



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCR REV. NO. 169 OF 2018

JASON KATHURIMA RUKARIA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The matter herein entails a revision under S. 362 CPC Cap 75 LOK against orders of the Kilungu SRM court dated 12/10/2018 in Traffic Case No. 1023/2018.
2. The court ordered:-
 - Applicant to pay fine of Kshs. 500,000/=.
 - The motor vehicle KBP 360A be detained until fine is paid.
3. The Application is supported by affidavit of Jason Kathurima Rukaria sworn on 16/10/2018 and a further affidavit sworn by same deponent on 01/11/2018.
4. The Respondent via Eunice Gitau state counsel filed replying affidavit to oppose the Application.
5. The parties agreed to canvass application via submission. Only Applicant has filed same as directed by the court.

APPLICANT'S SUBMISSIONS

i. Whether this Honourable court has jurisdiction.

6. It is the Respondent's contention that the application before the court is improper as the Applicant ought to have filed an appeal against the orders of the trial court. The Applicant has opposed this contention on the grounds that he was not a party to the proceedings in the trial court as he had not been charged nor convicted.
7. The court however proceeded to order that he should pay a fine and that his vehicle should be detained until he surrenders himself. The Applicant's contention is therefore that he does not have a right of appeal.
8. The criminal procedure code provides as follows at section 347(1)(a):-

347 (1) save as is in this part provided – (a) A person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court.

9. The purport of the above section is therefore very clear that only a person convicted may appeal. In the case of **Adan Samow Eymoi –Vs- Republic [2016] eKLR**, Dulu J. delivered himself thus:-

“In my understanding the complaint raised in these revision proceedings only relates to the orders of the chief magistrate on forfeiture and condemnation of the motor vehicle or lorry which was carrying uncustomed goods. I have perused the record. The Applicant herein not having been an accused nor participated in the criminal proceedings is correct to approach this court through its revision jurisdiction, as he has no right of appeal.”

10. Section 362 of the Criminal Procedure Code provides this as regards revision:-

362. The High Court may call for and examine 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.

11. Section 364(1) of the same act provides as follows:-

364. (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

12. It is therefore that this court indeed has jurisdiction to here the application herein and proceed to set aside the orders of the trial court in respect of the Applicant.

ii. Whether the trial court violated the Applicant's right to a fair hearing and right to property by condemning him in absentia.

13. In the **ADAN SAMOW EYMOI** case (Supra) Dulu J. delivered himself thus:-

"I agree that even under our replaced constitution the right to be heard was sacred. In our present constitution, it is not just sacred but there is a constitutional requirement even for fair administrative action under article 47. The bill of rights has also been enlarged and clearly amplified and all courts are commanded to enforce the same. Article 40 clearly protects every person's right to property. The lorry herein, it is admitted, belonged to the Applicant who was not an accused person."

14. In the instant case, it is not disputed that the Applicant was not a party to the criminal proceedings. It is also not disputed that despite the fact that he had not been charged nor convicted, the trial court proceeded to issue orders for detention of the motor vehicle as well as an order directing him to pay a fine.

15. As has clearly emerged from the documents supplied by the Applicant, if he had been accorded an opportunity to be heard he would have been able to explain that in fact there was no violation of the law on his part or that of his driver. It is therefore that the Applicant's right to a fair hearing and right to property were violated and that the said violation caused undue prejudice to him.

iii. Whether the trial court erred by making orders in respect of a person not a party to the proceedings before it.

16. Section 80 of the Energy Act 2006 provides as follows:-

S. 80(4) No person shall drive a vehicle, or engage a driver, for the purpose of transporting petroleum unless such driver is certified for that purpose in accordance with this Act.

(5) A person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings, or to a maximum term of imprisonment of one year, or to both.

17. Black's Law Dictionary, 4th edition, at page 403, defines conviction as follows:-

"In a general sense, the result of a criminal trial which ends in a judgment or sentence that the prisoner is guilty as charged."

18. In the instant case, it is not disputed that the Applicant herein was not charged before the trial court. As such, he cannot in any way be said to have been convicted. The Energy Act contemplates that the penalties contained in section 80(5) would only be imposed after conviction.

19. There is no provision that empowers a court to impose the penalties therein upon a person who has not been convicted. As such, there was a manifest error by the trial court in making orders against the Applicant and that the same occasioned a grave injustice to the Applicant and can only be cured by setting aside the said orders in their entirety.

iv. Whether an offence had indeed been committed either by the Applicant or the accused.

20. It is the Applicant's contention that there was a directive by the ERC extending the period of compliance for petroleum transporters up to 15/10/2018.

21. As such, the Applicant contends that no offence can be said to have been committed on 11/10/2018 when the vehicle was impounded.

22. The Applicant also avers that he had complied with the licensing requirements as he had applied for a license in respect of himself as well

as his driver. The Applicant avers that the procedure in respect of the issuance of driver's certificates has yet to be operationalized by the ERC and as such the license issued to him was to cover both the vehicle and the driver.

23. The Applicant also avers that his application had been approved but there was a delay on the part of the ERC in issuing the license. The license has now been issued. The said averments have not been rebutted by the Respondent.

24. Although the Respondent contends that the extension period issued by the ERC was only in respect of transporters licenses and not driver's certificates, the said contention has been rebutted by the Applicant who avers that the said extension was issued in respect of licensing requirements as a whole and there was no caveat exempting driver's certificates from the said extension.

25. It is also to be noted that section 80 of the Energy Act is titled "licence for petroleum business".

26. The said section at subsection (4) provides for certification of drivers. The Energy (Licensing of Petroleum Road Transportation Business) Regulations 2013 contained in the subsidiary legislation of the Energy Act also provide for the issuance of driver's certificates.

