



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**CRIMINAL APPEAL NO. 39 OF 2016**

**BETWEEN**

**SAMWEL OMBOKE OKODA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being appeal from original conviction and sentence of CM's Court Homa Bay in Criminal Case No.413 of 2015 consolidated with Criminal Case No.759 of 2015 - Hon.S. Ndegwa dated 16<sup>th</sup> May, 2016.)*

**JUDGMENT**

1. The appellant (MARGARET WAMBUI THINDIGWA) is the registered owner of motor vehicle registration No.KBQ 132 Y NISSAN X-TRAIL which was retained by police in relation to criminal case **No.837 of 2014 (REPUBLIC –VS- KENNEDY KIPTOO)** who had been charged and convicted for the offence of trafficking narcotic drugs. The motor vehicle was produced in that case as exhibit because it had been found ferrying narcotic drugs. Margaret who testified on the case was also required to show cause why the vehicle would not be forfeited to the State and the Chief Magistrate ruled that the said motor vehicle should be restored to her vide a ruling dated 4<sup>th</sup> April 2016.
2. However, the same motor vehicle was required as an exhibit in **Criminal case NO.413 of 2015 – Republic –vs- Charles Okumu and Another.**
3. The State Counsel, Mr. Shabola informed the court that the investigating officer would attend court that very day to produce the motor vehicle – this was done and photographs of the motor vehicle were even taken.
4. Mr. SHABOLA then applied that the motor vehicle be released to the registered owner – drawing the court's attention to the Chief Magistrate's ruling of 4<sup>th</sup> April 2016.
5. The presiding magistrate S. NDEGWA (PM) declined the request saying the application ought to be made before the court Hearing Criminal case No.413 of 2015, and that the Chief Magistrate's ruling had not directed for the motor vehicle to be released to the appellant, and that since not all witnesses had testified she did not think it prudent to allow release of the motor vehicle.
6. The appellant has appealed against that ruling saying the trial magistrate failed to consider that a finding had already been made by the Chief Magistrate that the motor vehicle ought to be restored to the owner.

7. Further that both the investigating officer and the prosecuting counsel had requested that the motor vehicle be released to the owner to avoid further waste and damage, so the orders by Hon. Ndegwa did not serve anyone's interest.

8. The question which arises is this – since the Chief Magistrate was already satisfied that the motor vehicle should not be forfeited to the State, and should be restored to the owner – and since the motor vehicle had been produced by the investigating officer, and seen by the court, and photographs taken to enable the remaining witnesses to refer to as exhibit – what was the rationale for insisting that the motor vehicle remains in police custody and be subjected to waste.?

9. I have considered the written submissions made by the appellant's counsel. Indeed counsel has properly referred to the case of **R. –V- JOHN NGANGA MBUGWA – MISC. CR. APPLICATION NO.69 OF 2014** that “... it is a practice in criminal cases that photographs will be taken by the scenes of crime personnel and will be produced in evidence during the hearing.” Counsel argues that no prejudice would have been occasioned to either the prosecution or the accused persons, by the release of the motor vehicle. Indeed there is no indication in the court record that the accused persons objected to release of the motor vehicle to the appellant.

10. In conceding the appeal, MR. OLUOCH on behalf of the State submitted that there was already a ruling made on 4<sup>th</sup> April 2016 which referred to release of the motor vehicle – which ruling had not been challenged by review or revision.

11. Secondly, the office of the DPP had by a letter **REF.ODPP/HBY/ ABV/5(227)** dated 13<sup>th</sup> April 2016 stated which also made reference to the ruling by the Chief Magistrate and urged the Sub-County Criminal Investigation Officer (Homa Bay) to release the motor vehicle to the registered owner – nothing has changed.

12. Infact the release of the motor vehicle was to be subject to the motor vehicle being photographed – that was done according to the investigating officer – and just in case it hasn't been done then counsel prays the DCIO Homa Bay takes photographs of the same.

13. The upshot is that there was no justification whatsoever in refusing to allow release of the motor vehicle to the appellant and the contested ruling dated 4<sup>th</sup> May 2016 is quashed.

*a) The motor vehicle Registration No. KBL 132 Y Nissan Xtrail shall be duly released to MARGARET WAMBUI THINDIGWA once the DCIO Homa Bay has ensured that photographs of the same have been taken.*

*b) The appellant shall hand over the original logbook to the DCIO before the release until the pending criminal case is heard and determined.*

*c) The appellant shall make an undertaking in writing to produce the motor vehicle during the hearing of the pending criminal case if so directed by the trial court.*

14. The appeal is allowed.

Delivered and dated this **05<sup>th</sup>** day of **September, 2016** at Homa Bay.

**H. A. OMONDI**

**JUDGE**