



**Republic v Abdalla & another (Suing through his Registered Lega Attorney Mohamed Musao Yusuf) (Criminal Revision E051 of 2022) [2024] KEHC 4375 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4375 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL REVISION E051 OF 2022**

**A. ONG'INJO, J  
APRIL 25, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**YUSUF MOHAMMED ABDALLA ..... ACCUSED**

**AND**

**ISMAEL MOHAMED IREI ..... RESPONDENT**

**SUING THROUGH HIS REGISTERED LEGA ATTORNEY MOHAMED MUSAO  
YUSUF**

**RULING**

**Application**

1. The application dated 8<sup>th</sup> February 2022 filed under Certificate of Urgency was brought under Article 165 (6) and 165 (7) of *the Constitution* of Kenya 2010, Sections 362 and 364 of the *Criminal Procedure Code* Cap 75 Laws of Kenya. The Applicant seeks for the following orders: -
  - i. That the Honourable Court be pleased to order stay of execution of the orders issued by the Honourable RM Amwayi, Senior Resident Magistrate Mombasa Law Courts on 17<sup>th</sup> February 2021 in Criminal Case No. E1945 of 2021, Republic v Yusuf Mohamed Abdalla pending the hearing and determination of this revision.
  - ii. That this Honourable Court do urgently call for the record in Mombasa Criminal Case No. E1945 of 2021, Republic v Yusuf Mohamed Abdalla and examine the record of the proceedings therein to determine the propriety of the ruling delivered on 17<sup>th</sup> February 2022.



- iii. That this Honourable Court be pleased to review, vacate, reverse and/or set aside the orders made by the Learned Trial Magistrate on 17<sup>th</sup> February 2022 in Criminal Case No. E1945 of 2021, Republic v Yusuf Mohamed Abdalla for the release of MV Tima Fena Vessel.
  - iv. That this Honourable Court be pleased to grant preservatory orders of exhibits and protection of the same from interference until the matter is heard and determined.
  - v. That this Honourable Court be pleased to make or grant any other order or relief as it may deem just and fair to meet the ends of justice.
2. The application is premised on the following grounds: -
- i. That the Learned Trial Magistrate erred in both law and fact by directing that MV Tima Fena Vessel be released whereas it was properly seized in accordance with Section 213 (1) of the East African Community Customs Management Act, 2004 and is an exhibit in Criminal Case No. 1945 of 2021, Republic v Yusuf Mohamed Abdalla where the accused has been charged with the offence of smuggling goods.
  - ii. That the Learned Trial Magistrate erred in both law and fact by failing to consider the provisions of Section 213 (1) of the East *African Community Customs Management Act*, 2004 which allows for seizure and detention of any aircraft, vessel, vehicle, goods, animals or any other thing liable to forfeiture regardless of the fact that any prosecution for an offence under the Act which renders that thing liable to forfeiture has been, or is about to be instituted.
  - iii. That the Learned Trial Magistrate erred in both law and fact by failing to consider the provisions of Section 199(b)(1) of the *East African Community Customs Management Act*, 2004 and the applicant's objection to the release of MV Tima Fena Vessel as it is subject to an application for forfeiture upon the conclusion of the case.
  - iv. That the Learned Trial Magistrate erred in both law and fact by not appreciating Article 50 of *the Constitution* of Kenya on the right to a fair trial to all parties by disregarding the fact that the hearing process in Criminal Case No. E1945 of 2021, Republic v Yusuf Mohamed Abdalla had not commenced and MV Tima Fena Vessel had not been subjected to identification by prosecution witnesses and production by the investigating officer.
  - v. That the Learned Trial Magistrate erred in both law and fact by directing that the vessel in Criminal Case No. E1945 of 2021, Republic v Yusuf Mohamed Abdalla, be released disregarding the fact that the vessel had not been produced as an exhibit in court and that it is only when it has been produced as an exhibit that the court would have been seized with the jurisdiction to order for its disposal.
  - vi. That the Learned Trial Magistrate erred in both law and fact by failing to appreciate the fact that a subordinate court does not have inherent powers in criminal matters and that 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*, when the goods have been produced in evidence as exhibits before the court. The Learned Trial Magistrate failed to appreciate the fact that a trial court is only entitled to order for restitution of property to the owner at the conclusion of the criminal trial.
  - vii. That the orders made in the ruling delivered on 17<sup>th</sup> February 2022 in Criminal Case No. E1945 of 2021, Republic v Yusuf Mohamed Abdalla are unjust, prejudicial and shall jeopardise the trial in this case.



