



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISC. CRIMINAL CASE NO. 53 OF 2016

DICKSON NATSIO MUKUBA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

Introduction

1. The applicant by the notice of motion dated 6th September, 2016 wants this court to effect Section 177 of the Criminal Procedure Code for the restitution of his property. His application is supported by his own affidavit in which he states that he was accused of defilement before Mumias Senior Principal Magistrate's court in Criminal Case No. 1262 of 2014. The said case was heard and he was found guilty convicted and sentenced to serve 10 years imprisonment.
2. He claims that the complainant's father led a group of people who destroyed and deprived him of his property which is worth Kshs. 250,000/= because he had accused their relative ZMM. He further claims that after his property had been destroyed the case of defilement was then framed against him.
3. The applicant avers that he made a report to the police at Booker police post under OB [particulars withheld] , hence this application. He also claims that his rights as enshrined under Article 40 of the Constitution have been violated.

Submissions

4. The application was canvassed orally. In his submissions the applicant stated that his properties were taken and that the court should help him recover the same.
5. Mr. Jamusumba for the state submitted that the applicant's property was not taken or destroyed by the police. He contended that the applicant should file a civil suit or a constitutional petition for compensation. He also submitted that in light of the provisions of Section 177 of the Criminal Procedure Code Cap 75 the applicant is not entitled to the order sought because no property was taken from him by police officers. It was counsel's considered view that section 177 of the Criminal Procedure Code envisages a situation where the property is still available and is in the hands of Law enforcers.
6. In a short rejoinder the applicant stated that his claim was against the K and CA.

Determination.

7. The provision of Section 177 of the Criminal Procedure Code are as follows;-

“177 Where, upon the apprehension 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 a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.”

8. In light of the above provisions, the instant application cannot stand as the orders sought cannot be granted because the applicant was not charged before this court. Secondly, the applicant’s claim is against third parties who are not the police. The applicant ought to have made this application before the Mumias Principal Magistrate’s Court which heard and determined Criminal Case No. 1262 of 2014.

9. Further I agree with the prosecution counsel that Section 177 of the CPC envisages a situation where the property is still available and is in the hands of law enforcers. Clearly the alleged property is not in the hands of law enforcers nor is there evidence that the property is still available.

10. Consequently, I find no merit in the application herein and the same is dismissed.

Orders accordingly

Ruling delivered, dated and signed in open court at Kakamega this 20th day of March,2017

RUTH N. SITATI

JUDGE

In the presence of;

Present in person.....for appellant

Mr. Ng’etich(present).....for respondent

Mr. Polycap.....Court Assistant