



**IN THE HIGH COURT AT HOMA BAY**

**CRIMINAL REVISION NO. 7 OF 2014**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MILDRED AJIAMBO ONYANGO ..... 1<sup>ST</sup> RESPONDENT**

**THOMAS JOSEPH OWITI ..... 2<sup>ND</sup> RESPONDENT**

***(An application for revision of an order of Hon. P. Mayova, Ag. SRM dated on 17<sup>th</sup> June 2014 made in Criminal Case No. 800 of 2014 at Chief Magistrate's Court at Homa Bay,)***

**RULING**

1. The Office of the Director of Public Prosecutions has, by a letter dated 19<sup>th</sup> September 2014, moved this court for the revision of an order issued by the subordinate court directing the release of a motor vehicle, after conviction of the accused, to an unknown third party.
2. **MILDRED AJIAMBO ONYANGO** and **THOMAS JOSEPH OWITI** were charged with the offence of dealing with alcoholic drinks without a license contrary to **section 79(1)(b)** as read with **section 62** of the ***Alcoholic Drinks Control Act, Act No. 4 of 2010***. The particulars of the charge were as follows: *On the 16<sup>th</sup> day of June 2014, at Mbita Township in Mbita district within Homa Bay County jointly were found transporting alcoholic drinks to wit 66 cartons (1330) bottles of assorted alcoholic drinks in motor vehicle registration number KBR 576F make Toyota Premio without license in contravention to the said Act. [Emphasis mine]*
3. They also faced a second count of dealing with alcoholic drinks packed in plastic containers contrary to **section 31(2)** as read with **section 31(3)** of the ***Alcoholic Drinks Control Act***. The particulars of the charge were as follows; *On the 16<sup>th</sup> day of June 2014, at Mbita Township in Mbita District within Homa Bay County jointly were found transporting alcoholic drinks with alcoholic (assorted) to wit 50 cartons )1000 bottles packed in plastic containers of 205 ml in contravention of the said Act.*
4. The accused were convicted on their own plea of guilty and were sentenced to a fine of Kshs. 200,000/= each in default one year in prison on the first count and fined Kshs. 30, 000/= each or four months jail in default on the second count.
5. The issue raised in this matter concerns motor vehicle registration number KBR 576 which was used to ferry the illegal goods. After the accused were convicted and sentenced, the court ordered that the alcohol be forfeited to the State for destruction. However, it directed that the motor vehicle be released to the owner.

6. Mr Oluoch, the learned Senior Assistant Director of Public Prosecutions, impugned the order releasing the motor vehicle on the ground that the vehicle was released to an unknown owner and that it could not have been released without an application in that regard. He also stated that the State desires that vehicle be forfeited to it.
7. Ordinarily in criminal proceedings, anything or goods used in the commission of the offence will be forfeited to the State upon conviction of the accused unless a third party lays claim to it. The procedure on forfeiture of goods is set out in **section 389A** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** which provides as follows;

*389A(1) Where, by or under any written law (other than [section 29](#) of the Penal Code), any goods or things may be (but are not obliged to be) forfeited by a court, and that law does not provide the procedure by which forfeiture is to be effected, then, if it appears to the court that the goods or things should be forfeited, it shall cause to be served on the person believed to be their owner notice that it will, at a specified time and place, order the goods or things to be forfeited unless good cause to the contrary is shown; and, at that time and place or on any adjournment, the court may order the goods or things to be forfeited unless cause is shown by the owner or some person interested in the goods or things:*

*Provided that, where the owner of the goods or things is not known or cannot be found, the notice shall be advertised in a suitable newspaper and in such other manner (if any) as the court thinks fit.*

*(2) If the court finds that the goods or things belong to some person who was innocent of the offence in connexion with which they may or are to be forfeited and who neither knew nor had reason to believe that the goods or things were being or were to be used in connexion with that offence and exercised all reasonable diligence to prevent their being so used, it shall not order their forfeiture; and where it finds that such a person was partly interested in the goods and things it may order that they be forfeited and sold and that such person shall be paid a fair proportion of the proceeds of sale.*

8. From the proceedings it is clear that the owner of the motor vehicle was neither known nor disclosed. There was no application made by the prosecutor or any other person requesting the magistrate to release the vehicle. The learned magistrate therefore erred by ordering the release of the vehicle to an unknown person when, according to the charges before the court, it was used in the commission of the offence. If the owner of the vehicle was not known, the court was duty bound to inquire into the ownership of the vehicle and call upon that person to show cause why the vehicle should not be forfeited in terms of **section 389A(2)** of the **Criminal Procedure Code**. The learned magistrate also erred in issuing a restoration order which was to take place immediately and not after 14 days which is the time limited for a party aggrieved to challenge the decision on appeal.
9. In accordance with **section 363(2)** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** and in light of what I have stated above, I make the following orders;
  - a. The order made on 17<sup>th</sup> June 2014 ordering the release of motor vehicle registration number **KBR 576F Toyota Premio** be and is hereby set aside.
  - b. I direct the Police County Commander, Homa County to forthwith impound motor vehicle registration number **KBR 576F Toyota Premio** and bring it before the subordinate court.
  - c. The subordinate court shall deal with the motor vehicle in accordance with the provisions of the **Criminal Procedure Code**.

**DATED and DELIVERED at HOMA BAY this 8<sup>th</sup> day of October 2014**

**D.S. MAJANJA**

**JUDGE**