viii. That it is just and fair that this Honourable Court grants the orders sought in this application.

### **Interested Party's Affidavit in Response**

3. The Interested Party's affidavit in response is dated 20<sup>th</sup> May 2022 and filed on the same day, and that the Interested Party reiterated contents of documentation lodged and testimony taken before the subordinate court in Mombasa Criminal Case No. E1945 of 2021, Rep. v Yusuf Mohamed Abdalla & Another.
4. The Interested Party stated that he lodged the motion dated 2.12.2021 seeking the following orders: -
  - i. That the application be certified urgent and service thereof be dispensed with in the first instance.
  - ii. That an order do issue to the effect that the evidence of the individuals/persons named hereunder be taken *de bene esse* within three (3) days of the making of such order or soon thereafter as the Honourable Court shall direct for purposes of the orders subject of prayers 3 and 4 hereafter, viz:
    - (a) Mohamed Masuo Yusuf, ID No. xxxxxxxx
    - (b) Abdulrahman Fakii, ID No. xxxxxxxx
    - (c) Yusuf Mohamed Abdalla, ID No. xxxxxxxx
    - (d) Officer-in-charge, Coast Guard Division, Kenya Coast Guard
  - iii. That an order do issue directing the Investigating Officer herein, David Okello, to arrange for the taking of still photographs and/or actual video footage of the vessel MV Tima Fena currently detained at Old Port, Mombasa.
  - iv. That an order do issue directing the Investigating Officer herein, David Okello, as well as any/all agencies of the multi-agency team involved in the detention of the vessel MV Tima Fena at Old Port, Mombasa to release the said vessel to Mohamed Masuo Yusuf within twenty four (24) hours of the making of such order.
  - v. That this matter be diarized forthwith for the hearing of the main cause.
  - vi. That costs of this motion be provided for.
5. The Interested Party pointed out that upon considering the said motion inter parties, the honourable court delivered ruling on 17.2.2022 and issued the following orders: -
  - i. That the respondent to release the applicant's vessel MV Tima Fena to the applicant within three (3) days from the date of the ruling.
  - ii. That the respondent arranges for prompt photographing of the vessel within (3) days from the date of the ruling.
  - iii. That the applicant gives a written undertaking to the Respondent that he will produce the vessel in court as and when directed by the court.
  - iv. That mention on 14<sup>th</sup> March 2022 to fix a hearing date.
  - v. That the state to be supplied with certified copy of proceedings and ruling.



6. That the extracted orders were duly served upon all relevant individuals/ entities with effect 18.2.2022. That the said orders of the Honourable Court have not been discharged, varied and/or set aside on appeal and/or review and the legal position pertaining to-date as regards custody of the vessel subject hereof is that the vessel be released to the Interested Party/Applicant within three (3) days of the making of the said order.
7. That despite the Interested Party/Applicant's constant pleas to the state through the Investigator, David Okello, to comply with said orders, the said individual has severally resorted to willful and/or deliberate and/or other failure and/or refusal and/or neglect to comply with and/or contravention and/or defiance, and/or disobedience of said orders through consistently failing to release the vessel to the Interested Party/Applicant as ordered by court.
8. The Interested Party stated that the orders of the court are not issued in vain, that refusal to obey a valid court order and/or any hindrance to its execution is contempt of court, that the Investigating Officer's contempt of the orders of court as regards the Interested Party/Applicant access to the vessel is likely to proceed unabated unless checked by this Honourable Court, and the Investigating Officer's contempt of the orders of the court is acutely injurious and prejudicial to both the Interested Party/Applicant, the vessel's entire crew and their families as the vessel is unable to engage in its commercial operations to sustain the welfare and livelihood of the identified parties.
9. The Interested Party argued that the applicant has approached this court with unclean hands, having blatantly defied valid, legitimate orders, and that the applicant is simply wholly undeserving of the entirety of the relief sought herein.

