



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL REVISION NO. 3 OF 2018

HFC LIMITED.....APPLICANT

VERSUS

JOHN CLIFF AYEGA.....INTERESTED PARTY

RULING

1. The applicant herein through the firm of Mutua Waweru Advocates wrote a letter dated 4/12/2017 seeking for orders of revision arising from orders made on **14/9/2017 in Machakos CM CR. No. 46 of 2017 Republic Vs LILIAN ANNAH KITUKU**. The grounds in support of the revision orders are as follows:-

- (i) The Applicant is the complainant in the above case while the accused is a former employee of the complainant and who used to work as its branch manager Nyalı and Machakos branches.
- (ii) That during a routine reconciliation of accounts, the complainant discovered that the accused had wired some monies from the complainant's Global Suspense Account into a certain account in the names of one Mr. Mbutia amounting to Kshs. 5,969,000/- which rose to Kshs. 8,760,000/-.
- (iii) That the aforesaid transactions were considered suspicious or fraudulent by the complainant and a report lodged with the police for investigations leading to the arrest and arraignment of the accused herein.
- (iv) That further investigations on the person whose account had been credited with the aforesaid monies revealed that the same was used for the purchase of land parcel Kilifi/Chauringo/172 and a motor vehicle registration number KCH 952R by the accused herein.
- (v) The police later impounded the said motor vehicle KCH 952R for the purpose of being used as an exhibit in the aforesaid criminal proceedings against the accused.
- (vi) That the subject motor vehicle KCH 952R has since been released by the trial court in circumstances that are unacceptable to the Applicant who is the complainant in the matter yet its concerns were not considered by the court.
- (vii) That the Applicant now seeks this court to exercise its supervisory powers and have the orders by the trial court dated 14/9/2017 set aside and the subject motor vehicle be handed back into the custody of the investigating officer as it is an exhibit in the trial against the accused herein.

2. Parties herein agreed to present written submissions regarding the Applicant's request for orders of revision. The person who is alleged to have purchased the vehicle registration number KCH 952R from the accused came in as an interested party whose learned counsel duly filed submissions. Learned counsel for the state (Respondent) sought to adopt the submissions by the interested party. The Applicant's learned counsel also filed submissions. I have carefully considered the said submissions as well as the cited authorities. I find the only issue for determination in this revision is whether or not there was an irregularity on the part of the trial court so as to justify an order for revision.

3. The power of the High Court to call for records from the lower courts is provided for under Section 362 of the Criminal Procedure Code as follows:

“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.”

A perusal of the lower court record and made on the 14/9/2017 reveals that an order was made regarding the release of the subject motor vehicle registration number KCH 952R which was on the following conditions:

- (a) That the logbook of the motor vehicle be deposited in court.
- (b) That the motor vehicle be photographed by scenes of crime officers
- (c) That the Applicant avails the motor vehicle to court as and when required to do so.

The applicant herein is the complainant in the trial against the accused person. Ordinarily the complainant is represented through the prosecutor who prosecutes criminal cases on behalf of the Republic. Even though the complainant comes under the umbrella of the prosecutor, the same does not deny it a right of audience before the court since it is an integral part of the proceedings. It is the complainant who avails the evidence to be used against the accused person and as such it is a proper party entitled to approach this court for revisionary orders. Indeed any party who has an interest in any matter before a court of law and likely to be affected either directly or indirectly has a right to apply for revision before the High Court. Even without any party moving the High Court, the High Court may of its own motion revise any order or finding once its attention has been drawn to it by any quarter.

It is clear from the record that the subject motor vehicle had been impounded by the police and was to be used as an exhibit in the criminal proceedings. The interested party sought for the release of the vehicle on the grounds that the said vehicle would be prone to waste and depreciation while it remains at the police station yard awaiting production as an exhibit. The trial court proceeded to order for the release of the said vehicle upon certain conditions. However it must be pointed out that the appropriate procedure was for the investigating officer to be called to produce the said vehicle and thereafter the court then becomes seized of the same and to release upon terms. This was not done. The practice has always been that even where perishable goods are involved, then the investigating officer is called upon to testify briefly and to produce the exhibits after which the same could then be released by the court on terms and that the investigating officer would later on be required to be recalled to come and wrap up his or her testimony regarding the matter of the investigations and even to produce other exhibits if need be. No reasons have been given as to why the investigating officer herein was not called to produce the subject vehicle after which the trial court would then be fully seized of the same and to proceed to release it on terms deemed fit. Even though the learned prosecutor did not oppose the application for the release of the vehicle, I find that did not of itself confer jurisdiction upon the trial court to issue the orders of release of the subject vehicle. The learned prosecutor was also under a duty to consider the views and concerns of the complainant in this case. It matters not that the trial court granted stringent conditions for the release of the vehicle as long as the same had not been produced as an exhibit, then the trial court lacked the requisite jurisdiction to make the orders of release. In any case the Applicant has raised issues to the effect that the interested party herein is the one who is said to have posted the cash bail for the release of the accused yet the alleged purchase agreement had been made quite early and full purchase price paid. This then raises some germane issue on as to the question of who really owns the said motor vehicle. This might have informed the Applicant to approach this court to have a look at the record of the lower court with a view to making a revisionary order.

4. As the trial court lacked jurisdiction to order the release of the subject motor vehicle, I find there was an irregularity warranting for an order of revision. The Applicant's request for revision therefor has merit. Consequently, the orders made by the trial court on the 14/9/2017 are hereby set aside and substituted therefore with an order that the subject motor vehicle registration number KCH 952R be seized and restored back into the custody of the investigating officer herein who shall thereafter organize for the same to be produced before the trial court as an exhibit. It is only after the production aforesaid that an order of release on terms shall ensue by the trial court.

Dated and Delivered at Machakos this 2nd day of October, 2018.

D.K. KEMEI

JUDGE

In the Presence of:-

Muthama for Mutua - for the Applicant

Machogu - for the Interested Party

Josephine - Court Assistant