



REPUBLIC OF KENYA



**Republic v Ochieng & another; Mbago (Applicant) (Criminal Case E926 of 2024) [2025] KEMC 57 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEMC 57 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
CRIMINAL CASE E926 OF 2024  
YA SHIKANDA, SPM  
MARCH 25, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**JOSEPH CALEB OCHIENG ..... 1<sup>ST</sup> ACCUSED**

**MOSES ONYANGO OBONG'O ..... 2<sup>ND</sup> ACCUSED**

**AND**

**AKOKO FREDRICK MBAGO ..... APPLICANT**

**RULING**

**The Application**

1. Akoko Fredrick Mbago (hereinafter referred to as the applicant) moved the court by way of a notice of motion dated 9/12/2024. The application was filed under a certificate of urgency. It seeks the following main orders:
  1. That this Honourable court be pleased to grant a release order for m/v Reg.No. KCN 969V (Toyota Axio) which is being held at Mtito Andei police station pending the hearing and determination of this case;
  2. That the costs of this application be provided for.
2. The application is supported by the affidavit sworn by the applicant and further affidavits sworn by Jared Ochieng Okeyo and Thomas Njoroge Kiarie herein and is premised on the following general grounds:
  - a. The motor vehicle was leased to the applicant for taxi services and hire purchase business at Ksh. 8,000/= per week by the lawful owner Jared Ochieng Okeyo;



- b. The applicant had hired out the motor vehicle to one Brian Mghana Makori for seven days;
  - c. The applicant depends on the income from the motor vehicle to run its affairs and pay the owner as per the lease agreement;
  - d. The applicant did not authorize Brian Mghana Makori or the driver to use the motor vehicle for unlawful business;
  - e. The applicant is ready and willing to comply with any conditions that this court may impose.
3. In the supporting affidavit, the applicant reiterated the grounds in support of the application and attached copies of documents in support of the application. Thomas Njoroge Kiarie deposed that he was the registered owner of the motor vehicle in issue. That on 12/1/2024 he sold the motor vehicle to Jared Ochieng Okeyo and upon payment of the deposit, he handed over the motor vehicle to the purchaser but retained the log book pending completion of payment of the full purchase price. Jared Ochieng Okeyo deposed that he bought the motor vehicle from Thomas and upon gaining possession thereof, he leased the motor vehicle to Migori Poster Progressive Group. He urged the court to release the motor vehicle to him.

### **The Respondent's Response**

4. The respondent filed an affidavit in opposition of the application. The affidavit was sworn by one Cpl Philip Mutisya, who claimed to be the investigating officer herein. The deponent admitted that they impounded the motor vehicle on allegations that it was carrying a large quantity of cannabis. The deponent gave a long history of what transpired. I will disregard that history since it ought to be part of the evidence to be adduced at the hearing. The respondent argued that the applicant lacked locus standi as he was not the registered owner of the motor vehicle. The respondent contended that the motor vehicle was to be tendered as an exhibit herein and that its release would greatly prejudice the prosecution case.
5. That the motor vehicle may be tampered with if released, thereby compromising the prosecution case. The respondent further argued that the court is yet to hear the case and that it was crucial for the motor vehicle to remain in police custody for purposes of preservation pending identification, inspection and admission as an exhibit. The respondent argued that the applicant had failed to demonstrate any prejudice that will befall the registered owner of the motor vehicle if the motor vehicle is detained. That the applicant has not provided evidence to substantiate claims of business loss or demonstrate how the motor vehicle is integral to his alleged business operations. The respondent deposed that section 90 of the *Proceeds of Crime and Anti-Money Laundering Act* underscores the importance of retaining exhibits where conviction may lead to confiscation orders.

### **Main Issues For Determination**

6. Having considered the application and the response by the Prosecution, I find that the main issues for determination are as follows:
- i. Whether the court has jurisdiction to order for release of the motor vehicle in issue;
  - ii. If so, to whom should the motor vehicle be released?
  - iii. Whether the applicant is entitled to the reliefs sought.



