



REPUBLIC OF KENYA



**Gathecha v Republic & another (Criminal Appeal E293 of 2021)  
[2025] KEHC 9220 (KLR) (Crim) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9220 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL APPEAL E293 OF 2021  
K KIMONDO, J  
JUNE 26, 2025**

**BETWEEN**

**JACOB GATHECHA ..... APPLICANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**ZAKARIAIH MAINA NDIBARU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Jacob Gathecha (hereafter the applicant) was the complainant in the Chief Magistrates Criminal Case No. 886 of 2019 at Milimani Law Courts. In the case, Zakariaih Maina Ndibaru (the 2<sup>nd</sup> respondent) was charged with theft of motor vehicle KCL xxxP Toyota Landcruiser V8 had the Engine number 1UR-FE-036xxxx belonging to motor vehicle KBX xxxA (hereafter the suit vehicle) which was stolen from the complainant.
2. The learned trial magistrate acquitted the 2<sup>nd</sup> respondent. The complainant now claims that the prosecution had proved that the suit motor vehicle was stolen from him. He is thus aggrieved by the subsequent order of the learned trial magistrate made on 16<sup>th</sup> November 2023 releasing the vehicle to the 2<sup>nd</sup> respondent.
3. In the Notice of motion dated 20<sup>th</sup> December 2023, the applicant prays for stay of the impugned order; or, in the event that the vehicle has been released, that it be returned to the custody of the investigating officer, Faith Masiolo. There is also a prayer for costs.
4. The primary grounds are that, firstly, the trial court was misled that there was no appeal by the Republic against the acquittal of the 2<sup>nd</sup> respondent; secondly, that the applicant only became aware of the order when he was tipped by a call from the DCI. He avers that he then promptly wrote to the trial court



to clarify that indeed, this appeal had been lodged well in advance of the impugned order. Lastly, the applicant contends that he will suffer great prejudice unless the reliefs sought are granted.

5. The motion is ardently opposed by both the Republic and the 2<sup>nd</sup> respondent. At the hearing of the motion, Learned Senior Assistant DPP, Mr. O. Omondi, stated that the Republic was not filing a formal reply but would make oral submissions.
6. The 2<sup>nd</sup> respondent on the other hand relied on grounds of opposition dated 23<sup>rd</sup> April 2025 filed by the firm of Kang'ahi & Associates. In a synopsis, he contends that the applicant is usurping the powers vested in the Director of Public Prosecutions (hereafter the DPP) under Article 157 of the Constitution; that the matter is overtaken by events; that the DPP has filed a Notice of Withdrawal of the appeal; and, that the present appeal was not lodged by the office of the DPP and accordingly disowns it.
7. On 24<sup>th</sup> April 2025, I heard learned counsel for the applicant, Mr. Thuo; learned Prosecution Counsel, Mr. Omondi; and, learned counsel for the 2<sup>nd</sup> respondent, Mr. Kang'ahi. However, Mr. Kang'ahi's call dropped in the course of the session. Nevertheless, I have considered his grounds of opposition dated 23<sup>rd</sup> April 2025 which I set out at length earlier.
8. I take the following view of the matter. I have kept in mind that although there is on record a Notice of Withdrawal of the appeal dated 1<sup>st</sup> April 2025, the appeal has not been formally withdrawn by the High Court. Learned Senior Assistant DPP, Mr. O. Omondi, admitted as much. It then follows that at this moment in time, the main appeal against the judgment of the lower court is thus still pending at the High Court.
9. For that reason, and in view of the decision I propose to make, it would be prejudicial to delve too deep into the whether the person who lodged the "appeal" was instructed by the DPP; or, whether the complainant has a standing in this appeal; or, whether he is usurping the powers of the DPP. It would equally be unjust to deal with the merits of the "appeal" or otherwise at this juncture.
10. The present petition of appeal is dated 23<sup>rd</sup> October 2023 and received at the High Court Registry on 24<sup>th</sup> October 2023. On 6<sup>th</sup> November 2023, and following the acquittal of the 2<sup>nd</sup> respondent, his counsel made an application for release of the vehicle. From the original and certified proceedings that are before the High Court, the learned prosecutor, Mr. Omariba, told the trial court: "I am not aware of any appeal".
11. The learned trial magistrate then ruled as follows at page 65 of the typed record-

Having acquitted the accused under sec 210 CPC and no appeal being preferred over one month later, the investigating officer is hereby directed to release motor vehicle Registration Number KCL xxxP Toyota Landcruiser, V8 Black in colour and its key to Zacharia Maina Ndibaru.
12. I thus readily find that the trial court was misled by the learned prosecutor that no appeal had been lodged at that date. It may as well be that the filing of the petition was improper or not authorized by the DPP. As I have stated, it is premature to make a finding on that issue. I also stated that the DPP has now moved to withdraw the appeal. But the point to be made is that the appeal has not yet been formally withdrawn by the court.
13. Granted those reasons, I find that the applicants notice of motion is merited. In the interests of justice, I order as follows-



- a. That the order of the lower court (Hon Z. Abdul, PM) dated 6<sup>th</sup> November 2023 in Chief Magistrates Criminal Case No. 886 of 2019 at Milimani Law Courts be and is hereby stayed pending the hearing and determination of this appeal or any further orders by the High Court.
- b. That in the alternative, the 2<sup>nd</sup> respondent be and is hereby restrained from selling, transferring or in any other manner parting with possession of motor vehicle Registration Number KCL xxxP Toyota Landcruiser, V8 Black in colour pending the hearing and determination of this appeal or any further orders by the High Court.
- c. That I decline to order any costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

**KANYI KIMONDO**

**JUDGE**

Ruling read virtually on Microsoft Teams in the presence of-

Mr. Thuo for the applicant instructed by A. Thuo Kanai & Company Advocates.

Ms. Awino for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

