



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL MISC. APPLICATION NO. 6 OF 2017

JAMES KIARIE MUTUNGEI APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The application by way of notice of motion dated 18/1/2017 filed pursuant to Article 159 (1) (2) (a) (b) and (d) of the Constitution section 177 (a), 364 (1) (b) of the Criminal Procedure Code Cap 75 of the Laws of Kenya seeks the following orders:

- (1) That the ruling made by Hon. L.D. Ogombe SRM on 6/12/2016 concerning the continued detention of the applicant's motorcycle reg. No. KMDB 7091 be altered and reversed.**
- (2) That the OCS Ngong police station be ordered to release motorcycle reg. No. KMDB 7091 to the applicant's custody.**

The grounds in support of the application are that:

- (1) That the continued detention of the motorcycle is causing financial hardship to the applicant since it's his livelihood.**
- (2) That the applicant is the undisputed owner of the said motorcycle.**
- (3) That the trial of the applicant criminal case no. 160 of 2016 is yet to commence and the date of conclusion is uncertain.**
- (4) That the applicant is ready and willing to avail the motorcycle at the trial as and when required.**

The applicant further swore an affidavit to supplement the grounds in support of the application. The gist of the averments in the affidavit dwelt on ownership and that photographs of the motorcycle should be taken to enable the same be used as evidence at the trial. In a nutshell the applicant urged this court to review the order of the trial court and have the motorcycle released.

Mr. Akula, the senior prosecution counsel filed written submissions and raised an objection to the release of motorcycle subject matter of the criminal trial. In support of the submissions learned prosecution counsel placed reliance on the following authorities; **Republic v Inspector General of Police & Exparte Antony Ngumo Muya [2014] eKLR, Republic v DPP & 3 Others Exparte Bedan Mwangi Nduati & Another [2015] eKLR.**

In the decisions referred to the courts held that the issue of exhibits which are a subject of an ongoing trial remain a purview of that court and revisionally powers conferred upon the High Court cannot interfere or reverse the order. In the case of Republic v I.G. & Exparte Antony Ngumo Muya (Supra) the learned judge also observed that where a property is detained and it is continued that the same is a subject of the criminal proceedings, the right forum to raise the issue of the detention is the trial court in which the criminal proceedings are pending. The court went further to state that it is only in cases where an applicant demonstrates that the property detained has nothing to do with the charge preferred in the trial court, it would be unreasonable and abuse of powers and discretion to detain the property.

It is necessary first to bring forth the statutory provisions pertaining to the revision jurisdiction of this court under section 364 (1) (b) of the Criminal Procedure Code. This provision in the code reads as under:

“In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to the knowledge the High Court may order:

(a) In the case of conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358 and may enhance the sentence.

(b) In the case of any other order other than an order of acquittal alter or reverse the order.”

The applicant did invite the revisionary jurisdiction of this court on matters arising as provided for under section 177 which provides:

“Where upon the application 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 be 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 apart thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.”

The powers of the High Court under section 364 as read together with section 362 empowers the court to call for and examine the record to satisfy itself as to the correctness, legality or propriety of the decision passed by the subordinate court or tribunal. The conferment of revision jurisdiction under the criminal procedure should not be compared with the appellate jurisdiction. The main objective of the High Court where under section 362 as read with section 364 of the Criminal Procedure Code is to enable the court to keep subordinate courts and tribunals within the bounds of their authority to make them exercise their jurisdiction and all in accordance to the laws. The revisionary power under the statute is a much reminder scope compared with that under appellate jurisdiction.

My reading of section 367 together with section 364 the high court should not interfere with findings of facts because merely it disagrees with the subordinate court or tribunal one of the key words under this two sections is propriety. Oxford English Dictionary Vol. VIII propriety means - fitness, appropriateness, aptitude, suitability, appropriateness to the circumstances, conformity with the requirements, rightness, correctness, justness, accuracy.

In the context of this case I have perused the lower court record and the impugned order. My take is that there is no evidence that the trial court has ignored evidence or proceeded on a wrong premise of law in making the detention order of the motorcycle. The matters being raised on the motorcycle being photographed and the property get to be released to the applicant are all matters within the jurisdiction of the trial court.

I am of the conceded view that on examination of the record I find no irregularity, impropriety or

illegality of the decision made by the trial court. The notice of motion is therefore lost.

Dated, signed and delivered in open court at Kajiado this 14th day of February, 2017

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R. NYAKUNDI

JUDGE

Representation:

Applicant present

Mr. Akula for Director of Public Prosecutions present

Mr. Mateli Court Assistant - present