



REPUBLIC OF KENYA

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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 42 OF 2014**

REPUBLIC.....APPLICANT

VERSUS

1. YOUSUF YAQOOB
2. YOQOOB IBRAHIM
3. SALEEM MUHAMMAD
4. BHATIA ABDUL GHAFOR
5. BAKHSH MOULA
6. PRABHAKARA NAIR PRAVEEN
7. PAK ABDOLGHAFFAR
8. VIKAS BALWAN
9. MUHAMMAD SALEH
10. KHALID AGIL MOHAMED
11. MOHAMED OSMAN AHMED
12. MAUR ABDALLA BWANAMA.....RESPONDENTS

**RULING**

This is the court's ruling in respect of an Application to review the orders of Hon. M. Gicheru Chief Magistrate made on 28<sup>th</sup> August, 2014. At the outset it is important for the record to reflect that on 29<sup>th</sup> August, 2014 I made a brief oral ruling and I did undertake to deliver a reasoned written ruling within a week. Whilst my written ruling was still pending, media reports indicated that the vessel in question was destroyed under the supervision of His Excellency The President of the Republic of Kenya on 29<sup>th</sup> August, 2014 at approximately 16.20 hours. This renders my ruling purely academic. Be that as it may having given an undertaking to provide reasons for my oral ruling and for completeness of the record I do hereby tender the same.

On 28<sup>th</sup> August, 2014 the Hon. Director of Public Prosecutions filed this Criminal Revision Application seeking “*the court to call for and examine the record of the proceedings in the Chief Magistrate’s Court for the purpose of satisfying itself as to the correctness, legality or propriety of the orders recorded on 27<sup>th</sup> and 28<sup>th</sup> August, 2014.*” The application went on to state that

**“The Republic is aggrieved by the decision of the Chief Magistrate to grant orders for destruction of narcotic drugs and psychotropic substances to the exclusion of the vessel in which the said drugs were recovered and seized. By operation of the law, the subject vessel AMIN DARYA/MV AL NOOR is deemed to be an instrumentality of crime and therefore subject to seizure, condemnation and disposal by the Minister/Cabinet Secretary as per the regulations under the Narcotic Drugs and Psychotropic Substances Act.”**

The background of the case is as follows. On 9<sup>th</sup> July, 2014 twelve (12) accused persons were charged before the Chief Magistrate **HON. GICHERU** in Mombasa with the offence of **TRAFFICKING IN NARCOTIC DRUGS, CONTRARY TO SECTION 4(a) OF THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES CONTROL ACT NO. 4 OF 1994**. All twelve entered a plea of ‘Not Guilty’ to the charge and their trial commenced on 31<sup>st</sup> July, 2014. Amongst the exhibits to be relied upon by the prosecution was “*377.224 kilograms of creamish granular heroin said to be with 1,131,672,000/= liquid heroin to wit 33,200 liters valued at Kshs. 189,000,000/= and 2,400 liters of diesel mixed with heroin valued at Kshs. 1,440,000/= all with a market value of Kshs. 1,322,112,000/= (one billion, three hundred and twenty two million, one hundred and twelve thousand shillings.*” Aside from this contraband a ship **AMIN DARYA** also known as **AL NOOR** was also an exhibit. After recovery of the haul the vessel was held at Berth No. 8, at Kilindini Port. On 4<sup>th</sup> July, 2014 the Kenya Maritime Authority detained the vessel on the basis that it was unseaworthy.

