



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL REVISION NO. 96 OF 2017

REPUBLIC.....APPLICANT

VERSUS

JAMES KINYUA KIIRU.....RESPONDENT

RULING

1. The applicant in this revision seeks for orders that the orders of the trial court by Hon. M.N. Gicheru made on 17/10/2017 be set aside. Further that the motor vehicle registration number KBC 806 V held as an exhibit be detained at Itabua Police station pending the hearing and disposal of the case.
2. The grounds supporting the application are that the respondent was found in direct and physical control of the vehicle on arrest. The vehicle was ferrying 143.21 kilograms of bhang which together with the vehicle was seized as an exhibit in CM Criminal case No. 197 of 2017. The trial is ongoing and it is appropriate that the exhibit be preserved at Itabua Police station pending the determination of the case.
3. The trial court made an order in favour of the respondent that the vehicle be released to him on 17/10/2017. The applicant is convinced that the release which is likely to jeopardize the trial in the event that the court orders forfeiture as provided for by the law.
4. The application was opposed by the respondent on grounds that the prosecution conceded to the application for release of the vehicle through its prosecutor one Mr. Onjoro and that the prosecution should now be estopped from asking the court to revise the order for release. The respondent further stated that the application does meet the requirements of Section 362 of the Criminal Procedure Code and should not be entertained.
5. The application was argued by way of written submissions. Ms. Nandwa represented the applicant while Messrs Morris Njage & Co. were for the respondent.
6. The issues arising from this application is whether the order for release of the vehicle was vitiated by any impropriety, illegality or irregularity to warrant revision under Section 362 of the Criminal Procedure Code.
7. It is not in dispute that the prosecution conceded to the application for release of motor vehicle. The question is whether the prosecutor was in order to concede to the application and whether the court was in order to allow the application.
8. The relevant law is Section 362 of the Criminal Procedure Code and Section 4 and 78 of the Narcotic Drugs and Psychotropic Substances (Control) Act.
9. Section 362 provides:-

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.
10. Section 4 of the Narcotic and Psychotropic Substances (Control) Act prescribes the offence and the penalty for trafficking in narcotic drugs for which the accused is charged with.
11. Section 78 provides:-

Where a person is convicted of an offence under this Act and any narcotic drug or psychotropic substance, motor vehicle, aircraft,

ship, carriage or other conveyance or any other article or thing, liable to forfeiture to the Government under this Act in respect of that offence has been seized under this Act, the court convicting him may, in addition to any other penalty imposed on him, order that the narcotic drug, psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or other article or thing be condemned and forfeited to the Government.

12. In the supporting affidavit of the investigating officer Cpl. Fredrick Ochido states that the accused in criminal case No. 197 of 2017 was arrested by police officers on patrol within Embu town ferrying 143.21 kilograms of *cannabis sativa* in vehicle registration No. KBC 806 V Toyota Platz. Both the vehicle and the narcotic drugs were seized as exhibits and are detained at Itabua Police Station pending the trial.

13. The officer further deposes that there is a possibility of forfeiture of the vehicle and that its security cannot be guaranteed in the hands of one Dennis Mbae who claimed ownership and in whose favour the release orders were made. It would be prejudicial to the trial should the vehicle be released to at this stage.

14. Section 78 calls for the condemning and for the forfeiture of any motor vehicle or vessel used as an instrument of crime specifically in ferrying drugs or psychotropic substances.

15. The order for release was made on 17/10/2017 before the trial commenced. For the court to decide on whether to forfeit the vehicle or any other exhibit used as an instrument of crime, it must have heard the case and delivered its judgment. If the accused is found guilty, the court may order forfeiture of the vehicle or vessel.

16. In this case, the orders made before the conclusion of the trial defeat the purpose of Section 78 of the Act in that the respondent may dispose of the vehicle by way of sale or otherwise during the pendency of the trial. It was in order for the investigating officer to take photographs but this alone may not meet the ends of justice.

17. The defence argues that the owner of the motor vehicle is not the accused person. Section 78 does not concern itself as to whether the accused was the owner or had hired the vehicle. It is for the court to decide among other things whether the owner of the vehicle was aware of the purpose the vehicle was being used for when it was hired. The chances are that Section 78 would be applicable whether the accused was the owner or not.

18. I am convinced that the trial court did not give due consideration to the provisions of Section 78 of the Act when it granted the orders. It was also wrong for the court prosecutor to concede to the application in total disregard of the procedural law guiding courts in dealing with offences of trafficking under the Act.

19. I come to the conclusion that the orders for release issued by the trial court on 17/10/2017 were irregular for failure of the court to address the issue of preservation of the exhibit.

20. I hereby invoke the powers of this court under Section 362 of the Criminal Procedure Code to revise the said orders.

21. The orders are hereby set aside. The vehicle registration No. KBC 806 V shall be detained at Itabua police station pending the disposal of the case.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Mati for Applicant

Mr. Muriithi for Njage for Respondent