IN THE HIGH COURT OF JUSTICE OF THE F.C.T.

IN THE ABUJA JUDICIAL DIVISION

MAGISTRATE APPEAL

HOLDEN AT COURT NO.8 NYANYA-ABUJA

ON WEDNESDAY, THE 20TH DAY OF MAY, 2020

BEFORE: HON. JUSTICE U.P KEKEMEKE(PRESIDING JUDGE)
HON. JUSTICE K. N. OGBONNAYA

JUDGE

SUIT NO.: FCT/CRA/25/2018

BETWEEN:

CHARLES OKOYE ....APPELLANT

AND

COMMISSIONER OF POLICE..........................RESPONDENT

JUDGMENT

In the Appeal before this Court the Appellant Charles Okoye is Challenging the Ruling of the Court

blow for not granting him the Reliefs sought in motion M/104/17 wherein he wanted an Order of Court for the release of a Volkswagen Bus Reg. No.XA 120 YAB chasis No. WVW 222702RH068317-Green in color with white stripes. He had wanted the vehicle to be released on Bond to him pending the determination of the substantive Suit. Meanwhile the vehicle is the material in issue in this case and there is ownership tussle. The motion was challenged by the Respondent in a 21 paragraph Counter Affidavit. After hearing both parties the Presiding Magistrate did not grant the application hence this Appeal.

The Appeal is predicated on the following 4 grounds:

That the Magistrate misconducted himself in law by not considering the Provision of Section 331 (2) ACJA 2015. That he conducted the case in such a manner that the Appellant is not likely to receive fair hearing/trial based on likelihood of bias.

That the Magistrate erred in law by his failure to consider the affidavit evidence of the appellant in exercise of its discretionary powers. More over that the Magistrate erred in law when he held that the application can only be brought after the subject matter has been tendered in Court as an Exhibit.

The Appellant sought the setting aside of the said Ruling and granting of the said Relief as sought and as contained in the said motion filed on 21/11/17.

In Order to fully understand the issue before this Court, it is imperative to state briefly the facts of this case.

The Appellant is the 3rd Accused person or 3rd Defendant at the lower Court Charged with the offence of receiving stolen goods and cheating contrary to Section 79,317 and 320 of the Penal code.

Going by the FIR, the norminal complainant bought the said vehicle for his wife for N450,000.00 (Four

Hundred and Fifty Thousand) Naira only from the 4th suspect Yarima Idris who is at large and who exchange the said Bus with a parcel of land valued at N700,000.00 (Seven Hundred Thousand) Naira only. But Yarima after back after 3 days of the agreement, deceived the norminal complainant, collected back the land documents, sold the vehicle and absconded and all efforts to reach him proved abortive.

The vehicle was found in possession of the Appellant. It was discovered that Appellant bought the vehicle from Yarima without any prove of change of ownership. The appellant was charged to Court. He applied that the vehicle be released to him relying on the provision of Section 331 (2) Administration of Criminal Justice Act (ACJA) 2015.

Meanwhile the charge is on joint act , theft receiving stolen property and cheating. The lower Court refused to grant the release of the vehicle.

The Appellant came before this appeal Panel to challenge the decision of the lower Court.

It is imperative to point out that this case was later transferred to another Magistrate. It is in that Court that this matter was pending before it was referred to this Panel.

This Court had gone through the appellant brief and the recordings of the lower Court including, the Ruling being challenged. The Court had distilled that the main crux of the application by the appellant is that the Magistrate wrongly exercised its discretionary power by not considering the provision of Section 331 (2) of ACJA 2015 in which the application is predicated. The issue of bias raised is ancillary to the above.

