



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 8 OF 2014

REPUBLIC

VERSUS

HASSAN SHABAN MSHANA APPLICANT

RULING ON REVISION

1. By a letter dated 9/5/2014, the office of the **Director of Public Prosecutions, Kajiado** applied to this court to exercise its powers of revision under **section 364** of the **Criminal Procedure Code** for the following reasons:-

- a). **That the plea was not properly taken.**
- b). **That the exhibits were released unprocedurally.**

2. The Applicant seeks orders that the trial do commence *de novo* and that the **Witness Protection Agency** be allowed to execute its Constitutional mandate in respect of the two police officers who intercepted the exhibits.

3. Since the orders sought if allowed would be prejudicial to the accused and the owners of the properties complained about, this court pursuant to the provisions of **section 364 (2)** of the **Criminal Procedure Code** made orders that the application be served for hearing. **Mr Weda Advocate** appeared for the accused and for the Interested Party. **Mr O'Mirera**, the **Senior Assistant Director of Public Prosecution, Kajiado** (hereinafter **DPP**) appeared for the Applicant.

4. The background to the application is that on 22/11/2013, the accused, **Hassan Shaban Mshana** was arraigned before the **Principal Magistrate's Court, Mavoko in Criminal Case 1301/2013** on the following charges:-

Count I – Being in possession of uncustomed goods contrary to **section 186 (a)** of the **Customs and Excise Act Cap 472 Laws of Kenya** as read with **section 200 (d)** of the **East African Community Customs Management Act of 2004**.

The particulars of the offence were that “on the 14th day of November 2013 at 03.00 hrs at **Isinya District**, within **Kajiado County** was found in possession of 152 drums of Ethanol spirit and 43 bags of sunflower cakes all valued at Kshs.14 million knowing to be uncustomed goods.”

Count II – Conveying uncustomed goods contrary to **section 185 (II)** of the **Customs and Excise Act Cap 472 Laws of Kenya** as read with **section 199 (A)** of the **East Africa Community Customs Management Act of 2004**.

5. The particulars of the offence were that “on the 14th day of November at 03:00 hrs at **Isinya District**, within **Kajiado County** being the driver of motor vehicle registration No. t144bvr/t 891bzs semi trailer make **Scania** was found conveying 152 drums of **Ethanol** spirit and 43 bags of sunflower cakes all valued at Kshs.14 million knowing the same to be uncustomed goods.”

6. The accused pleaded not guilty and the case was fixed for hearing on the 3rd and 5th of March 2014. However, on 3/2/14, the defence counsel applied for a production order for the accused to be brought to court for purposes of changing plea.

7. The accused was produced in court on 6/2/2014. However, the case was adjourned severally before the plea could be taken. The prosecution was not ready to present the facts to the court and stated that the Government Chemist’s Report was not ready. On the subsequent date the court was informed that the valuation report was not ready. The case was fixed for plea on 27/3/14. However, on 27/3/14 the court was informed by the prosecution that the witness statements were not ready. The court however proceeded to take the plea. The accused pleaded guilty in both Count I and II. The court fixed the case for the recording of facts on 24/4/2014 at 2.30 p.m. at **Kajiado Police Station**. On 24/4/14 the court was informed by the prosecution that one of the prosecution witnesses had sought protection from the **Witness Protection Agency** due to threats and intimidation on his person. The prosecution then applied for adjournment of the case for 1½ months on the grounds that the case was a complex one and the investigations were not complete due to logistical issues. The application was opposed by the defence. The court then gave a final adjournment to the prosecution and fixed the case for the recording of facts on 6/5/2014 at 2.30 p.m. at **Kajiado Police Station**.

8. On 6/5/2014, the court convened at **Kajiado Police Station** at 2.30 p.m. However, the State Counsel was not present. One **Ms Judith Momanyi** who is reflected on the record as a “prosecutor for **Kenya Revenue Authority**” was present. The accused and his advocate were also present. At 4.15 p.m., the court made a ruling which outlines the history of the case from the day the accused was arraigned in court. The court expressed its frustration over the continued delay of the case by the prosecution.

