



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 32 OF 2018**

**ABDI ABDALLA DECOSTA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The application dated 28<sup>th</sup> September 2018 seeks for the released of Motor vehicle Registration No. KBP 896E, Toyota Land cruiser. The application was supported by the applicant's affidavit wherein he avers that he is the registered owner of the aforesaid motor vehicle. He stated that he was not in possession of the said motor vehicle at the time of his arrest. In addition, the motor vehicle is neither an exhibit, nor connected to the transaction/ subject of the case. He averred that he sent his family members to collect the vehicle but the police refused to release it. In a subsequent supplementary affidavit dated 6<sup>th</sup> February 2019 he attached a copy of the Logbook to prove his assertion that he is the registered owner of the motor vehicle.

**Response**

2. The application was responded to by **Omar Godana Dida**, father of the deceased & **Amos Gichuki** the investigating officer through affidavits dated 2<sup>nd</sup> March 2019. They both averred that the accused used the motor vehicle in commissioning the murder of the deceased and similarly escaped with the same from the scene of the crime. They averred that the motor vehicle was an aiding tool in the commissioning of the crime hence still relevant in this case. They also averred that the accused later on abandoned the motor vehicle at Sagana from where it was impounded by the police.

3. **Patrick M.Namiti**, the Prosecuting Counsel however conceded to the application through his replying affidavit dated 1<sup>st</sup> March 2019. He averred that the motor vehicle was abandoned at Fumco Car Wash where it was picked by the D.C.I.O Isiolo and escorted to Isiolo where it is detained to date. He averred that the physical motor vehicle is no longer material to the case since they have already taken photographs of the aforesaid motor vehicle and have since been processed the same for production hence they wish not to insist on detaining the motor vehicle.

**Analysis and Determination**

4. Counsel for the applicant filed written submission. He relied on **Article 48 (Access to justice) and Article 50- presumption of innocence, of the constitution**. He also cited authority of **Republic v John Nganga Mbugua [2014] eKLR** where it was observed by **Justice Mucheru** as follows;

**“it is the practice in criminal cases that photographs will be taken by the scene of crime personnel of exhibits and scenes of crime which will be produced in evidence during the hearing. If it is possible to avail the exhibit itself, the photographs may also be produced. If the vehicle is released after its photographs are taken no miscarriage of justice will be occasioned during the trial....”**

5. The reasoning expressed in **Republic v John Nganga Mbugua [2014] eKLR** is quite apt. But in my view, the motor vehicle should always be produced as an exhibit together with photographs taken of it before a release order is made. Once that is done, the vehicle may be released to the owner but on conditions that it will not be sold or wasted away or diminished or dealt with in a manner that will make it unavailable to court should it be required for purposes of the proceedings. I do not think that seizure of property for being an instrumentality of crime and for purposes of being produced as an exhibit in a trial is a violation of right to property under article 40 of the Constitution. Seizure of instrumentalities of crime is permitted by law and production thereof as exhibit in a trial makes it the property of the law until it is released by order of the court. Therefore, the affidavits of the victim and the Investigating officer are not irrelevant or misplaced.

6. However, the prosecution seems to agree that the vehicle may be released after the vehicle and photographs of it have been produced. In the circumstances, I do not find any good reason to hold the vehicle as long as the vehicle, the logbook and photographs of it taken by the

crime of scene officer have been produced as exhibits in court. Accordingly, I direct that the motor vehicle, the original logbook and the photographs of it shall be produced at any time in the trial. Thereafter, the Court may direct it to be released on condition that the owner shall not sell, dispose of or exchange or convert the vehicle or deal with it a manner that dissipates it as an exhibit of the court. The vehicle shall be availed to court when it is so required. The owner shall also file periodic (quarterly) official inspection reports by reputable firm on the status of the vehicle for the tenure of these proceedings. In addition, the vehicle shall be presented in court on every occasion the case is fixed for hearing. It is so ordered.

Dated, Signed and delivered in open court on 14<sup>th</sup> day of May 2019

**F. GIKONYO**

**JUDGE**

**In presence of**

Ojiambo for accused

M/s Nyagah Watching brief.

**F. GIKONYO**

**JUDGE**