## The Applicant's Submissions

7. The applicant reiterated the contents of his affidavit in support of the application and urged the court to release the motor vehicle to him.

## Submissions By The Prosecution

8. Ms. Karuga, learned Prosecution counsel opposed the application and relied on the Replying affidavit. Counsel argued that there was no evidence to show that a loan was being serviced in respect of the motor vehicle. Counsel urged the court to order for detention of the motor vehicle until the case is determined.

## Analysis And Determination

9. I have carefully considered the application and given due regard to the parties' submissions. I have also taken into consideration the applicable law. The applicable provision is section 177 of the [Criminal Procedure Code](#). I will begin by addressing the issue of jurisdiction. In the writings of John Beecroft Saunders in a treatise entitled "Words and Phrases Legally defined" – Volume 3: I – N at page 113, quoted in the case of *Seven Seas Technologies Limited v Eric Chege* [2014] eKLR, the following was said about jurisdiction:

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".

10. In the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, Justice Nyarangi (as he then was) of the Court of Appeal held as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".



11. In *Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 others* [2012] eKLR, the Supreme Court of Kenya pronounced itself on jurisdiction and stated:

"A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

12. The Constitutional and statutory foundation for the jurisdiction of the Magistrates courts is Articles 23 (2) and 169(1) (a) of *the Constitution* as read with the Magistrates Court *Act No. 26 of 2015*. Section 4(1) of the Magistrates Court Act stipulates as follows:

"The objective of this Act is to enable magistrate courts to facilitate just, expeditious, proportionate and accessible judicial services in exercise of the criminal and civil jurisdiction in this Act or any other written law."

13. Section 6 thereof provides:

"A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a criminal nature as may be conferred on it by—

- (a) the *Criminal Procedure Code*; or
- (b) any other written law."

14. From the above provisions, it can be inferred that in order to ascertain whether a Magistrate's court has jurisdiction to entertain a matter before it, the court does not have to restrict itself to the provisions of the Magistrates Court Act. Jurisdiction may be conferred by other written law.

15. Section 177 of the *Criminal Procedure Code* provides thus:

"Where, upon the apprehension of a person charged with an offence, any property is taken from him, the court before which he is charged may order—

- (a) that the property or a part thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored either to him or to such other person as he may direct; or
- (b) that the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged."

16. The above provision does not expressly indicate the stage of the proceedings at which the court may exercise such powers. However, a careful analysis of the provision reveals that the court may exercise such powers during the pendency of the hearing or upon conviction of the accused person. Furthermore, the provision does not distinguish between property intended to be used as an exhibit and that which is not intended to be used as such.

17. I am aware that there are divergent views by High court Judges on the question of whether a court has jurisdiction to order for release of an item intended to be used as an exhibit before its production in court. I will highlight some of the authorities on the subject:

1) *John Syimonjero v Directorate of Public Prosecution & Another* [2018] eKLR.

In this case, a motor vehicle had been detained by the police and it was stated that the same would be used as an exhibit in a murder trial. Lagat Korir J ordered for the release of the motor



vehicle and observed that it was an established practice by the courts that a motor vehicle would normally be released to the owner on condition that it would be availed whenever required by the court. The court further noted that ownership of the motor vehicle was not contested.

2) Republic v John Nganga Mbugua [2014] eKLR.

The applicant was the complainant in a criminal case. His motor vehicle was seized by the police and detained. It was alleged that the applicant had hired his motor vehicle to the accused person who later unlawfully sold it to a 3rd party. Ownership of the motor vehicle was not contested. The state opposed the application orally on the ground that they intended to use the motor vehicle as an exhibit in the criminal trial. However, there was a letter from the ODPP directing the DCIO to release the motor vehicle to the owner. Muchemi J observed that the fact that the vehicle was yet to be produced before the court does not bar the trial court from dealing with issues of exhibits still in the hands of the investigator provided that the state confirms that the item in question will be produced as an exhibit. The court ordered for the release of the motor vehicle and for photographs to be taken. The court further ordered the applicant to give a written undertaking that he would produce the motor vehicle during the hearings or as directed by the trial court and that the logbook be held by the prosecution or the police pending disposal of the case.