### **Applicant's Submissions**

10. The Applicant submitted that releasing the subject vessel usurped the commissioner's statutory mandate of seizing, detaining and condemning a vessel liable to forfeiture. That Kenya's tax collection regime largely relies on full disclosure by importers to voluntarily declare the correct information on the value, description and quantity of imported goods for purposes of assessment of the duty payable. The applicant cited Section 210 of *EACCMA* which provides that uncustomed goods are liable to forfeiture, and Section 211 *EACCMA* which provides that a vessel of less than 250 tons made use of in conveyance of goods liable to forfeiture is in itself liable to forfeiture.
11. That Section 214 of *EACCMA* provides that where there is a prosecution, the thing detained shall not be released until the determination of such prosecution and be dealt with under 211 as read with Section 215. That Section 215 of the *EACCMA* provides that conviction has the effect of instantly condemning the thing detained while the only time the court is invited to make a determination for release is upon acquittal and not prior to any such determination. The applicant relied on decisions in the cases of *Republic v Noordin Haji Juma & 3 Others* (2016) eKLR and *Kenya Revenue Authority v Josiah Thiong'o* (2022) eKLR to that effect.
12. On whether the trial magistrate erred in ordering the release of exhibit that had not yet been identified by witnesses and produced in court, the applicant submitted that the subordinate court does not have inherent powers in criminal matters and that a magistrate's court can only make an order for restituting property to a proved owner under the provisions of Section 177 of the *Criminal Procedure Code* when the goods have been produced in evidence as exhibits before the court. This position was supported by the cases of *Everlyn Wamuyu Ngumo v Republic* (2016) eKLR and *Elijah Nyakebondo Onsongo v Republic* (2017) eKLR.



13. The Applicant submitted that the order for release of an exhibit that the prosecution intended to rely on in evidence was premature and extremely prejudicial. That the subject vessel is a prosecution exhibit that is yet to be identified by prosecution witnesses and produced as an exhibit, and release of the same to the accused will not only interfere with the chain of custody but will deny the applicant any control measures to ensure that status quo is maintained pending the determination of the prosecution case.

### **Interested Party's Submissions**

14. The Interested Party argued that the revisionary jurisdiction of the High Court was discussed by Odunga, J. in the persuasive decision of *Joseph Nduvi Mbuvi v Republic* (2019) eKLR. That similarly, Nyakundi, J in *Prosecutor v Stephen Lesinko* (2018) KLR outlined guiding principles pertaining Section 362 of the *Criminal Procedure Code* to include the following: -
- a. Where the decision is grossly erroneous;
  - b. Where there is no compliance with the provisions of the law;
  - c. Where the finding of fact affecting the decision is not based on evidence or it is a result of misreading or non-reading of evidence on record;
  - d. Where the material evidence on the parties is not considered; and
  - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
15. The Interested Party contended that powers of the High Court to exercise revisionary jurisdiction are provided for under Section 364 of the *Criminal Procedure Code*. Further, the Interested party stated that the prayer of revision vested in the High Court under Section 362 of the *Criminal Procedure Code* is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court. Accordingly, revision is by no means to be taken as an appeal by the aggrieved party to the High Court in criminal cases where such orders are being sought under Section 364 on revision the court should steer clear from trespassing into the realm of appellate jurisdiction.
16. The Interested Party contended that jurisdiction under Section 362 as read with Section 364 of the *Criminal Procedure Code* has been considered in several cases such as *Kiwala v Uganda* (1967) EA 758, *REX v Compensation Appeal Tribunal* (1952) IKB 338 – 347 and *Sriraja Lakshmi Dyeing Works v Pangaswamy Chettair* (1980) 4SCC 259.
17. The Interested Party argued that under Article 31 of *the Constitution*, every person has the right to privacy which includes the right not to have their possession seized, which is also in line with the provisions of Article 40 on the protection of the right to property.
18. The Interested Party submitted on whether the instant motion is merited that the applicant has not made out a sufficient and/or prima facie case on the merits to warrant grant of any of the prayers sought in the application for revision dated 8.2.2022. The Interested Party therefore urged the court to disallow the orders sought with costs.

