



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Criminal Revision 3 of 2008

REPUBLIC APPLICANT
VERSUS
LALJI REMJI CHABHADIA RESPONDENT

RULING

The applicant herein is facing criminal charges, vide Kakamega Criminal Case **No.1014** of 2007. He filed this constitutional reference dated 5th March, 2008. The main issue of contention is that the criminal case against the applicant is based on a motor vehicle that has already been adjudged to belong to the applicant in Kakamega Civil Case No. **CMCC NO.560 of 2005**. Mr. Samba for the applicant did not attend court when the application was listed for hearing on 29th July, 2009.

The application was referred to this court by the Senior Principal Magistrate, for interpretation of the Constitution. The lower court that is trying the criminal case is faced with the accused's contention that the Attorney General or his representative, the Private prosecutor, has no locus to bring the criminal proceedings against the accused since the accused has a decree in **CMCC No. 560 of 2005**. The charge sheet has three counts. In count one the applicant is charged with Robbery with violence contrary to **section 296(2)** of the Penal Code. He is also charged with handling suspected stolen property contrary to **section 322** of the Penal Code and in the third count the applicant is charged with unlawful use of motor vehicle contrary to **section 294** of the Penal Code.

The issue for determination is whether the Attorney General can bring criminal charges when ownership of a disputed property has already been resolved in a civil court.

In the civil case No. CMCC 560 of 2005, the applicant is the plaintiff and Winston Keya Alumosi is the defendant. The case was fully heard. The final verdict by the trial court was that motor vehicle registration No. **KAK 565 Y** belong to the applicant as the lawful owner and that the same be released to the applicant by the District Criminal Investigations Officer, Kakamega.

The charge facing the applicant is that he violently robbed one Meshack Shinali motor vehicle **KAE 802 K** Mazda Pick-up on 12th April, 2005. The proceedings in the Civil case show that the issue as to whether motor vehicle **KAE 802 K** was indeed the same as motor vehicle **KAK 565 Y** was determined. Two log books were produced and the court found in favour of the applicant.

Since the complainant in the criminal case was the defendant in the civil case, it follows that having lost in the civil case, the

complainant wishes to use the criminal proceedings to recover what he could not in the civil case. The exhibit motor vehicle No. **KAE 802 K** seems not to have been recovered as already a court of law has held that it is not the one registered as No. **KAK 565Y**.

Allowing the criminal proceedings to proceed is tantamount to saying that the accused person violently stole his own vehicle. There is no indication why the police did not charge the applicant when they recovered the vehicle. The alternative charge of handling stolen property cannot be proved as already the court has ruled that the property the applicant handled was his. Similarly, the count on unlawful use of a motor vehicle cannot stand as the applicant was using his motor vehicle.

Although **section 26** of the Constitution empowers the Attorney General to initiate criminal proceedings, such powers cannot be used arbitrarily. The criminal case was initiated after the lower court delivered its judgement in the civil case on 8th May, 2007. This is pure harassment disguised as prosecution. I do find that the prosecution is criminal case No.1014 of 2007 through a private prosecution is not proper and is oppressive to the applicant. Should the trial court reach a verdict that the applicant is guilty, then there would be two parallel decisions on the same subject matter. The complainant should have appealed after the civil suit was finalized.

Al though criminal proceedings can still be instituted even if there are civil proceedings in certain cases, courts have to evaluate the proceedings and determine their suitability. To allow the criminal proceedings in the lower court trial is to create conflict in the legal process. The proceedings are an abuse of the court process. I do order that the proceedings in criminal case No. Kakamega 1014 of 2007 be terminated forthwith.

Delivered, dated and signed at Kakamega this 5th day of November, 2009

SAID J. CHITEMBWE
J U D G E