3) Republic v Everlyne Wamuyu Ngumo [2016] eKLR.

In this case, the trial court ordered for release of a motor vehicle to the respondent who was the accused person. The prosecution moved the High court for revision arguing that the motor vehicle was intended to be used as an exhibit in the trial. While reversing the order, Bwonwonga J held as follows:

"I find that the trial court was not entitled to direct that the motor vehicle be released to the respondent/accused in order as that court put it "to save it from the wear and tear due to immobilization of the engine." The reason for this is that the motor vehicle had not been produced as an exhibit in court. It is only when some property including a motor vehicle have been produced as an exhibit in court that that court is then seized with the jurisdiction to order for its disposal.....I find that the trial court did not have jurisdiction to order the release of the subject motor vehicle to the accused, given that the prosecution intended to use it in proving their case against the accused person."

4) Director of Public Prosecutions v Marias Pakine Tenkewa t/a Naresho Bar Restaurant [2017] eKLR.

The respondents were charged with the offence of operating a wines and spirit wholesale shop without a licence under the [Alcoholic Drinks Control Act](#). The police had seized several exhibits consisting of alcoholic drinks of various brands and assortment. The trial court ordered for the release of the exhibits upon photographs being taken. This was before the exhibits were identified and formally produced in evidence. On revision, Nyakundi J observed that the release of the exhibits was premature in the absence of them being marked, identified and admitted in evidence. The court also found that the trial Magistrate did not have jurisdiction to order for release of the exhibits pursuant to sections 60 and 61 of the [Alcoholic Drinks Control Act](#).

5) Francisca Akinyi v Republic [2018] eKLR.



A motor vehicle had been detained and intended to be used as an exhibit in a criminal trial. The owner of the motor vehicle who was not party to the trial applied to have it released to her. The trial court agreed to release the motor vehicle to the owner on condition that she deposits a sum of Ksh. 500,000/= plus the logbook in court. The trial was still pending and the motor vehicle had not been produced as an exhibit. Gitari J observed that the trial court had jurisdiction and discretion to release the motor vehicle under section 177 of the *Criminal Procedure Code*.

- 6) David Muigai Mucheru v Kenya Forest Service & Another [2012] eKLR.

In this case, while interpreting section 177 of the *Criminal Procedure Code*, the court held that:

"Clearly, therefore, there is no requirement in that section, that the court before which the person is charged must have received the property as an exhibit before the court can give orders in relation thereto. Provided that some property was taken from the accused when he was apprehended, (whether such recovery was made before, at the time of, or after the actual arrest), the court before which he is charged can issue orders relating to the property."

- 7) Elijah Nyakebondo Onsongo v Republic [2017] eKLR.

In this case, a motor vehicle had been released by the court before conclusion of the criminal case. On revision, Bwonwonga J held that:

"First, a subordinate magisterial court including the court of Senior Principal Magistrate only has jurisdiction as may be conferred upon it by any statutory law including *the Constitution*. In criminal matters as in the instant application such courts do not have inherent powers. It is important to point out that such courts only have inherent powers in civil matters in terms of section 3A of the *Civil Procedure Act* (Cap 21) Laws of Kenya, but not in criminal matters. Furthermore, according to R. v. Cap Van International Ltd and Another (2004) 2 KLR 348 a magistrate's court can only make an order of restituting property to a proved owner under the provisions of section 177 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, when the goods have been produced in evidence as exhibits before the court. A trial court is only entitled to order for restitution of property to the owner at the conclusion of a criminal trial."

- 8) Republic v Cape Van International Ltd & another [2004] eKLR.

