



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 67 OF 2016

AGNES MAKENA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. The application dated the 25th day of **November, 2016** is brought pursuant to the provisions of **Articles 40(2)(a) and (b); 159(2)(a)(b)(d) and (e)** of the **Constitution of Kenya, 2010** and **Section 177(a) and 359A(2)** of the **Criminal Procedure Code**.

2. The Applicant seeks orders as follows:

That the Honourable Court be pleased to fast track this Appeal and hear it from day to day basis until its conclusion and/or in the alternative do order for the release of the subject motor-vehicle to the Applicant pending the hearing and determination of the Appeal; and that the court do make such further orders as the ends of justice may demand.

3. The application is premised on the grounds that the Appeal has an overwhelming chance of success and as such any continued detention of the motor-vehicle keeps on increasing the volume of injustices, suffering and losses to the Applicant for no apparent reasons; Even if it is assumed for once that the motor-vehicle would finally be forfeited, there are so many other alternative systems and/or ways to ensure availability of the same or the Applicant in person to ensure justice is guaranteed and that the Applicant remains an innocent third party in the criminal proceedings who is expected to suffer injustices and losses.

4. The application is supported by an affidavit deponed by **Agnes Makena**, the Applicant who states that she owns motor-vehicle registration **No. KBE 662X Mitsubishi Lorry** jointly with **Equity Bank (K) LTD**, a financier. **Patrick Isika Kisoso**, the 1st Accused in the matter hired the motor-vehicle while **Symon Njuguna Mwangi** was its driver. The 1st Accused kept on sending her charges therefore she did not know of the existence of the Criminal Case or if the motor-vehicle was involved in illegal business. The motor-vehicle has been detained by the police. Her application for release of the same has been declined hence the Appeal which has been filed per the advise she got has high chances of succeeding. Being an innocent party in the trial there is no reason why the motor-vehicle should remain at the Police Station. And that she is losing income, money that she would use to pay the loan.

5. In response thereto, **No. 68903 P C Gona Kalama** swore a Replying Affidavit where he deposed that no proof was given by the Applicant as to the ownership of the motor-vehicle. No hire-agreement was availed. The motor-vehicle is an exhibit in **Criminal Case No. 808 of 2016** which is still pending and if convicted forfeiture of the motor-vehicle is provided for by Statute. There is no guarantee that the motor-vehicle will be availed.

6. At the hearing of the application Counsel for the Applicant **Mr. Kilonzi** reiterated what is averred in the body of the application and the affidavit in support. He went on to add that the Applicant moved the Lower Court to have the motor-vehicle released so that she would not suffer prejudice, an application that was opposed by the Office of the Director of Public Prosecutions. Reasons relied upon were that one of the Accused had absconded while the other one, investigations were ongoing. Nothing pointed to the Applicant as having been aware. There was nothing to suggest that the Applicant would get the motor-vehicle out of the jurisdiction of the Court. The Applicant's innocence was not considered.

7. Relying on the sentencing policy, Counsel urged the Court to consider that per the situational analysis some individuals may suffer before conviction, a fact that was not appreciated by the Principal Magistrate. In his opinion the Magistrate had pre-determined that the Accused was guilty and that the motor-vehicle will be available.

8. The State through learned Counsel, **Mr. Wanjala** opposed the application arguing that the vehicle was an exhibit in the Lower Court. Alluding to **Section 55** of the **Forest Act**, he submitted that the Court has jurisdiction to detain the motor-vehicle pending trial.

9. In response thereto Counsel for the Applicant stated that the law became operational where there is a conviction and we had not reached

that stage.

10. This application arises following a Ruling delivered by the Lower Court. What can be deduced from the application is that two Accused persons were charged before the Lower Court and motor-vehicle registration number **KBE 662Y Mitsumbishi Lorry** is an exhibit. The Applicant herein claims ownership of the motor-vehicle. According to annexure **"DUC1"** the Ruling of the Lower Court, the Applicant sought release of the motor-vehicle unconditionally and secondly, an order directing the Investigating Officer to ensure photographs of the motor-vehicle and any goods loaded thereon taken for use as exhibits. The application was considered and reasons for the decision reached given. This is a subject of the Appeal filed herein which this Court cannot determine at this stage, however it is important to point out that the Application is brought pursuant to the provision of **Article 40(2)(a)(b)** of the **Constitution** that provides thus:

"(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4)."

Looking at the Article in totality it allows any individual to own property in this country, Kenya. In case a person is deprived of property arbitrarily she/he has a right to contest or lay a claim in a court of Law.

11. The Application herein has by way of affidavit evidence made a claim over the motor-vehicle. The only annexures attached to the affidavit in support of the application are a copy of the Judiciary Sentencing Policy guidelines; the Ruling of the Lower Court and a copy of her identity card. She has failed to establish ownership of the motor-vehicle as alleged.

12. I have been asked to fast track the Appeal. This can be done as soon as the same goes through the admission process. This court has in the alternative been asked to release the motor-vehicle pending hearing and determination of the Appeal. In declining to release the motor-vehicle, the learned Trial Magistrate pointed out that the motor-vehicle had not been adduced in evidence as an exhibit therefore the Court could not release what it was not in possession of.

13. I do note that per the proceedings, on the **6th October, 2016** the Prosecution was ready to proceed with the case but the Accused persons were not ready to proceed. This is a matter that should have been given a priority in regard to hearing since a motor-vehicle was impounded. I note that it is scheduled to be heard on the **24th January, 2017**.

14. As correctly pointed out it will be prejudicial for the motor-vehicle to be released before it is produced in evidence and to person who has not proved ownership. In the premises the alternative prayer is rejected.

15. The Applicant is therefore directed by the Court to take necessary steps to ensure the Appeal is admitted for hearing for it to be fast tracked.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 11th day of January, 2017.

L. N. MUTENDE

JUDGE