

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION CASE NO. 347 OF 2018**

REPUBLIC ..... APPLICANT

VERSUS

MICHAEL JOMODAN

TOANA INTERNATIONAL LIMITED ..... RESPONDENTS

**RULING ON REVISION**

1. On 10<sup>th</sup> May, 2018 the Director of Public Prosecutions filed an application for revision after Hon. E Mutunga, Senior Resident Magistrate dismissed Mombasa Chief Magistrate's Court Criminal Case No. 1426 of 2017 when the accused persons (respondents) failed to attend court on several occasions. He deemed the case to be a waste of the court's time and dismissed it under the provisions of Section 202 of Criminal Procedure Code. This court has been moved through the provisions of Section 362, 364 and 365 of the Criminal Procedure Code to revise the said order.
2. Mr. Adera Advocate, appeared for the Anti-Counterfeit Agency which was the complainant in the lower court case. He submitted that the respondents never appeared in the lower court to take plea and that the said court erroneously dismissed the charge under Section 202 of the Criminal Procedure Code (CPC). He further submitted that the prosecution was unable to personally serve the respondents who

are based outside the country. He referred to the provisions of Section 28(3) as read with Section 28(4) of the Anti-Counterfeit Act, which state that where an order for acquittal or dismissal is made, the court must make a finding on the status of the counterfeit goods by way of forfeiture.

3. Counsel for the applicant stated that the Trial Court failed to make an order for forfeiture of the goods. He prayed for an order of revision so that the case could be remitted to the lower court to make a determination as to the status of the said goods that were seized was uncertain.

#### ANALYSIS AND DETERMINATION

The issue for determination is if it was procedural for the Trial Court to dismiss the lower court case without making an order for forfeiture of anti-counterfeit goods.

4. Section 362 of the Criminal Procedure Code provides as follows with regard to the powers conferred on the High Court on revision: -

*“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.”*

5. The chronology of the proceedings of the lower court as to what happened on various dates is well articulated in the application for revision and I need not restate the same herein. A perusal of the lower court file indicates that from 21<sup>st</sup> September, 2017 to 26<sup>th</sup>



April, 2018 when the respondents should have been arraigned and tried in the lower court, they were nowhere to be seen. Their absence led to dismissal of the case under the provisions of Section 202 of the CPC. The said Section provides as follows:-

*“If in a case which a Subordinate Court has jurisdiction to hear and determine, the accused person appears in obedience to summons served upon him, at the place and time appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and the place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks.” (emphasis added).*

6. The above provisions and the marginal notes to Section 202 of the CPC address the issue of **non-appearance of a complainant** at the hearing and not the non-appearance in court of an accused person. In dismissing the lower court case under Section 202 of the Criminal Procedure Code on the basis that the accused persons were not in court, the Trial Magistrate made an erroneous decision.

7. On 7<sup>th</sup> November, 2017 the Trial Magistrate had made an order for warrants of arrest to issue against the respondents. On 23<sup>rd</sup> January, 2018 he did not inquire if the said warrants had been executed. The prosecutor informed the said Magistrate that the accused persons had been served with summons through their clearing agent. The

prosecutor further informed the Trial Court that a copy of the summons was served through registered mail but the respondents had absconded court. The prosecutor prayed for a mention date for orders of forfeiture to be made.

8. On 26<sup>th</sup> April, 2018 the prosecutor stated that she was not ready to proceed and the case was dismissed. As Mr. Adera submitted, after dismissing the case, the Hon. Magistrate should have gone further in making a decision of what was to become of the goods that are said to be counterfeit. The provisions of Sections 28(3) and (4) of the Anti-Counterfeit Act state as follows:-

*“(3) The court before which a person is charged with an offence under this Act shall, whether such person is convicted of the offence or not, order that any goods in his possession which appear to the court to be counterfeit goods or to be tools used or intended to be used for making counterfeit goods, be destroyed or otherwise dealt with as the court may deem appropriate.*

*(4) where a person charged with an offence under this Act absconds and does not appear in court or where counterfeit goods are seized but are not claimed, an inspector may apply to have the counterfeit goods forfeited to the state for destruction.* (emphasis added).

9. The proceedings of the lower court indicate that after Hon. Mutunga, SRM, dismissed the case against the respondents, he did not make further orders on what was to happen to the counterfeit goods. The Anti-Counterfeit Agency was left with goods which it is stuck with and can do nothing about unless a court of law gives an order directing whether they should be forfeited to the State for destruction or not.



10. I do concur with Mr. Adera that the application for revision has merit. I hereby grant the prayer sought for reinstatement of Mombasa Chief Magistrate's Court Criminal Case No. 1426 of 2017, **Republic versus Michael Jomodan & Toana International Limited**. Consequently, the order for dismissal of the lower court case is hereby set aside.

11. The said case will be mentioned on 16<sup>th</sup> December, 2019 before the Chief Magistrate's Court Mombasa, for further directions. The case will be heard by any other Magistrate of competent jurisdiction other than Hon. Mutunga SRM, whose order forms the subject of this revision. It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of November, 2019.**

  
**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Muthom holding brief for Mr. Adera for the applicant

No appearance for the respondents

Mr. Oliver Musundi - Court Assistant