For clarity and posterity it is imperative to state verbatim the provision of Section 331(2) ACJA 2015. The said provision states thus:

"**Notwithstanding that the trial proceeding or an appeal is pending in respect of the case the court <u>May</u> in any case make an Order under the Provisions of Subsection (1) of this Section for the delivery of any property to a person appearing to be entitled to the possession of the property on his executing a Bond with or without Sureties to the <u>satisfaction of the Court</u>, undertaking to restore the property to the Court". (Emphasis mine)**

To understand and appreciate the above provision it is important to also state in full the provision of Section 331 (1) ACJA which states thus:

"Where any proceedings or trial in a criminal case is concluded the <u>Court may make such Order as it thinks fit</u>, for the disposal by destruction, confiscation or <u>delivery to a person appearing to be entitled to the possession or otherwise, of any movable property or document produced before it or in its custody regarding which an offence</u>

<u>appears to have been committed or which has been used for the commission of an offence".</u>

From the content of Section 331 (2) ACJA, for Court to act or take any decision on the property as in this appeal, there must be on going trial or proceeding or appeal in respect of the property. The use of the word **"MAY"** in line 3 of the section means that whatever decision the Court takes is exclusively in the exercise of its discretionary power, as it deemed fit. This means that grant of any application as in this case is not automatic. It is at the discretion of the Court not at the whims and caprices of the applicant. Such discretion can be exercised favorably even without the applicant presenting a surety provided the Court is satisfied with the applicant's undertaking.

Again the power of the Court to make an Order under Section 331(1) can only come into existence after the conclusion of trial or proceeding not while trial is going on. This means that, by Section 331 (2)

the Court can exercise its discretion to release such property while trial is going on, if the Court is satisfied. That means the Court can do so with or without the Applicant having a surety. This power and the exercise of such power is not automatic. It is at the exclusive discretion of the Court upon been satisfy with the Bond and undertaken made by the applicant.

It is not for the applicant to weigh, dictate and Judge whether the discretion was exercised properly or not. It is the Court that has that right. The Magistrate in the lower Court exercised that discretion unfavorably to the Applicant. The said magistrate is right in doing so, going by his reasoning's in the Ruling.

To start with the property in issue is at the center of the debacle in this case. The said property has not been tendered as an EXHIBIT in this case because the prosecution is yet to do so going by the record of proceeding. As it were the property is still with

the police or it is still with the Prosecution. Going by Section 331(2) ACJA 2015, the property is yet to be in custody of the Court. The question is should this Court grant an Order for the release of what is not yet in its custody?

It is my humble view that the Court has no power to do so at this stage notwithstanding the provision of the Section 337 (1) ACJA.

A closer look at the provision of Section 337 (1) shows that upon a report by police on property as in the present case, the Court.

"…. Shall make an Order in respect of the disposal of the property or its delivery to the person entitled to its possession".

"Or such other Orders as it may deem fit in the Circumstance"

The tail part of Section 337 (1) ACJA 2015 shows that even where the police had made a report of the seized property to Court within 48 hours, the

Court has a right and power to either release the property to the person entitled to it or to refuse to release same depending on the circumstance of the case. That is why the provision of Section 331 (1) has at its ends with

"…or such other orders as it (the Court) may deem fit to make in the circumstance.

That phrase further shows that the grant of an application to release a property in issue upon the report made by police is at the discretion of the Court and not automatic. The Court in, exercise of that discretion will consider the circumstance of the case. Once it is convinced that there is no merit in such application and that the circumstance does not warrant the release of the property, Court will not order for its release. That is exactly what the lower Court did in this case. That decision by the lower Court in that regard is right. The Court discretion was exercised judiciously and judicially. That is what this Court holds.

Again a closer look at section 10 (4) ACJA 2015 on which the appellant also anchored this appeal shows that:

"… the police May upon request by……..any party having interest in the property, release such property on Bond pending the arraignment of the suspect before a Court".

From the above, it means that by the use of the word "May" the police, may or may not, upon request release the property. This means the police has the discretionary power to act otherwise where there is an application to release the property. It is not automatic that the police must release property once an application is made.

It is imperative to look at Section 10 (5) (6) ACJA. In subsection (5) where application is refused under section 10(4), the police shall make a report to Court informing it about the property taken from the arrested person, stating the property in issue.

Section 10 (6) shows that where such report is made the Court involved,

"…May if it is of the opinion that the property can be returned in the interest of Justice, direct that the property may be returned…to such person having interest in the property".