9. **Ms Momanyi** then informed the court that she was watching brief for **Kenya Revenue Authority** and that she was also a gazetted prosecutor under the **East African Community Customs Management Act Gazette Notice No.16299** of 16/11/2012 and handed out the copy of the Gazette Notice to the court. **Ms Momanyi** then asked the court to allow her to prosecute the case stating that a similar request had been made to the office of the **DPP**, vide letter dated 19/10/2013. The defence counsel stated that his client the accused was languishing in remand and was not opposed to the case being prosecuted by **Ms Momanyi**. The court proceeded to allow the application by **Ms Momanyi**.

10. **Ms Momanyi** then proceeded to present the facts of the case to the court. A lorry registration Number **T144 BVR/T 891BZS** make **Scania** semi trailer, a Government Chemist’s report, 152 drums each containing 250 litres of **Ethanol** and 43 bags of **Sunflower** seeds were produced as exhibits. The value of the goods was given as 14 million. The Appellant was convicted in both Count I and II and sentenced accordingly. The trial court then made the following order:-

“The owner of the goods to pay duty as assessed by KRA or the goods will be forfeited to the State within 14 days from today.”

11. The prosecutor thereafter applied for the goods to be released to **Kenya Revenue Authority** but to remain in the custody of the **OCS Kajiado Police Station** pending the payment of duty. The defence counsel made an application for the release of the motor vehicle to one **Karol Joseph T/a Alliance Merchants** who was said to be the owner of the motor vehicle which was said to have been hired to transport the goods in question. The prosecutor in reply stated:-

“The decision whether or not to forfeit the motor vehicle to the State lies with the court and I leave it to the court to decide.”

The court arrived at the finding that the owner of the goods had shown sufficient cause why the motor

vehicle should not be forfeited to the State and made orders that the vehicle be released to the owner.

12. During the hearing of the application, the Applicant submitted that the proper procedures for plea taking were not complied with, that the prosecution was not ready with the facts, that the prosecutor who presented the facts to the court had no instructions from the office of the **DPP**, that the correct registration details of the motor vehicle were not brought to the attention of the court and finally that the correct forfeiture procedures were not followed by the trial court.

13. The learned Counsel for the accused and the Interested Party submitted that the plea was properly taken and the sentence within the law. That nothing incorrect, improper or illegal has been pointed out. The court was referred to **section 347 (1) and 348 of the Criminal Procedure Code** in respect of appeals to the High Court.

14. I have considered the record of the lower court and the submissions made by the Counsels for the respective parties.

15. Section 362 of the Criminal Procedure Code confers powers to the High Court and the same covers correctness, legality and propriety of any finding, sentence or order recorded or passed or the regularity of any proceedings of the subordinate court. This matter is therefore properly before this court.

16. I will first deal with the issue of plea taking. The principles to be followed while taking plea were set out in the case of **Adan –vs- Republic 1973 EA 445** where the Court held:-

- i. **The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.**
- ii. **The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.**
- iii. **The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.**
- iv. **If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.**
- v. **If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”**

16. A perusal of the court record does not reflect any departure from the aforesaid procedure. It is not disputed that **Ms Momanyi** was a competent prosecutor who was duly gazetted by the office of the **DPP**. The other matters raised regarding whether **Ms Momanyi** had instructions from the office of the **DPP** are administrative issues to be dealt with by the office of the **DPP** but not a suitable matter for revision.

17. It is observed that **Mr O’Mirera** the prosecuting counsel failed to attend court without sending anybody to hold his brief and explain his predicament to the court. On this issue, I am in agreement with the dictum by **Isaac Lenaola J in Republic –vs- Benedict Kalovwe Kaweto H.C. Mks Criminal Revision 13 of 2008** where it was stated as follows:-

“No court should be held at ransom by the prosecution and each magistrate is entitled to ensure order and decorum in his court.”

18. An accused person can change plea at any time before sentencing (**See Kioko –vs- R 1983 KLR 283**). It was therefore prejudicial to the accused for the plea to be deferred on grounds of collection of further evidence yet the accused was ready to plead guilty to the offence.

19. As stated by the **Court of Appeal in Obuon –vs- R (1983) e KLR:-**

“The police investigate the case and after having done so they prepare a charge which is filed in the Magistrate’s Court....”

20. On whether the correct facts were given to the court or not, it is observed that the registration number of the motor vehicle that is reflected in the particulars of the offence is the same registration number T144 BVR/T 891BZS which was given in the facts that were presented to the court. The matters raised in the application in respect of whether these were the correct registration plates for the motor vehicle or whether the same tallied with the chassis and engine number of the motor vehicle are new matters that were not before the trial court and are therefore outside the ambit of revision.

21. Questions have arisen on whether the correct procedure was followed by the trial court when it made the orders for payment of duty within 14 days or the goods would be forfeited to the State then proceeded to make orders for the motor vehicle to be released to the person who presented himself in court as the owner of the motor vehicle. The trial magistrate referred to **section 199 of East African Community Customs Management Act** which provides for forfeiture of a vehicle that transports uncustomed goods but arrived at the finding that the owner had shown sufficient cause why the vehicle should not be forfeited. The vehicle was then released to the owner.

22. The effect of a conviction is provided for under **section 215 (1) of East African Community Customs Management Act** as follows:-

“Where any person is prosecuted for an offence under this Act and any thing is liable to forfeiture by reason of the commission of the offence, then the conviction of the person of the offence shall, without further order, have effect as the condemnation of the thing.”

23. Under **section 217 (1) of the East African Community Customs Management Act**:-

“Where any thing has been seized under this Act, as being liable to forfeiture, then the condemnation of the thing shall in no way be affected by the fact that any owner of the thing was in no way concerned with the act which rendered the thing liable to forfeiture.

(2) Where any thing is condemned under this Act, then-

a. subject to section 219, the thing shall be forfeited and may be sold, destroyed, or otherwise disposed of in such manner as the Commissioner may deem fit;

b. the condemnation of the thing shall have effect as from the date when the liability to forfeiture arose;

c. the condemnation shall, subject to any appeal in any proceedings which resulted in the condemnation be final and, save as provided in section 218, no application or proceedings for restoration or in detinue by any person all lie.”

24. Similarly, the **Customs and Excise Act** provides that the effect of a conviction is as follows:-

25. **Section 201 (1)**:-

“Where a person is prosecuted for an offence under this Act and any thing is liable to forfeiture by reason of the commission of that offence, the conviction of that person of that offence shall, without further order, have effect as the condemnation of that thing.”

26. The question therefore is what constitutes condemnation? **Section 203 of the Customs and Excise Act** has explained condemnations as follows:-

203 (1):-

“Where anything has been seized under this Act as being liable to forfeiture, then the condemnation of the thing shall in no way be affected by the fact that an owner of the thing was in no way concerned with the act which rendered it liable to forfeiture.”

203 (2):-

“Where anything is condemned under this Act, then-

a. Subject to section 214, the thing shall be forfeited and may be sold, destroyed or otherwise disposed of as the Commissioner may think fit;

b. condemnation of the thing shall have effect as from the date when the liability to forfeiture arose;

c. condemnation shall, subject to any appeal in proceedings which resulted in condemnation, be final and, save as provided in section 204, no application or proceedings for restoration or in detinue by any person shall lie.”

203 (3):-

“Where goods have been condemned and are in the possession of some authority other than the customs they shall be returned to the customs for disposal under subsection (2).”

27. With the foregoing, it is clear that upon the conviction of the accused, the motor vehicle and the goods stood condemned and the same are forfeited goods to be dealt with by the **Commissioner of Customs** as provided for by the law. The goods and the motor vehicle therefore ought to be released by the police to **Kenya Revenue Authority** for disposal. The court’s role ends after making an order for the release of the goods to **Kenya Revenue Authority**. There are no forfeiture proceedings supposed to be carried out by the court. The court cannot also release the goods or the motor vehicle to any person or entity except to **Kenya Revenue Authority**. The other issues alluded to by the Applicant e.g. witness protection, destruction of the **Ethanol** and the questioned registration number of the motor vehicle were not matters that were for determination by the court under the offences charged.

28. With the foregoing, I revise the orders issued by the trial court and order that the motor vehicle, the 152 drums of **Ethanol** and the 43 bags of Sunflower cakes be released to **Kenya Revenue Authority**.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 16th day of July 2014.

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JUDGE