



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 26 OF 2019**

**RADHOD KAUSHIK .....APPELLANT**

**VERSUS**

**ROY TRANSMOTORS..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS .....2<sup>ND</sup> RESPONDENT**

**MARSHALL WANDERA ..... 3<sup>RD</sup> RESPONDENT**

**OCS CHANGAMWE POLICE STATION ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. On 27<sup>th</sup> February, 2019 the applicant filed the present application under the provisions of Article 50(2) of the Constitution of Kenya, 2010 and Section 356(1) of the Criminal Procedure Code. It seeks the following orders:-

(i) Spent

(ii) Spent;

(iii) An order be issued to stay further proceedings in respect of the 1<sup>st</sup> respondent's application dated 1<sup>st</sup> of November, 2018 filed in Mombasa Chief Magistrate's Court Criminal Case No. 1226 of 2018: Republic vs Marshal Wandera and another including the hearing, issuing of directions, allowing or granting any other order in respect of the said application pending the hearing and determination of this appeal; and

(iv) That the costs of and incidental to this application do abide the result of the appeal.

2. The application is anchored on the grounds in support of it and the affidavit of Radhod Kaushik sworn on 27<sup>th</sup> February, 2019.

3. The 1<sup>st</sup> respondent (Roy Transmotors Limited) through the law firm of Omulama E.M. & Co. Advocates filed grounds of opposition on 26<sup>th</sup> March, 2019. They state as follows:-

(i) That the appellant/applicant lacks *locus standi* to maintain the instant application and appeal;

(ii) That the application is frivolous, scandalous, vexatious and an abuse of the court process;

(iii) That the application is incurably defective and cannot be maintained;

(iv) That the firm of Oluga & Company Advocates should be directly condemned to pay costs of this application as they are engaging in endless vexations and malicious applications which do not serve the interest of any of the parties herein;

(v) That the application has not been filed in good faith and is an attempt to hinder the 1<sup>st</sup> respondent from accessing what is legally theirs; and

(vi) That the application lacks merit and should be dismissed with costs.

4. Mr. Mwadeje for the 4<sup>th</sup> respondent and Ms Marindah for the 2<sup>nd</sup> respondent sought to be excused from the present application as it did not affect their clients. The 3<sup>rd</sup> respondent did not file any response to the application.

5. Mr. Ojwang, Learned Counsel for the applicant submitted that an application was made in Mombasa Chief Magistrate's Court Criminal Case No. 1226 of 2018, Republic vs Marshall Wandera and Others. He stated that the application was heard and when it came up for ruling, a part of the ruling was held in abeyance to pave way for amendment of the charge which bore the name of the complainant which was different from the name given on the application. He pointed out that the name which was to be amended was Roy Company Limited as reflected on the charge sheet as the application bore the name Roy Transmotors Limited.

6. It was submitted for the applicant that under Article 157 of the Constitution, the Director of Public Prosecutions (DPP) does not act under the control or direction of any person or authority. With regard to the provisions of Article 50(2)(e) of the Constitution, it was stated that a court should start and finish a trial without undue delay. Mr. Ojwang argued that the fact that the ruling was held in abeyance violates the rights to a fair hearing.

7. He also submitted that if the applicant herein is subjected to a fresh charge it will have been put through double jeopardy. He prayed for the application to be allowed.

8. Ms Mukoya, Learned Counsel for the 1<sup>st</sup> respondent submitted that the applicant herein lacks the *locus standi* to bring the present application. She stated that the said applicant did not participate in the application filed on 1<sup>st</sup> November, 2018 in the lower court although it was represented by Mr. Oluga Advocate.

9. Counsel for the 1<sup>st</sup> respondent indicated that the applicant herein in response to the application before the lower court filed an affidavit sworn by Irene Ndinda Mbinda an employee of Transoceanic Projects and Developments (Kenya) Limited. Reference was made to the ruling of Hon. Ogweno who found that Irene Ndinda Mbinda was not a party to the lower court case. Ms Mukoya submitted that the applicant herein is causing unreasonable delay by filing the present application but if they had followed due process by having an affidavit filed by the right party in the lower court, they would have proceeded on.

