



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 4 OF 2019

THE DCIO CHUKA.....APPLICANT

VERSUS

ASHFORD MUNENE NJAGI.....RESPONDENT

(Being an Appeal from the ruling and orders of Hon. J.M Njoroge (CM) delivered at Chuka on 11th February 2019 in Misc. Civil Case No. 21 of 2018)

J U D G M E N T

1. This appeal emanates from the decision of Hon. J.M Njoroge delivered on 11th February, 2019 vide Chuka ***Chief Magistrate's Court Misc. Civil Application No. 21/2018***. In that Misc. Application the Respondent had moved the subordinate court for release of motor vehicle Registration No. KBN 117 L NZE Toyota Corolla which vehicle had been detained by County Criminal Investigation Officer (CCIO) for suspected criminal activities.

2. The Applicant's basis was that he was the beneficial owner of the motor vehicle having purchased it from one Martin Mugambi Mutuma. It was his contention that he had given a prospective buyer the motor vehicle to go for a road test but that the prospective buyer never went back with the vehicle but instead gave him excuses that the vehicle had suffered minor mechanical problems which he was trying to fix. The prospective buyer however did not turn up and the Respondent later learnt that his vehicle had been detained at DCI Chuka and that efforts to get an explanation from the CID Officers bore no much fruit.

3. The Appellant's response at the lower court was that the motor vehicle in question was involved in suspicious activities and that when the occupants noticed police officers on patrol they tried to evade the officers by speeding off and in the ensuing chase, the occupants of the vehicle shot at the police leading to an exchange of fire that only ended when the vehicle had a tyre bust and the occupants took off on foot. The DCI through the Director of Public Prosecution urged the court to disallow application as investigations were going on including establishing the true ownership of the motor vehicle.

4. The trial court held that the DCI had had sufficient time to carry out the investigations and that courts were under an obligation to protect the right to property. It then ordered the motor vehicle to be released to the owner who is the Respondent herein.

5. The Appellant felt aggrieved and filed this appeal raising the following grounds namely:-

i. That the learned magistrate erred in law and fact by entertaining the application while bereft of jurisdiction.

ii. That the learned magistrate disregarded overwhelming evidence.

iii. That the trial court erred by entertaining the matter through a civil application when the cause of action was a criminal transaction.

iv. That the motor vehicle Registration KBN 117 L was an exhibit and it was erroneous to have it release before it was produced in court.

v. That the trial court erred by releasing the motor vehicle to the Respondent without prove of ownership.

vi. That the learned magistrate erred by failing to consider the Appellant's case and the circumstances under which the car was detained.

6. The Appellant has submitted that the Respondent improperly moved the subordinate court vide a miscellaneous application whereas the issue at hand was criminal in nature. It is the Appellant's contention that the learned magistrate erred in entertaining the application in the manner it was presented and in their view that led to misapprehension of facts and miscarriage of justice.

7. The Appellant also avers that the magistrate did not have jurisdiction to give the orders of restitution and relied on the case of Elijah Nyakebondo Onsongo -vs- Republic [2017] eKLR. It is the Appellant's case that courts can only exercise inherent power under **Section 3A of Civil Procedure Act** but such powers do not apply to criminal matters. The State further contends that an order for restitution can only be made when the goods have been produced as exhibits.

8. The Appellant has submitted that the issue of ownership was not proven as the Respondent did demonstrate how he became a beneficial owner. It has asserted that the Respondent did not show a sale agreement between him and the registered owner and did not show the original logbook as proof of ownership. The State avers that the Respondent's claims to have bought the motor vehicle on 19th October, 2016 but to date he has not registered change of ownership which in its view is a criminal offence under **Section 9 (1)** as read with **Section 14** of the **Traffic Act**.

9. The Respondent has opposed this appeal through written submissions by his counsel. The Respondent avers that the right to property is enshrined under **Article 40** of the **Constitution** of Kenya and the subordinate court was correct to enforce it. He has asserted that the Appellant was granted ample time to conduct investigations. He further contends that **Section 177** of the **Criminal Procedure Code** applies only where a person has been charged with a criminal offence. He has also faulted the Appellant's contention that he should have filed criminal proceedings insisting that the criminal jurisdiction of the court cannot be invoked when there is no criminal case. He contends that in the absence of a criminal case, he was at liberty to institute a civil suit to assert rights of ownership under **Article 40** of the **Constitution** and that he had a cause of action against the DCI.

10. The Respondent has further submitted that the detained car cannot be an exhibit as no criminal case is pending in court. He insists that the vehicle has been detained since 29th October 2018 and to date no criminal charges have been preferred against any person. He has contended that the documents he exhibited in trial court including insurance cover shows that he is the owner.