By the use of the phrase

"the Court…may if it is of the opinion…"in the interest of justice..."

This means and clearly shows that it is at the discretion and opinion of the Court to decide if grant of order to release the property is in the interest of justice.

The above provision shows and further confirms that the grant of any application for release of vehicle seized in the cause of a criminal case can only be done at the discretion of the Court where the police had made a formal report. Section 10 (4) ACJA 2015 also shows that to release such property

by the police upon request is not also automatic. It is at the discretion of the police because of the use of the word “May”.This means that the submission and argument of the Appellant in this regard lacks merit. His submission and the Legion of Judicial authorities cited cannot stand because that is not the intendment of the drafters of that law and the decision of the Court in all those case. This Court refuses to buy those submissions because they are deceivingly misconstrued.

The letters of the Section 10 (4) ACJA is clear and does not need to be misinterpreted by anyone.

Giving the circumstance of the case, the FIRS the facts of the case as stated by the Appellant, and the facts that the Court was yet to here the case and there is no justice in allowing the release of the vehicle at this stage in this case. It should have been a different thing and the Court would have considered the review of the Ruling if the property in issue has already been tendered before the lower

Court and admitted as exhibit. In that case the Court would have release the vehicle before conclusion of trial based on Section 331 (2). After all, the said section 331(2) can only be operational where there is already a trial or appeal. This matter is yet to go into trial. The only thing done so far is arraignment. Section 331 (2) cannot therefore be applied at this stage. That been the case any application predicated on section 331(2) cannot stand.

The trial Magistrate is right in refusing the application to release the vehicle in its Ruling of 9/5/18. This Court therefore upholds the said Ruling.It is important to point out that the fact that a party did not respond to a process served on it does not mean that the Court will swallow hook line and sinker the facts contained in the affidavit of an applicant. Yes it is said that unchallenged facts are deemed admitted by the Respondent. Where such unchallenged facts exist the Court is still duty bound

to critically analyze such facts which are deemed admitted by the Respondent. Admission by the Respondent by not filing a Counter to such affidavit does not mean and should not be interpreted to mean admission of those facts by the Court because the Court is duty bound to weigh and scrutinize such facts before it can come up with its decision on the application. The above applies to this case as the present case is not and cannot be an exception.

So notwithstanding that the Respondent did not file any response – Respondent brief to challenge this appeal it does not mean that the Court should not consider the issue raised in the appeal. It only means they admitted what the appellant stated having not filed any response to challenge same.

It is important to point out that the recording of proceedings in any case is as recorded by the Court.- the Presiding Officer Judge or Magistrate as the case may be and not as recorded by the Counsel in the matter pending in that Court. There is no

decision of the Court where the appellate Court can rely on the record made by the Counsel. So the particulars of error of appeal that the record of proceeding did not cover the records as "compiled" by the appellant Counsel is unfounded and unknown to law.

There is nothing going by the record of proceeding and even the reasoning's of the Court in the Ruling that shows evidence of bias by the Magistrate as the Appellant Counsel is trying to portray. The allegation that the Magistrate said to the appellant Counsel

"If you pressure me you will fail woefully"

Is unsubstantiated. The Counsel did not state what gave rise to that and what the alleged pressure was and what is and in what manner he behaved that made the Magistrate to say so if he actually did. It should be remembered that the magistrate just like the Judge is the master of its Court. The Appellant

Counsel would have told Court the nature of the pressure which the Court complained of.

A closer look at the Ruling of 9/5/18 shows that the Court even asked the Appellant Counsel to make the application de novo. Rather than doing so the Appellant Counsel decided not to, instead he anchored on bias by the Magistrate. The issue of bias by the magistrate is only ancillary to this interlocutory appeal.

From all indication this Appeal lacks merit.All in all this Court uphold the decision of the lower Court.

This is the Judgment of this Court delivered today. The……………day of …………………2020 by me.

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HON. JUSTICE	HON.JUSTICE
K.N.OGBONNAYA	U.P.KEKEMEKE
(JUDGE)	(PRESIDING JUDGE)