



Gitonga v Director of Public Prosecutions (Miscellaneous Criminal Application E019 of 2025) [2025] KEMC 180 (KLR) (16 July 2025) (Ruling)

Neutral citation: [2025] KEMC 180 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
MISCELLANEOUS CRIMINAL APPLICATION E019 OF 2025
YA SHIKANDA, SPM
JULY 16, 2025**

BETWEEN

NELSON KINOTI GITONGA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

The Application

1. Nelson Kinoti Gitonga (hereinafter referred to as the applicant) moved the court by way of a notice of motion dated 14/2/2025. The application seeks the following main orders:
 1. That the Respondent and/or its agents be ordered to take photographs and release motor vehicle registration number KCR xxxR to the applicant on condition that he produces it whenever required by the court to do so until the hearing and determination of the criminal case;
 2. That the costs of the application be provided for.
2. The application is supported by the affidavit sworn by the applicant herein and is premised on the following general grounds:
 - a. The applicant is the registered owner of the motor vehicle;
 - b. The subject motor vehicle was detained in connection with Criminal Caseno. E063 of 2025-*R v Wilson Maswii Kilunda & another*;
 - c. The applicant had assisted the 2nd accused person in the criminal case with the said motor vehicle to ferry members of the church to a crusade within Kibwezi area and to do some other church activities;



- d. Before the agreed date of returning the motor vehicle to the applicant, the 2nd accused person was arrested and the motor vehicle detained at Kithayu KWS Camp;
 - e. The prolonged detention of the motor vehicle will drastically affect its mobility as its tyres will deflate and it will waste away;
 - f. The applicant is counting losses as he has to source for alternative means which are costly and inconveniencing in his errands including spreading the gospel across the country;
 - g. It is in the interest of justice and all fairness that the application be allowed.
3. In the supporting affidavit, the applicant reiterated the grounds in support of the application and attached documents in support of the application. The applicant further undertook to make the motor vehicle available to court until the criminal case is heard and determined.

The Respondent's Response

4. The respondent filed a Replying affidavit in opposition of the application. The affidavit was sworn by one Sergeant Lamek Ogolla who claimed to be the investigating officer in the criminal case. The deponent admitted that the motor vehicle in issue was detained at Chyulu Hills National Park as an intended exhibit in the criminal case on allegations that it was used to facilitate commission of the offence therein. The deponent further deposed that the application was premature as the motor vehicle was yet to be produced in evidence and therefore not within the jurisdiction of the court. That the motor vehicle was registered in the name of the applicant and not the accused persons and that if released, it would be difficult to trace it and bring it to court as and when required. The respondent argued that no document had been attached to show that the motor vehicle was given to the 2nd accused person for purposes of church activities. The respondent contended that the motor vehicle was subject to forfeiture under section 105 of the [Wildlife Conservation and Management Act](#) and urged the court to dismiss the application.

Main Issues For Determination

5. Having considered the application and the response by the respondent, 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. Whether the applicant is entitled to the reliefs sought.

Analysis And Determination

6. I have carefully considered the application and given due regard to 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".

7. 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".

8. 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."

9. 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."

10. 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."

11. 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.

12. 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."

13. 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.

14. 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 Naresbo 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."

15. 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.
16. 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."
17. 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 belongs to the applicant. There is even evidence to that effect. The motor vehicle was not impounded from the applicant and the applicant has not been charged with any offence in respect of the motor vehicle.
18. 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.
19. 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. It is also not in dispute that the motor vehicle is in the custody of KWS. 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.
20. The accused persons in criminal case No. E063 of 2025 are charged with an offence under section 95(c) of the Wildlife Conservation and Management Act. Section 105 of the Wildlife Conservation and Management Act provides as follows:
- (1) The court before which a person is charged for an offence under this Act or any regulations made thereunder may, in addition to any other order—
 - (a) upon the conviction of the accused; or
 - (b) if it is satisfied that an offence was committed notwithstanding that no person has been convicted of an offence, order that the wildlife trophy, motor vehicle, equipment and appliance, livestock or other thing by means whereof the offence concerned was committed or which was used in the commission of the offence be forfeited to the Service and be disposed of as the court may direct.
 - (2) In making the order of forfeiture under subsection (1) the court may also order that the cost of disposing of the substance, motor vehicle, equipment, appliance, livestock or any other thing provided for in that subsection be borne by the person convicted there-under.
 - (3) The court may further order that any licence, permit or any authorization given under this Act, and to which the offence relates, be cancelled."
21. 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 Kenya Wildlife Service. The accused persons in the criminal case 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 person is convicted or the court finds that the motor vehicle was used in the commission of the offence, notwithstanding that the accused person(s) may not have been convicted.
22. The owner of the motor vehicle is not an accused person nor is there an allegation that he is under investigation. 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. Section 105 gives the court discretion in such circumstances. It is highly likely that the applicant was not privy to how the motor vehicle could have been used in the commission of the offence. Given the circumstances, I find it unfair to punish the applicant yet he is not facing any charges.

Disposition

23. In view of the foregoing, I make the following orders:
- a. The motor vehicle registration number KCR xxxR Toyota Prado be released to the registered owner Nelson Kinoti Gitonga;
 - 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, subject to clause (d) below;
 - 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 16TH DAY OF JULY, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