On 27<sup>th</sup> August, 2014 **PW1 HAMISI SALIM MASSA** the officer in charge of the Anti Narcotics Unit gave evidence before the trial court. He produced the vessel as **Exhibit No. 1** and the heroin as **Exhibit Nos. 15, 20, 25, G1-G21, 40, 41 and 42**. This witness and the three other witnesses who testified for the prosecution on that day were not cross-examined by any of the defence counsel on record. In the case of all four (4) witnesses their cross-examination was reserved to a later date. All the parties agreed by consent to have the contraband narcotics destroyed. On the next day 28<sup>th</sup> August, 2014 the prosecution through Mr. Alexander Muteti, Assistant Director of Public Prosecutions applied Ex Parte to the trial court, under certificate of urgency prayed for an order for the immediate destruction of the vessel, all its accessories and the drug haul. The learned trial magistrate declined to issue the orders sought declaring that

**“I find that it will not be fair, lawful or procedural to allow the current application. I direct that the issue of the forfeiture and determination of this vessel be raised within proceedings where the defence counsel can be heard before the court makes a decision one way or another. Owing to the importance of this case to the state, I am prepared to hear it on a daily basis until it is concluded.”**

Following that decision by the Hon. trial magistrate, the prosecution rushed to the High Court and filed this present application seeking to review the orders of the trial court. **MR. TOBIKO** the Director of Public Prosecutions argued the application on behalf of the state assisted by **MR. MUTETI** and **MR. MUTUKU**. The state argued that the continued retention of the vessel at the Mombasa harbor aside from being very costly to the Kenyan tax-payer due to daily charges payable and requirement for round the clock security also amounted to a serious security risk. The State further submitted that a seizure notice had been served upon the Captain of the ship in line with section 77 of the Narcotics Act. Thirty (30) days had elapsed and no person had as yet come forward to claim the ship. The State further submitted that the Hon. trial Magistrate erred in applying sections 177 and 389 of the Criminal Procedure Code in this matter since the Narcotic Drugs and Psychotropic Substances Control Act was a specialized and self-contained statute to which the Criminal Procedure Code was not applicable. It was further alleged that the ship was arrested without a flag and bore two names clear indication of an attempt to camouflage the same. The State undertook finally to be held responsible for any resulting liability from the destruction of

the vessel when and if the owner finally appeared.

**MR. NABWANA** held brief for **MR. OMBETA** Advocate (who was on that very day attending the burial of his father) for the 1<sup>st</sup> to the 9<sup>th</sup> accused persons. **MR. MAGOLO** acted for the 10<sup>th</sup> accused, **MR. OUMA** for the 11<sup>th</sup> accused whilst **MR. NABWANA** also held brief for **MR. OLUNYA** for the 12<sup>th</sup> accused person. Counsel for the 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> accused persons basically raised no objection to the destruction of the vessel. They all submitted that their clients had no claim over the vessel, had no interest in what happened to it and would leave the matter to the court to decide.

Mr. Nabwana on behalf of Mr. Ombeta submitted that the defence had a right to be heard substantially before orders to destroy the ship were made. He submitted that Mr. Ombeta had in his possession the title documents for the ship which document he would be in a position to present to the court on 2<sup>nd</sup> September, 2014 the date when the Hon. trial Magistrate was due to hear arguments inter partes. Counsel submitted that the seizure notice whilst allowing for 30 days to lay claim to the ship provided for a 90 day period beyond which no claim would be entertained which period had not yet elapsed. Counsel also submitted that under section 78 of the Narcotics Act condemnation of the vessel could only occur upon conviction of the accused persons. He submitted that the evidence of **PW1** remained untested by way of cross-examination thus prejudicing the defence and that the Narcotics Drugs and Psychotropic Substances Control Act just like the Criminal Procedure Code was an Act of Parliament and one could not supersede the other. Finally Mr. Nabwana submitted that the consent entered into between the parties on 27<sup>th</sup> August, 2014 related **ONLY** to the destruction of the contraband narcotics. No consent and/or agreement was entered into to have the vessel destroyed.