27. It is therefore abundantly clear that issuance of driver's certificates fall within the meaning of "licensing requirements" as contemplated in the communication from the ERC.

28. The above cited extension for compliance clearly covers driver's certificates. It is therefore our submission that no offence can be said to have been committed at the time of the arrest and impoundment and as such there was no legal basis for the proceedings and orders of the trial court. The said proceedings and orders are therefore a legal nullity and ought to be set aside.

29. It is therefore that from the totality of the above submissions the Applicants application has merit. We therefore urge this Honourable court to find and hold so and proceed to set aside the orders issued by the trial court.

RESPONDENT AFFIDAVIT

30. The Respondent via affidavit avers that, the driver of subject motor vehicle KBP 360A Mitsubishi Lorry was charged with the offence of driving the said vehicle without certificate contrary to section 80 subsection 4 of the Energy Act No. 12 of 2012, Laws of Kenya.

31. That the aforesaid driver pleaded guilty to the charges and was sentenced to pay a fine of Kshs. 500,000/= and in default thereof to serve one year imprisonment.

32. That after the sentence, the prosecution applied for detention of the subject motor vehicle at Sultan Hamud Police Station pending surrender of the owner of the vehicle (the Applicant herein) which application was allowed and orders were accordingly granted by the learned Honourable Magistrate.

33. That further orders were given by the court to the effect that the owner of the motor vehicle (the Applicant herein) to also pay the fine as imposed.

34. That the section of the law under which the driver of the motor vehicle was charged is clear that ***"no person shall drive a vehicle, or engage a driver for the purpose of transporting petroleum unless such driver is certified for the purpose in accordance with the act."***

35. That it therefore follows that the Applicant, by virtue of being the owner committed an offence by engaging the driver without requisite certificate.

ISSUES, ANALYSIS AND DETERMINATION

ISSUES

36. After going through the Application, Supporting Affidavit and Replying Affidavit and submissions, I find the issues are;

- a) Whether the application is properly before this court?***
- b) If above in affirmative, whether application has merit?***
- c) What is the order as to costs?***

37. On the first issue, it is the Respondent's contention that the application before the court is improper as the Applicant ought to have filed an appeal against the orders of the trial court. The Applicant has opposed this contention on the grounds that he was not a party to the proceedings in the trial court as he had not been charged nor convicted.

38. The trial court proceeded to order that Applicant should pay a fine and that his vehicle should be detained until he surrenders himself. The Applicant's contention is therefore that he does not have a right of appeal.

39. The criminal procedure code provides as follows at **Section 347(1)(a)**:-

347 (1) save as is in this part provided – (a) A person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court.

40. The purport of the above section is therefore very clear that only a person convicted may appeal. The Applicant herein not having been an accused nor participated in the criminal proceedings is correct to approach this court through its revision jurisdiction, as he has no right of appeal.

41. See **ADAN SAMOW EYMOI –VS- REPUBLIC [2016] EKLK, Section 362 of the Criminal Procedure Code** provides this as regards revision:-

The High Court may call for and examine 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.

42. **Section 364(1)** of the same act provides as follows:-

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

43. It is therefore that this court indeed has jurisdiction to hear the application herein and proceed to set aside the orders of the trial court in respect of the Applicant.

44. On the second issue, the Applicant contention is that the trial court violated the Applicant's right to a fair hearing and right to property by condemning him in absentia.

45. In the **ADAN SAMOW EYMOI** case (Supra) court rendered opinion thus:-

"I agree that even under our replaced constitution the right to be heard was sacred. In our present constitution, it is not just sacred but there is a constitutional requirement even for fair administrative action under article 47. The bill of rights has also been enlarged and clearly amplified and all courts are commanded to enforce the same. Article 40 clearly protects every person's right to property. The lorry herein, it is admitted, belonged to the Applicant who was not an accused person."

46. In the instant case, it is not disputed that the Applicant was not a party to the criminal proceedings. It is also not disputed that despite the fact that he had not been charged nor convicted, the trial court proceeded to issue orders for detention of the motor vehicle as well as an order directing him to pay a fine.

47. It is therefore that the Applicant's right to a fair hearing and right to property were violated and that the said violation caused undue prejudice to him.

48. **Section 80 of the Energy Act 2006** provides as follows:-

S. 80(4) No person shall drive a vehicle, or engage a driver, for the purpose of transporting petroleum unless such driver is certified for that purpose in accordance with this Act.

(5) A person who contravenes this section commits an offence and shall, on conviction, be liable to a fine not exceeding one million shillings, or to a maximum term of imprisonment of one year, or to both.

49. **Black's Law Dictionary, 4th edition**, at page 403, defines conviction as follows:-

"In a general sense, the result of a criminal trial which ends in a judgment or sentence that the prisoner is guilty as charged."

50. In the instant case, it is not disputed that the Applicant herein was not charged before the trial court. As such, he cannot in any way be said to have been convicted. The Energy Act contemplates that the penalties contained in section 80(5) would only be imposed after conviction.

51. It is therefore that from the totality of the above analysis the court finds that, the Applicant's application has merit thus holds so and proceeds to set aside the orders issued by the trial court and makes the following orders ;

a. The orders of 12/10/2018 in SRM Traffic Case No 1023 of 208 Kilungu are hereby set aside.

b. M/V KBP 360A is hereby restored to the Applicant.

SIGNED, DATED AND DELIVERED THIS 21ST DAY OF JANUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE