



**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CRIMINAL DIVISION
REVIEW CASE NO. 42 OF 2021**

(Being Criminal Case No. 165 of 2021 before SRM, Mwanza Magistrate Court)

THE REPUBLIC

V

ISON CHIRIKUTSI

ORDER ON REVIEW

Chima J

1. This matter comes for review under sections 360, 362 and 363 of the Criminal Procedure and Evidence Code and also sections 25 and 26 of the Courts Act. The accused, a Zimbabwean citizen, was on 17 June 2021 charged with bringing in property dishonestly acquired outside Malawi contrary to section 331 of the Penal Code. The property in question was a Toyota Fortuner bearing the registration number JVN78MC GP. The accused denied the charge.
2. The following day on 18 June 2021, the accused through his counsel applied to the court under sections 147 and 149 of the Criminal Procedure and Evidence Code to have the said vehicle, which had been impounded by the state, released to him. In his address, counsel for the accused stated that he had served the state with the application and that they (the state) had been notified of the date of the application and that he did not know why they had not appeared. He asked the court to proceed with the application in the state's absence and the court granted him that request. Thus counsel proceeded to make his application. The application was supported by an affidavit sworn by the accused. It stated thus:
 - '3. That the motor vehicle in issue is owned by one Mr Ntantis Nedmore a South African national. I hereby produce and exhibit herein a copy of a blue book thereof marked "ICI".

4. That the said Mr Ntantiso Nedmore duly authorized me to use his vehicle herein on my trip to Malawi. I hereby produce and exhibit herein a copy of his affidavit to that effect marked "IC2"
 5. That I arrived at Mwanza border on the 15th June 2021 and in the course of processing a Temporary Importation Permit in respect of the vehicle, the Mwanza Police Officers seized the vehicle on allegations that the vehicle had been stolen from South Africa.
 6. That the police officers produced pictures of documents alleged to be of the vehicle but the information or details thereon were inconsistent with the actual details of the vehicle.
 7. That there is none in Malawi or elsewhere outside Malawi who is claiming ownership of the vehicle.
 8. That I have been formally charged with the offence of bringing in property dishonestly acquired outside Malawi contrary to section 331 of the Penal Code, which I denied.
 9. That the prosecution avers that besides the police, the Malawi Revenue Authority is investigating the matter.
 10. That as long as the vehicle remains in police custody, I will continue to suffer prejudice on the basis of unfounded allegations.
 11. That the respondent intends to carry out investigations on the particulars of the vehicle and then decide whether to continue with the prosecution or not.
 12. That I repeat paragraph 11 hereof and state that the state's conduct of effecting seizure of the vehicle herein before concluding investigations is like putting the cart before the horse.
 13. That unless the court makes an order releasing or restoring the vehicle back to me I and the said proprietor of the vehicle will continue to suffer prejudice.
 14. That I believe that this is a proper matter in which the court should consider restoring the vehicle to me up until the respondent completes its investigations or any other order of the court.'
3. The magistrate stated that he would grant the application to the accused as "the rightful owner" since the state had shown no interest in the application. It appears that the vehicle was not released to the accused as it was now in the hands of Malawi Revenue Authority, who apparently were investigating tax offences in relation to the same vehicle. Thus on 29 June 2021, the magistrate issued an enforcement order against the Controller of customs and excise and also against the Commissioner of Malawi Revenue Authority to release the vehicle to the accused.
 4. On 28 June 2021, the Director of Public Prosecutions appointed Counsel Victor Jere as the public prosecutor in this matter and on 12 July 2021, Counsel Jere brought an application to set aside the property restoration order and for the preservation of the motor vehicle. The application was supported by an affidavit. The affidavit in part stated as follows:
 - '2. That Pace Car Rentals is the owner of a motor vehicle Toyota Fortuner registration number CY110037, vehicle identification number (VIN no.) AHTCB8G402206118. A copy of the said vehicle's certificate of registration is here by exhibited...
 3. That the said vehicle was reported stolen at Bishop Lavis Police Station in Cape Town on 9th June 2021 after the person who had rented the vehicle a few days before failed to return the vehicle and car track South Africa had confirmed that the vehicle was in Harare, Zimbabwe.
 4. That on 15th June 2021 the said vehicle was intercepted at Mwanza border bearing a registration number JN78MC GP and VIN No. AHTCB3G5202009869.
 5. That coincidentally registration number JN78MCGP belongs to one Nosipho Ntatiso of Khayelitsha in Cape Town who owns a Toyota Fortuner with engine no. 2GDC619724 and VIN no. AHTCB3G5202009869 which vehicle is still in her possession.
 6. That from the available evidence it is clear that the motor vehicle herein although purporting to bear registration number JN78MC GP is the complainant's vehicle whose real registration number is CY110037. Exhibited hereto marked as exhibit "VJ2" is a sworn statement of Warrant Officer Peter Matome Mmamorobela of the South African Police Service giving a detailed account of how the motor vehicle registration number CY110037 belonging to Pace Car Rentals ended up being impounded at Mwanza border bearing a different registration and VIN number and in the possession of the accused person herein.

7. That I am informed by the prosecutor herein, Esau Wilson, that the state failed to attend court on 18th June 2021 and oppose the accused's application for a restoration order due to the fact that the said application was served less than two clear days' notice for its return date (apparently at 4 pm on 17th June 2021 when the hearing was on 18th June at 9 am) when the prosecutor handling the matter, Esau Wilson, was in Blantyre for other duties and he only became aware of the application upon his return to the office in the afternoon of 18th June 2021.

8. That it is clear from the evidence that the vehicle in question does not belong to the accused person or the person he alleges sent him.

9. That it is clear from the evidence that the vehicle in question belongs to the complainant only that upon being stolen it had its details falsified as further confirmed by the inconsistency in the blue book that the accused submitted to the MRA officials at Mwanza and what is on the vehicle. Exhibited hereto marked "VJ3" is a copy of the accused's caution statement.

10. That if the vehicle were to be released to the accused person there is a high risk of it disappearing and the accused person being a foreigner, he is a flight risk and the interest of justice herein will be defeated.

11. That despite the release order herein of 18th June 2021, the accused person has not been able to take custody of the vehicle simply because Malawi Revenue Authority is the one holding on to it due to customs offences that the accused committed in relation to the declaration of the said vehicle.

12. That the interests of justice demand that the vehicle remains in the custody of the relevant law enforcement officers pending the hearing of this matter so that the court can make an informed decision on the ownership of the vehicle.

13. That the witnesses from South Africa are ready to come to testify in this court as to the true ownership of this vehicle and I am informed by the police prosecutor that investigations are concluded and the state is ready to prosecute the matter.'

5. The defence opposed the application and relied on their affidavit in support of the application of the restoration of the vehicle to the accused dated 17 June 2021. The record states that the court visited the locus in quo (apparently, the place where the vehicle was being kept by the state). The court refused to grant the prosecution's prayer. It gave out two rulings. One, a handwritten one, dated 12 July 2021 and another a typed one dated 13 July 2021. In the ruling dated 12 July 2021, the court said:

'After going through the affidavit filed in support for the order setting aside/ preservation order I find most of the things therein speculative. The motor vehicle that is claimed to belong to Pace Car Rental has a different registration number and VIN number altogether. It is claimed that the same particulars of the vehicle seized at MRA belongs to a certain lady in RSA but this is all hearsay because this claimed lady did not come with her vehicle to give us an explanation or let alone compare the two vehicles. The personnel from Interpol, Anti-motor and many other stakeholders have not availed themselves or shown interest in the matter three weeks down the line. If at all there is any suspicion on the documents of the vehicle with any other vehicle in RSA the same should be dealt with RSA authorities (enforcement officer). Absence of SAR-PCO and Interpol has left me with so many doubts. All in all, the state's application to set aside the earlier restoration order fails in its entirety...' (sic)

In its ruling dated 13 July 2021, the court, after giving the background of the matter and quoting the provisions of sections 147 (a) and 149 (1) of the Criminal Procedure and Evidence Code, stated thus:

'In the case at hand the court was moved to the place where the vehicle is impounded to confirm what was averred in the state's application to set aside the restoration order dated the 18th June 2021, however, the motor vehicle impounded has registration number JN78MCGP....and vehicle identification number AHTCB3G5202009869. Counsel for the prosecution failed to explain any reason why he averred in his affidavit that the VIN number was tampered with or changed. No expert was brought forth to prove that the VIN number was falsified as averred in the state's affidavit. The alleged lady that the state said has the same vehicle details as the impounded did not

testify or bring any other independent evidence to prove such an allegation. If I was to be honest whatever has been averred in the state's affidavit through counsel is mostly hearsay and so speculative that no reasonable tribunal or court of law can set aside the restoration order granted in by itself. This being a court of law is bound by evidence and proof not speculation strangely if whatever counsel has averred in the affidavit or how the matter was commenced without involvement of stakeholders such as anti-motor, Interpol, SARPCO etc. such that if the issue was about theft of motor vehicle in RSA the same leaves a lot to be desired. No valid reasons have been raised to make me set aside my own order of restoration of motor vehicle to the rightful entitled owner...The state is further advised to expedite the hearing of the matter so that **a proper and final determination in terms of disposal of the vehicle can be made.**'

I. RETURN DATE FOR APPLICATIONS IN CRIMINAL CASES

6. In this matter, the 'application for the immediate restoration of a motor vehicle' was filed with the court on 17 June 2021 and the return date given was 18 June 2021. The affidavit of service states that the application was served at around 4p.m. The following day, the state did not attend the application. The court, however, went ahead to hear the application. In civil matters, there is given at least two clear days between the date of filing the application and the return date unless the time has been abridged.¹ That cannot be any less in criminal matters. The magistrate did not allow sufficient time to the state. If the state had wanted to file their response, what time was there?

II. DISPOSAL OF PROSPECTIVE EXHIBITS

7. The application for restoration of the motor vehicle was made under sections 147 and 149 of the Criminal Procedure and Evidence Code. Section 147 of the Criminal Procedure and Evidence Code states thus:

'Where, on 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 is the person charged, that it be restored either to him or to such other person as he may direct...'

Section 149 of the Criminal Procedure and Evidence Code stipulates that:

'(1) At any time in the course of, or after the conclusion of, an inquiry or trial, the court may make such order as it thinks fit for the disposal, by destruction, forfeiture, confiscation, delivery to any person claiming to be entitled to possession thereof, or in any other manner, of any property or documents produced before it or in its custody or regarding which any offence appears to have been committed or which has been used for the commission of any offence...

(3) When an order is made under this section, such order shall not (except where the property is livestock or is subject to speedy and natural decay) be carried out until the period allowed for appealing against such order has expired or, when an appeal is brought within such period, until such appeal has been disposed of.

(4) In this section, "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any person but also any property into or for which the same may have been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise.'

8. I must say that it was very irregular of the magistrate to have granted the application to restore the motor vehicle to the accused before he had heard the evidence in the matter in view of the charge involved. The vehicle was the subject matter of the alleged offence.

¹ Order 10 rule 6 of the Courts (High Court) (Civil Procedure) Rules, 2017

Without it, how could the state successfully prove the offence? As already stated, the magistrate took a precarious step when he made the application returnable the day following the filing date when there was no urgency as to the application. When the prosecution failed to appear, he took another step in the wrong direction by granting the application. It should have been obvious to the magistrate that the vehicle would be an exhibit and it needed to be preserved by the prosecution in the state that it was seized from him. Otherwise, once it was released to him, there is no telling whether or not it would be brought back to court in the same state or if it would even be brought back at all.

9. The magistrate was faced with two conflicting claims of the ownership of the vehicle based on affidavits. It was not proper to decide the ownership of the vehicle based on affidavit evidence when there was going to be a full trial (unless the state decided not to prosecute the matter or showed a reluctance to that effect) that would probably determine that issue. The prosecution would need to prove the matter beyond reasonable doubt, just like in any criminal case, to establish whether the accused brought in a vehicle that was dishonestly acquired outside Malawi. That kind of proof or the lack of it would be determinative of whether the accused would be entitled to the possession of the vehicle. While an order disposing of property can be made any time in the trial, this is a case where a right order concerning the vehicle could only be properly made after the trial has been concluded. (This is a vehicle and not some perishable goods that requires urgency in its disposal.)
10. **Even if the order for disposal could properly be made at the stage in the trial that the magistrate made it, subsection 3 of section 149 of the Criminal Procedure and Evidence Code states that such an order could only be carried out after the period of appeal has expired and not before that, unless the property in question is perishable.**
11. It was also irregular for the magistrate to issue an enforcement order against officials of Malawi Revenue Authority when the same were not parties to the present proceedings.
12. This court thus sets aside the order of restoration as well as the enforcement order. The vehicle must be preserved by the state for the purposes of the trial and appeal (should there be one).

III. THE STATE OF THE COURT RECORD

13. The filing of the documents in the present case file from the magistrate court was jumbled. There is need for the record of proceedings in the magistrate court to be properly kept. A record in good order saves the time of the reviewing or appellate court or even another magistrate in case of transfer of the case to another magistrate. As a matter of practice, the record in both criminal and civil matters in the magistrate court, ordinarily has the last filed document at the bottom of the file with few exceptions. The first document when one opens a criminal case file must be the charge sheet and followed by the plea sheet. From here, usually what follows are the magistrate's notes on the evidence that is led or on any other applications. The magistrate's notes need to be paginated sequentially. Each day's proceedings must start with an indication of the date of the proceedings and the flow of the numbering of the pages should continue from the last date's number. There is no need to

start from page one on each new date of proceedings. This just creates confusion for the other judicial officers visiting the case file. Where there is a typed ruling or judgment or sentence, it can have its own numbering (that is, it can start from page one) but the typed ruling or judgment or sentence should be filed in almost the same place that a handwritten ruling/ judgment should have been. Documentary evidence is to be found after the magistrates' notes, with exhibit one being soon after the magistrate's notes and the rest of the documents should follow sequentially according to their exhibit numbers. Administrative records like letters to the court from the parties and the like should be filed on the left side cover of the case file. While clerks are also involved in the filing and maintenance of court files, the magistrate needs to supervise this process and ensure proper record keeping.

IV. REASSIGNMENT OF THE PROCEEDINGS TO A DIFFERENT MAGISTRATE

14. It is only proper that the proceedings in this matter be disposed of by another magistrate as opposed to the one who was handling it. I thus direct the proceedings to be removed to the Chief Resident Magistrate who should identify a magistrate to preside over the matter.

Made this day the 5th of November 2021



Justice Vikochi Chima