I have carefully considered the submissions on record, and the relevant law on the matter. The prosecution came to the High Court seeking to have the orders of the learned trial magistrate **Reviewed**. The powers of review of the High Court are donated by section 362 of the Criminal Code. Section 362 provides

**“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”** *[my own emphasis]*

Therefore in seeking a review the prosecution was under a duty to demonstrate what irregularity, illegality, impropriety or incorrectness existed in the orders made by the Hon. trial magistrate which would require the intervention of the High Court by way of review. I have carefully considered the proceedings of 28<sup>th</sup> August, 2014 when the Ex-Parte Application for destruction of the vessel was made before the trial court. The Hon. Magistrate declined to make Ex Parte orders for destruction of the vessel. He ruled that such a decision should only be made after the defence had been heard. He deferred the matter to 2<sup>nd</sup> September, 2014 less than a week from the date of his ruling to hear representations from both sides. I find nothing irregular, illegal, improper or incorrect in this ruling. The Hon. trial Magistrate was merely upholding the right of each party not to be condemned unheard a principle of natural justice. The vessel had been in the port since July, 2014. To my mind an extra one week would not prejudice any party and certainly would not prejudice the state.

The prosecution emphasized the fact that a Notice of Seizure had been duly served on the Captain on 18<sup>th</sup> July, 2014 and no claim had been made within 30 days as required. Section 77 of the Narcotics Act deals with Notices of Seizure. Section 77 (3) provides

**“(3) Any person who claims any article or thing referred to in subsection (1) and seized under this Act, as its owner or any other person duly authorized by such owner may give notice to the Commissioner of Police that he claims the article or thing within thirty days of the date on which the notice of seizure under subsection (1) was delivered under subsection (2) (a) or if the notice of seizure was not so delivered, of the date on which the owner came to know of the seizure provided that no notice of claim shall be entertained by the**

**Commissioner of Police under this subsection after the expiry of ninety days from the date of seizure [my own emphasis].**

Therefore inasmuch as the law under section 77(3) provides for 30 days within which one must lay claim to an article seized under the Act the proviso to section 77(3) allows for a ninety day period within which the Commissioner may still entertain and consider a claim. By 29<sup>th</sup> August, 2014 when the matter came before me this ninety day window had not elapsed.

Further upon perusing the record I do note that on 18<sup>th</sup> August, 2014 Mr. Ombeta made an application in open court for the release of the vessel to its owner. The Hon. trial Magistrate directed that he file a formal application for consideration. As of 29<sup>th</sup> August, 2014 this application had not been lodged. No time limit was given within which counsel was required to file the application for release of the vessel. It was therefore in my view premature to order the destruction of the vessel before this application had been heard and determined. Most probably it would have been through this application that the identity of the vessel owner (whom the Director of Public Prosecutions emphasized he was very keen to know) would have been revealed.

In the Ex Parte application before the trial court on 28<sup>th</sup> August, 2014 the prosecution cited section 78 of the Narcotics Act as one of the provisions they were relying on. Section 78 provides as follows

**“Where a person is convicted of an offence under this Act and any narcotic drug or psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or any other article or thing, liable to forfeiture to the Government under this Act in respect of that offence has been seized under this Act, the court convicting him may, in addition to any other penalty imposed on him order that the narcotic drug, psychotropic substance, motor vehicle, aircraft, ship, carriage or other conveyance or other article or thing be condemned and forfeited to the Government.” [my emphasis]**

Section 78 refers to a situation where a suspect charged under the Act has been **convicted**. At that point any seized article including vessel is subject to condemnation. In this case the witnesses have not even been cross-examined and no conviction had been rendered against any of the accuseds. Again this means that any decision to destroy the vessel would be premature. Based on the foregoing I am not persuaded that there is any valid reason to review the orders of the Hon. trial Magistrate of 28<sup>th</sup> August, 2014. However, in view of the consent of all parties I do uphold the order to destroy the contraband narcotics. I further order that the matter proceed before the Hon. trial Magistrate as directed on 2<sup>nd</sup> September, 2014.

**Dated and delivered in Mombasa this 5th day of September, 2014.**

**M. ODERO**

**JUDGE**

In the presence of:

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