In this case, Kimaru J (as he then was) held thus:

"In any event, section 177 of the *Criminal Procedure Code* can only be invoked after it has been established beyond any reasonable doubt that the goods in question belong to the applicants. In the instant case, the said learned magistrate could not possibly be in a position to make a finding as to the ownership of the said goods as the criminal trial has yet to commence. It has been stated that there is a rival claimant of the said goods. In the absence of a positive determination by the trial Court in the criminal case as to the true owners of the stolen goods, the provisions of section 177 of the *Criminal Procedure Code* may not be invoked. The said learned magistrate thus fell into further error in law.....The said learned magistrate did not have jurisdiction to entertain the said application and order the release of goods which were not in possession of the Court or under its control. A Magistrate's Court can only make an order restituting the property to a proved owner under



the provisions of section 177 of the [Criminal Procedure Code](#) when the said goods have been produced in evidence before court. Before the said goods or property is produced in court as exhibits in evidence, a Magistrate Court cannot make an order in a criminal proceeding for the release of such goods."

18. The foregoing clearly illustrates that there are two different schools of thought on the subject. I am yet to come across a Court of Appeal decision. The doctrine of precedent dictates that the decisions of the higher courts are binding on the lower court. What happens when there are conflicting decisions by the same court? Which decision should the lower court follow? In the case of Justice Jeanne W Gacheche & 5 others v Judges and Magistrates Vetting Board & 2 others [2015] eKLR, a five Judge bench of the High Court held as follows:

"The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are:

- (a) where there are conflicting previous decisions of the court; or
- (b), the previous decision is inconsistent with a decision of another court binding on the court; or
- (c) the previous decision was given per incuriam.

As a general rule though not exhaustive, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness or some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."

19. Being guided by the above authority, it follows that there being conflicting decisions by the same court, I will be entitled to choose which decision to follow. In my view, the choice should be made judiciously and in the interest of justice. I agree with the proposition that section 177 of the [Criminal Procedure Code](#) does not expressly or specifically require that an item must have been produced in evidence as an exhibit for the court to order for its release. A literal interpretation of section 177 of the [Criminal Procedure Code](#) would imply that the property in issue must have been found in the possession of the accused person. In this case, it is not in dispute that the motor vehicle does not belong to the accused persons. It is also not in dispute that the motor vehicle is registered in the name of Thomas Njoroge Kiarie.
20. In my considered view, the court should not adopt a restricted interpretation of section 177 of the [Criminal Procedure Code](#). The provision should apply to circumstances where the property in issue is not found in the physical possession of the accused person but is linked to him in the charge. It would be unreasonable, in my view, to infer that the provision would only apply to property found in the physical possession or custody of the accused person. Furthermore, it is my opinion that the provision would apply to any property, whether or not it forms a subject matter of the charge. The parties are merely required to establish existence and ownership of the item. This brings me to the conclusion that the court has jurisdiction and discretion to order for release of an item not produced in evidence. I am of the view that where the property is intended to be produced as an exhibit, different considerations would apply. The power to order for release of an intended exhibit will depend upon the circumstances of the case.
21. This is an interlocutory application and the court must be very cautious against basing its finding on facts which would otherwise be part of the evidence that ought to be adduced by the parties in the main



trial. The existence of the motor vehicle is not in dispute. In my view, production of exhibits in support of a charge against an accused person is entirely within the discretion of the prosecution. The accused person or even the court cannot compel the prosecution to produce certain exhibits in evidence. I say so because it is the duty of the prosecution to prove its case against an accused person and the nature of the evidence to be adduced towards that end is up to the prosecution. The duty of the court will then be to ascertain whether the evidence tendered is sufficient to prove the charge against the accused person to the required standard.

22. The accused persons are charged with an offence under section 4 of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#). Section 20 of the [Narcotic Drugs and Psychotropic Substances \(Control\) Act](#) provides as follows:

- (1) Any machinery, equipment, implement, pipe, utensil, or other article used for the commission of any offence under this Act shall be forfeited to the Government.
- (2) Every conveyance used for the commission of any offence under this Act or for carrying any machinery, equipment, implement, pipe, utensil or other article used for the commission of any offence under this Act, or any narcotic drug or psychotropic substance, shall be forfeited to the Government:

Provided that where, on application made by the person who was the owner of the conveyance to the court in which any prosecution for any offence under this Act or before which any proceedings under this Act for the forfeiture and condemnation of any conveyance, not being a proceeding under Part IV is pending, the court is satisfied beyond reasonable doubt that—

- (a) the person who was the owner of the conveyance, and
- (b) in the case of an aircraft or ship, every person who was a responsible officer thereof, when it was made use of for such conveyance, was not concerned in or privy to such use, the conveyance shall be restored to the owner by the court.