11. **Analysis and determination**

The Appellant has cited the provisions of **Section 177** of the **Criminal Procedure Code** to support this appeal. The provisions of **Section 177** of the **Criminal Procedure Code** provides as follows:-

" Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order-

a) That the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he is the person charged, that it be restored either to him or to such other person as he may direct; or

b) that the property or a part thereof be applied to payment of any fine or any costs or compensation directed to be paid by the person charged," (Emphasis added).

It is clear from the above provision that the law refers to restitution of property found on an accused person which was not the case in the lower court. The lower court in its ruling did not refer to that provision (**Section 177**) because it was not relevant in the circumstances obtaining in the case presented in that court. No one had been charged in relation to the detained vehicle and the vehicle was not released to the Respondent under **Section 177** of the **Criminal Procedure Code**. References to **Section 177** of **Criminal Procedure Code** is therefore misplaced and irrelevant in the circumstances. The cases cited by the Appellant that is Republic -vs- Cap Van International and Republic -vs- Elijah Onsongo are not relevant in this instance. In Republic -vs- Cap Van International, the court was dealing with a pending criminal case while in Republic -vs- Elijah Onsongo, the court was dealing with matters related to Forest Act which has specific provisions for seizure and detention of motor vehicles or vessels used to ferry forest products.

12. The Appellant has raised a fundamental issue in this appeal which is whether the lower court had jurisdiction to entertain the application presented before him and whether the matter should have been presented through criminal proceedings rather than civil given that the nature of the matter at hand was criminal in nature. There is no dispute that a party can properly invoke the criminal jurisdiction of a magistrate's court where a criminal matter is pending before that court.

13. It is also true that an aggrieved person who feels that any of his fundamental rights and freedom in the bill of rights as enshrined under the constitution can move the court for enforcement of those rights. The Respondent for good measure invoked those rights in his application when he moved the lower court as he invoked **Articles 20, 22, 23 and 49** of the **Constitution** of Kenya. The Respondent was seeking to enforce his rights over the detained motor vehicle but the big question is whether the magistrate's court had the power or jurisdiction to enforce or grant the reliefs sought.

14. From the reading of the Constitution it is apparent that the Appellant's contention in so far as jurisdiction is concerned is well founded. The provisions of **Article 23(1)** of the **Constitution** provides guidance on the question of jurisdiction and provide as follows:-

" The High Court has jurisdiction in accordance with Article 165 to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the "Bill of Rights".

The jurisdiction of the High Court to deal with matters related to infringements or enforcement of the bill of rights is wider in scope as compared to the subordinate court whose jurisdiction to enforce those rights is limited by statute. **Subsection 2** of the same Article provide as follows in regard to subordinate court;

" Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights" (Emphasis added).

15. The jurisdiction of the magistrates is therefore limited and the big question posed is whether the subordinate court in this instance entertained a matter related to upholding and enforcement of fundamental rights and freedoms when it was bereft of jurisdiction. To answer this question this court is persuaded by the decision in **Republic -vs- Chief Magistrate's Court at Nairobi, Milimani and 3 others Ex parte Solomon Kingora [2017] eKLR** where **Odunga J** while handling a similar scenario where the magistrate's court made a decision to release a detained motor vehicle citing violation of rights to property stated as follows;

" Accordingly in order to determine whether the 1st Respondent had jurisdiction to entertain the application that gave rise to the impugned order, recourse must be had to the relevant provisions of the Constitution.....it is therefore clear that whereas the High Court's jurisdiction in such matters is unlimited, the subordinate courts can only deal with "appropriate cases." seeking redress of a denial, violation or infringements of, or threat to, a right or fundamental freedom in the Bill of Rights. From the said Article, it is parliament that determines the parameters of the said appropriate cases since it is left to parliament to enact the legislation conferring jurisdiction on the subordinate courts

To give effect to the above constitutional provision, parliament enacted **Magistrate's Courts Act No.26 of 2015 Section 8** of the Act provide as follows:-

1. " Subject to Article 165(3) (b) of the Constitution and the pecuniary limitations set out in Section 7(1) a magistrate court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, right or fundamental rights.

2. The applications contemplated in subsection (1) shall relate to the rights guaranteed on Article 25(a) and (b) of the Constitution.

3. Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequences of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights."

16. It is therefore apparent that subordinate court's are restricted to entertaining claims on infringements of or threat to right or fundamental freedom in the Bill of rights that fall within the confines of **Article 25 (a) and (b)** of the **Constitution**. Now a look at **Article 25 (a) and (b)** of the Constitution of Kenya 2010 shows that the rights and fundamental freedoms relate to freedom from torture cruelty, inhuman or degrading treatment as well as freedom from slavery or servitude. That is the jurisdictional limits of the magistrate's court in Kenya.

17. In this instance the Respondent moved the trial court substantially under **Article 40** of the **Constitution** though he did not specifically state so perhaps fully aware of the jurisdictional limits of the subordinate court. However the trial court was clear in its mind as it expressed or rendered itself as follows;

" This court has the right to enforce the Bill of Rights, including the protection of right of property."

