ground that the release order was irregular.
4. The application is based upon the following grounds.
 - 1) the lower court had not been seized of the matter since no criminal charges had been filed against the driver or the owner of the motor vehicle.
 - 2) the said vehicle had not been produced as an exhibit by the state.
 - 3) the notice of motion application filed by the respondent was erroneously in that court and the respondent ought to have moved the High Court through judicial review against the state authority that has physical possession of the vehicle.
5. In the meantime, the respondent had filed an application for contempt against the OCS Narok police station for refusing to release the vehicle; pursuant to the above magisterial order vide Misc. Application No 12 of 2020 which I had certified urgent. The matter was fixed for *inter partes* hearing on 28/5/2020.
6. During the *inter partes* hearing it emerged that the DPP had earlier on filed the current application for revision, being Criminal Revision No. 25 of 2019 it was agreed by consent that the application of the DPP be heard and determined first.
7. As a result of the DPP's application, I called for the lower court file. After perusing it, I concluded that it is a matter that is capable of being disposed of by way of written submissions. As a result, counsel for both parties by consent agreed to file written submissions.
8. Counsel for the prosecution filed written submissions as directed by the court. counsel for the applicant did not file written submissions as directed.
9. Counsel for the prosecution submitted by going into the history in respect of the circumstances that led to the seizure of the subject motor vehicle registration No. KAA 141L Toyota hilux; which were that the said vehicle was detained for carrying forest produce namely red cedar posts. The driver of the motor vehicle escaped and has not been traced to date. Counsel cited the decision of this court (Bwonwong'a, J) in

Embu High Court Criminal Revision No. 138 of 2018, Republic v Everline Wamuyu Ngumo. In that case it was held that a subject motor vehicle therein had not been produced as an exhibit in court and therefore the trial court therein did not have jurisdiction to order for the release of the motor vehicle.

10. Furthermore, I find that in the lower court reference was made to the decision of this court (M.J. Anyara Emukule, MBS) in *Republic v Ministry of Internal CO-ordination & 2 Others, ex parte Evans Nyakwara Makori [2018] e-KLR*. In that case the court issued an order of mandamus directing the respondents and the Director of Public Prosecutions to, among other matters, commence within thirty (30) days forfeiture proceedings in relation to a matatu motor vehicle that was held and detained at the police station; since the respondents were under a public duty to commence those proceedings, which they had failed to do. It is debatable whether the court was right to order the DPP to commence forfeiture proceedings.

11. I have considered the submissions of prosecution counsel. I find that they relate to the history in respect of circumstances under which the motor vehicle was detained by the Kenya Forest Service (KFS) at Ngoben Camp. Because these are revisional proceedings, I am only required to peruse the record of the magisterial proceedings, which I have done. As a result, I have found that there was no person who had been charged in that court. I therefore find that it was only an application for the release of the subject motor vehicle which had been made.

12. The filing of the application for the release of the subject motor vehicle by the applicant was irregular, since that magisterial court did not have jurisdiction to entertain and determine the application. The court in which this application ought to have been filed is the High Court. The reason being that what was being challenged is the right of applicant to enjoy her property rights; which right is guaranteed by article 40 of the 2010 Constitution of Kenya.

13. In the light of the above allegation that her right to that property has been infringed, the right court in which the application ought to have been filed is the High Court as directed by article 23 of the 2010 Constitution of Kenya. It is the High Court which is vested with the jurisdiction to adjudicate disputes of alleged violations or infringement of a right or a fundamental freedom in the Bill of Rights.

14. The applicant claims that she is the beneficial owner of the subject motor vehicle. She does not claim that she is the registered owner of the motor vehicle. That does not stop her from enforcing her rights in that property. It is important to bear in mind that article 40 (1) (a) of the 2010 Constitution protects property of any description, which includes the applicant's beneficial rights in that motor vehicle.

15. I find as persuasive the decision of this court in *Republic v Ministry of Internal CO-ordination & 2 Others, ex parte Evans Nyakwara Makori supra*, that it is the High Court that is vested with jurisdiction to enforce the rights of an individual, which have been infringed or threatened to be infringed and not the magisterial court. A magisterial court only has jurisdiction when the property in dispute has been produced as an exhibit before it in court, according to *Embu High Court Criminal Revision No. 138 of 2018, Republic v Everline Wamuyu Ngumo, supra*.

16. In the premises, I find that the application by the prosecution succeeds with the result that the magisterial order dated 8/11/2019 is hereby quashed. The Kenya Forest Service is free to start forfeiture proceedings if the driver of the offending motor vehicle is not arrested within a reasonable time.

17. Furthermore, the contempt proceedings filed by the applicant and the consequential orders made therein in Narok High Court, Misc Criminal Application No. 12 of 2020, Susan Sein Parakuo v OCS Narok police station are hereby set aside on the basis that they are now moot.

Judgment signed, dated and delivered at Narok this 14th of October 2020 in the presence of Ms. Torosi for the applicant and in the absence of Mr. Kiruti for the Respondent.

J. M. BWONWONG'A.

J U D G E

14/10/2020.