23. The above implies that if the court finds that the motor vehicle herein was used in the commission of the offence, the court may order for its forfeiture to the Government. The accused persons are not charged with an ordinary offence. It is what I would call a forfeiture offence. In as much as the court has jurisdiction and discretion to order for release of items, it should be very cautious when dealing with forfeiture offences. The motor vehicle herein bears two characteristics:

- a. It is a proper intended exhibit in this case; and
- b. It is liable to forfeiture in the event that the accused persons are convicted or the court finds that the motor vehicle was used in the commission of the offence, notwithstanding that the accused persons may not have been convicted.

24. The proviso to section 20 of the governing Act gives the court discretion to release the motor vehicle to the owner on application, if the court is satisfied beyond reasonable doubt that when conveyance was made use of for such conveyance, the owner was not concerned in or privy to such use. The law does not stipulate that such an application ought to be made after conclusion of the case. Section 20 of the governing Act reveals that the application may be made either during the prosecution of the case or during forfeiture proceedings.

25. However, the application ought to be made by the owner of the motor vehicle. The applicant herein is not the owner of the motor vehicle. I agree with the prosecution that the applicant lacks the locus standi to bring the application. The application ought to have been made by Thomas Njoroge Kiarie or Jared Ochieng Okeyo, in conjunction with Thomas Njoroge Kiarie. The prosecution has not in any



way alleged or alluded to the fact that the owner of the motor vehicle was connected to or privy to the alleged offence herein. There is no indication that the owner of the motor vehicle is under investigation with respect to the offence. From the documents filed by the applicant, it would appear that the motor vehicle exchanged several hands before it was impounded.

26. The registered owner confirmed through an affidavit that he sold the motor vehicle to Jared Ochieng Okeyo who was still paying the purchase price. Jared confirmed through an affidavit that he had leased the motor vehicle to Migori Poster Progressive Group, in which the applicant is the Chairman. The documents further indicate that the group later leased the motor vehicle to one Brian Mghala Makori. No connection has been established between the owner(s) of the motor vehicle and the accused persons or the offence. As already indicated, there is no allegation that the owner(s) of the motor vehicle is under investigation. I am satisfied beyond reasonable doubt that the owner of the motor vehicle was not privy to how the motor vehicle could have been used in the commission of the offence.
27. I have already pointed out that the applicant is not the owner of the motor vehicle. The motor vehicle cannot be released to him. The registered owner as well as the purchaser of the motor vehicle filed affidavits urging the court to release the motor vehicle. In as much as there is no formal application by the owner of the motor vehicle seeking release, swearing an affidavit containing a prayer for release of the motor vehicle would suffice. Pursuant to Article 159(2)(d) of *the Constitution*, the court is enjoined to do substantial justice without undue regard to technicalities of procedure. Having considered all the relevant factors, I find sufficient grounds to order for the release of the motor vehicle.

### **Disposition**

28. In view of the foregoing, I make the following orders:
- a. The motor vehicle registration number KCN 969 V Toyota Axio be released to the registered owner THomas Njoroge Kiarie of National ID/NO. 323XXXXX or upon his consent and written authorization, to Jared Ochieng Okeyo of National ID/NO. 25178XXXX;
  - b. The investigating officer herein to cause photographs of the said motor vehicle to be taken before the motor vehicle is released;
  - c. The motor vehicle be released not later than three days from today;
  - d. The release of the motor vehicle is on condition that the owner deposits the original logbook (certificate of registration) in court and shall produce the motor vehicle in court as and when required upon reasonable notice;
  - e. The motor vehicle shall not be sold or alienated until the case is heard and determined or until further orders of the court.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 25<sup>TH</sup> DAY OF MARCH, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