It then went on to cite the provisions of **Article 40** of the **Constitution** and proceeded to order that to forestall an affront to the applicant basic right, the detained motor vehicle Registration No.KBN 117 L be released to the Respondent after 7 days.

18. This court finds that the learned trial magistrate fell into error by exercising constitutional powers he did not have. I agree, given express constitutional provisions above, with the Appellant contention that the learned trial magistrate erroneously entertained a matter when he was bereft of jurisdiction when it is trite that jurisdiction is everything.

19. Jurisdiction is either granted by the Constitution or a Statute and a court can only proceed within the powers granted to it either by Court or Statute It is true that there are times that courts are called upon to exercise their inherent powers for example under **Section 3** and **3A of Civil Procedure Act** to make such orders necessary for the ends of justice or to prevent abuse of the process of court. However those inherent powers are only exercised in civil matters pending in court and the Appellant is right to point out that what was before court was not purely a civil matter. It is clear that the matter was criminal in nature given that the office of the DCI Chuka Police Station was actively seized of the matter and from the response filed it was apparent that what was under investigation was a criminal activity. It was therefore improper for the Applicant to move the court vide a civil miscellaneous cause. The right legal procedure was either to move the court vide a miscellaneous criminal application given that criminal proceedings against anyone had not been commenced, or alternatively prefer a Constitutional Petition in an appropriate court if he felt that the police or anyone had infringed or was about to infringe any of his Constitutional right . The Respondent therefore in my considered view chose the wrong option and the trial court fell into error to entertain him and determine violation of his rights under **Article 40 (1)** of **Constitution** of Kenya 2010 contrary to the provisions of **Article 23 (1)** of the same which states that only High Court can give those orders.

20. I have also considered the Appellant's averment that the Respondent really did not establish ownership of the detained vehicle. I have looked at the documents presented at the lower court and I am persuaded that indeed the Respondent failed to tender proof of ownership. He did not tender the original logbook which by law is prove of ownership in so far as the particulars of the person registered in the logbook is prima facie proof that he/she is the owner. He presented only a duplicate copy of logbook and did not say where the original was. The verification of ownership from National Transport and Safety Authority (N.T.S.A) exhibited by the Appellant at the trial clearly indicates that the registered owner was one Muguro Wanjiru Agatha, while the Respondent provided evidence of ownership by way of a sale agreement between him and one Martin Mugambi Mutuma indicating that he had purchased the motor vehicle on 19th October 2016, there are two reasons why the trial court should have been reluctant to release the detained motor vehicle to him;

i. In the first place, there was no privity established between him and the registered owner given that the said Martin Mugambi Mutuma who sold the vehicle in question to him did not provide evidence by way of an affidavit or agreement indicating that he had purchased the said motor vehicle, if at all from the registered owner.

ii. Secondly the said motor vehicle had been involved in suspicious activities which were criminal in nature and the occupants of the vehicle were said to have sped off and even shot at the police on patrol raising suspicion on what they were really upto. The Respondent claims to have given one Dennis Mutwiri the said motor vehicle go for "**road test**" but for sure if that was the case, what was the most reasonable and obvious thing would one do if he gives out his motor to a supposed '**stranger**' and that stranger goes away on road test and delays for even one hour leave alone a whole day as claimed by the Respondent herein? If such a thing were to happen one is expected to rush to the police for assistance but in this instance, the Respondent stated that he trusted one "**Denis Mutwiri**" and did not reveal if the said Denis Mutwiri is an acquaintance so as to put trust in him or he was a complete stranger which in my considered view, raises even more suspicion.

21. I am not satisfied that an insurance policy and a sale agreement is sufficient proof of ownership especially given the circumstances that the said motor vehicle was found and detained. He has also not given any explanation why he would buy a motor vehicle in 2016 and 2 years later he had not gotten transfer or original logbook of the said motor vehicle. The fact that no one else has come to lay claim on the detained car in my view cannot be possibly mean that the Respondent is the owner. There could be a number of reasons why abandoned vehicles at times lay in police yards for years without anyone laying claim on them. They lie in the police yards because they have not been claimed by the owners, or are stolen vehicles etc,

22. In the end I find merit in this appeal. The lower court entertained and issued release order on a detained motor vehicle with the requisite jurisdiction. This appeal for the reasons advanced is allowed. The order issued by the subordinate court on 5th December 2018 is hereby set aside. The County Criminal Investigation Officer (CCIO) Chuka Police Station is at liberty to detain the motor vehicle and continue with the investigations until the Respondent or anyone turns up with proper documents proving ownership or until suspects who shot at the police officers on patrol are apprehended and arraigned.

Dated, signed and delivered at Chuka this 10th day of July, 2019.

R. K. LIMO

JUDGE

10/7/2019

Judgment dated, signed and delivered in the open court in presence of the Respondent in person and Maari for the Applicant.

R.K. LIMO

JUDGE

10/7/2019