10. It was stated that the lower court case had not started thus the rule against double jeopardy did not arise. It was further stated that the applicant herein is aware of who the complainant is, in the lower court case. Ms Mukoya prayed for the application to be dismissed due to lack of merit.

11. Mr. Oluga responded to the submissions by Counsel for the 1<sup>st</sup> respondent by stating that even if the applicant did not participate in the lower court application, it was aggrieved by the orders of Hon. Ogweno.

## **ANALYSIS AND DETERMINATION**

**The issue for the determination is if the Hon. Magistrate should have arrested her ruling awaiting the amendment of the charge.**

12. An application was filed in the lower court on 1<sup>st</sup> November, 2018 seeking the following orders:-

(i) That the Honourable court be to (sic) certify this matter urgent (sic) and service be dispensed with in the first instance;

(ii) That the Honourable court be pleased to order that the motor vehicle registration number KBH 913S, currently in the possession of the 4<sup>th</sup> respondent, be released to the applicant, the legal owner; and

(iii) That this Honourable court grants costs of the application.

13. A company by the name Transoceanic Projects and Developments (Kenya) Limited filed a replying affidavit sworn by one Irene Ndinda Mbinda. The law firm of Oluga and Co. Advocates filed the said affidavit. It is worth noting that the said company was not party to the proceedings in the lower court. The application was duly heard. The Trial court presided over by Hon. Ogweno, delivered a ruling whereby she addressed some issues but refrained from pronouncing herself on the application by the 1<sup>st</sup> respondent herein for release of the motor vehicle due to the variance between the name of the complainant given on the charge sheet as Roy Company Limited and the name Roy Transmotors Limited given in the application in the lower court. She requested the Prosecutor and the 1<sup>st</sup> respondent herein being the complainant in the lower court case, to work towards amending the charge.

14. The provisions of Section 214(1) of the Criminal Procedure Code contains provisions for amendment of charges. It provides as follows:-

***“Where at any stage of a trial before the close of the case for the prosecution, it appears to the court the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case....”***

15. As per the foregoing provisions, the Hon. Magistrate had the powers to order for the amendment of the charge even before the delivery of her ruling so that she could consider the substance of the application after the correct name of the complainant had been given. In my view, I do not see any irregularity in the manner Hon. Ogweno conducted the lower court proceedings when she arrested her ruling to await amendment of the charge.

16. It is not in contention that a deponent by the name of the Irene Ndinda Mbinda purported to file an affidavit in the lower court on behalf of the accused persons. She however indicated that she worked for Transoceanic Projects and Development (Kenya) Limited as a Manager. There was no correlation between the said company and the accused persons and if there was, it was not brought out in her affidavit. The Hon. Magistrate rightly found that the said deponent had no *locus standi* to oppose the application that had been filed by the 1<sup>st</sup> respondent herein. Technically, it means that the application before the lower court was not opposed by the applicant herein, Radhod Kaushik or any of the other accused persons in the said case.

17. The applicant herein therefore does not have the legal basis to move this court to stay further proceedings in respect to the 1<sup>st</sup> respondent's application dated 1<sup>st</sup> November, 2018 seeking the release of the motor vehicle in issue.

18. The argument put forth by Mr. Ojwang on the rule against double jeopardy does not arise as the accused persons have not yet been convicted or acquitted in the case against them in the lower court. Further, they have not been charged a 2nd time for the same offence. The argument about the accused persons being subjected to double jeopardy does not arise.

19. Given the said circumstances, I decline to grant the order prayed for in the application dated 27th February, 2019. Hon. Ogwen, Resident Magistrate is at liberty to deliver her ruling on the outstanding part of the application dated 1<sup>st</sup> November, 2018.

20. The lower court file shall be returned to the lower court criminal registry forthwith. The lower court case will be mentioned on 29<sup>th</sup> October, 2019 before the said Magistrate for her to give directions as to the hearing of the said case.

**DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of October, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of**

Mr. Ojwang holding brief for Mr. Oluga for the applicant

Mr. V. Otieno holding brief for Ms Mukoya for the 1st respondent

Mr. Oliver Musundi – Court Assistant