### **Analysis and Determination**

19. This court has considered the application dated 8<sup>th</sup> February 2022, the Interested Party's affidavit in response dated 20<sup>th</sup> May 2022, and the Applicant's and Interested Party's submissions thereto as well



as the legal provisions that the application was brought under. The issue for determination is whether the Applicant made a case for grant of the order sought in the application.

20. Article 165 (6) and (7) of *the Constitution* provide as follows: -

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

21. Section 362 of the *Criminal Procedure Code* provides: -

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

22. Section 364 (1)(b) of the *Criminal Procedure Code* provides: -

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may: -

in the case of any other order other than an order of acquittal, alter or reverse the order.

23. The Applicant's position is that the trial magistrate made an order without considering provisions of Section 214 of *EACCMA* which provides that where there is prosecution the thing detained shall not be released until the determination of such prosecution and Section 215 of *EACCMA* which provides that conviction has the effect of instantly condemning the thing detained.

24. The vessel in question is indicated as belonging to Ismael Mohammed Irei, the Interested Party/Applicant but the affidavit in support of his application at the lower court is sworn by Mohammed Masuo Yusuf who is indicated as the Registered Legal Attorney and well versed with the matter in question. However, there is no evidence of his relationship with the owner of the vessel. Neither is there evidence that the owner of the vessel donated any Power of Attorney to him.

25. This court has considered the application for revision and finds that the order that was made by the trial magistrate would prejudice the trial of the accused person and goes against the provisions of Section 214 (3)(a) of *EACCMA* which provides: -

Where anything liable to forfeiture under this Act has been seized, then: -

if any person is being prosecuted for the offence by reason of which the thing was seized, the thing shall be detained until the determination of such prosecution and dealt with in accordance with section 215;

26. Section 215 (1) of *EACCMA* which provides: -

Where any person is prosecuted for an offence under this Act and anything is liable to forfeiture by reason of the commission of the offence, then the conviction of the person of the offence shall, without further order, have effect as the condemnation of the thing.

27. The above two sections are mandatory provisions of the law and it was illegal to make an order that goes against the mandatory provisions of the law. The application for revision is therefore allowed and the Trial Magistrate's orders made on 17<sup>th</sup> February 2022 are hereby set aside.



28. The Trial Magistrate's file was placed before this court for consideration and it is observed that on 12<sup>th</sup> February 2024, the Trial Magistrate gave 2 consecutive days, 6<sup>th</sup> and 7<sup>th</sup> May 2024 for the hearing of the matter and the Prosecution were ordered to avail their remaining 6 witnesses. This court is optimistic that with the conclusion of the case, the Trial Magistrate will be able to make an order on whether or not to release the vessel. The trial court is therefore urged to expedite the hearing to alleviate any further hardships occasioned to any of the parties.
29. Mention on 30.4.2024 for further directions before the trial court.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS  
25<sup>TH</sup> DAY OF APRIL 2024**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

In the presence of: -

Etropia- Court Assistant

Ms. Nyarieda H/B for Mr. Ngiri for the Applicant

Mr. Ngonze Advocate for the Interested Party/Respondent

