REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO E398 OF 2021

MOHAMED ASIF REHMAN.....APPLICANT

VERSUS

THE CHIEF MAGISTRATE COURT, MAKADARA.....RESPONDENT

RULING

(Being a ruling from the order of Hon. H.M. Nyaga, CM, dated 5/10/2021 in Makadara Chief Magistrate's Court in Criminal Case No. 3881 of 2015, Republic v Mohamed Asif Rehman)

The case for the applicant

The applicant has applied for the following orders.

1) Spent

2) To grant an order staying further proceedings until the hearing and determination of this application inter partes.

3. To make an order calling for and examining the record of the proceedings in the Chief Magistrate's court at Makadara in Criminal Case No. 3881 of 2019, for the purpose of satisfying itself as to the correctness, legality or propriety of the ruling and the resultant orders issued on 5/10/2021 by the trial magistrate.

4. To make any order that the court deems fit in the interests of justice.

The application is based on five (5) grounds that appear on the face of the notice of motion dated 4/11/2021, with the major grounds being the following. First, on 5/10/2021 the learned chief magistrate misdirected himself as to the tenor and purport of section 180 of the Evidence Act. Second, there was no legal basis for the learned chief magistrate to rule that the defence would not be allowed to make any further objections as to the legality and authenticity of court orders relied upon by the prosecution pursuant to the various applications filed by the investigating officer. Third, the learned chief magistrate erred in law in misconstruing the clear distinctions between the offices of the Director of Public Prosecutions (DPP) and that of the Director of Criminal investigations (DCI).

Fourth, the learned chief magistrate erred in law in failing to consider its duty in guaranteeing the fair trial rights of an accused person as provided for in article 50 of the Constitution. Fifth, the learned chief magistrate erred in law in ordering and directing the defence on the manner it shall conduct its defence by limiting it on what objections it can or it cannot make.

Furthermore, the application is supported by 11 paragraphs supporting affidavit of the accused/applicant, whose averments are unnecessary to set out herein for reasons that will be stated herein below.

The Office of the Attorney General (OAG) filed five grounds in opposition to the application.

Those grounds are as follows. The application is made at the interlocutory stage and ought not to be entertained as it will delay the conclusion of the trial and the revisionary jurisdiction should not be invoked so as to micro-manage the trial court in the conduct and management of its proceedings citing Thomas Patrick Gilbert Cholmondeley v Republic (2008) e-KLR, which was cited with approval in Joseph Nduvi Mbuvi v Republic (2019) e-KLR.

The applicant has misread the ruling of the trial court; which did not expressly rule that the defence will not be allowed to make any further objections as to the legality and authenticity of court orders.

The learned trial magistrate did not err in interpreting the provisions of section 80 of the Evidence Act and the legal mandates of the Offices

of the DPP and DCI. The fair trial rights of the accused/applicant were not breached. The application is an abuse of the court process.

Issues for determination.

I have perused the ruling and the resulting order of the learned chief magistrate. I have also perused the grounds in support and in opposition to the application**.**

As a result, I find the following to be the issues for determination.

1. Whether the ruling and order are ripe for revision.

2. Whether it was necessary for the court orders to bear the court criminal application (motion) case number to show the court from which they emanated.

Issue 1

It appears that the trial court overruled the objection of the advocate for the accused/applicant, to the production as exhibits of the following documents that had been marked for identification.

1. The account opening documents (Mf1-49) and;

2. The account statements from 20th December 2012 to 27th October 2018.

I find as lacking in merit the basis of the objection namely that the miscellaneous application should have been done by the ODPP rather than the investigating officer; since section 180 of the Evidence Act (Cap 80) Laws of Kenya authorizes a court to issue a warrant to a police officer or other person named in that warrant (order) to investigate the bank account of any person in any banker's book. I further find that the learned magistrate was right in finding that Cpl Kibet, who was the investigating officer, acted within his powers in investigating the account of the accused/applicant.

Furthermore, I find that the learned chief magistrate was right in finding that the provisions of section 118 of the Criminal Procedure Code (Cap 75) Laws of Kenya grant to the investigating officer similar statutory powers to investigate the bank account of any person named in the warrant (order) issued by the court. That is why the investigating officer has to support his application with a sworn affidavit before he is issued with the search warrant. Additionally, it must be proved upon oath that the issuance of a search warrant is warranted before the court issues it.

It therefore follows that it is the police through the investigating officer who are authorized to apply for search warrants and once it is authorized by the issuing court, the person or institution which is under investigation has to comply failing which criminal sanctions will follow.

Additionally, once the investigating officer has been authorized by the court, the approval, if any, by the ODPP is merely an administrative or ministerial act.

It is also important to point out that the prosecutorial powers of the ODDP as set out in the article 157 of the 2010 Constitution of Kenya do not include powers to investigate bank accounts or any searchable material. The mandate conferred upon the ODDP by the 2010 Constitution of Kenya in article 157 (4) is to direct the police to investigate any information or allegation of criminal conduct and the police are mandatorily required to comply.

I therefore find that the learned chief magistrate was right in finding that: *"The distinction between the roles that the institutions (ODPP and police) is as clear as night and day and therefore cannot be said to be conflicting."*

I therefore find that ground 1 in support of the motion is without merit and I hereby dismiss it.

Issue 2

Once a police officer has received a complaint he may take any necessary steps within the law to investigate it. As at that time no case will have been filed in court. The filing of the case in court will depend upon the outcome of the investigations. If the outcome of the investigation, does not disclose a prosecutable offence, no case will be filed in court. On the other hand, if a prosecutable offence has been disclosed by the evidence, a case may be filed in court; which will of necessity bear the court case number.

It therefore follows that the issue taken by counsel for the accused/ applicant that the orders do not bear the case number is a minor issue of no consequence. It is a harmless error; which is cured by the details of the accounts to be investigated. I therefore find that the issue taken by counsel for the accused/applicant is without merit and I hereby dismiss it.

It is equally important to point out that it is unnecessary to file affidavits in respect of an order or ruling sought to be revised. The reason for this is that no evidence is needed in matters, where the revisionary jurisdiction of the court has been invoked. All that is required of a party applying for revision are the reasons or grounds of the application. It is for this reason that I found it unnecessary to set out the averments in the supporting affidavit of the applicant.

Furthermore, it is equally important to point out that it is only final orders that are subject to be revised; which orders are usually made after judgement (conviction and sentence) or after the acquittal of the accused. Interlocutory orders that are made in the course of a trial are not ripe for revision. If this were to be allowed it will result in delays and inconvenience to the parties. It may also administratively lead to congesting the registry of this court with magisterial court files that are called by the Deputy Registrar of this court with the result that the magisterial court proceedings will be stopped administratively because their files will have been taken to the High Court. This should be avoided in the interests of speedy disposal of trials, which is among the other rights, that are guaranteed to an accused person in article 50 (2) (e) of the 2010 Constitution of Kenya; which reads as follows:

> "*to have the trial begin and conclude without unreasonable delay…"*

In view of the foregoing, I find as persuasive the case cited by the OAG namely Joseph Nduvi Mbuvi v Republic, supra, which in turn cited with approval Thomas Patrick Gilbert Cholmondeley v Republic, supra, in which the court observed that the revisionary jurisdiction of the court should not be invoked so as to micro-manage the proceedings in the magisterial courts.

It is important to point out that a mid-trial or interlocutory order of a trial court may be revised if its effect amounts to a final order. In this regard, the decision of this court (Bwonwong'a, J) in Republic v Shadrack Savali Mwongami consolidated with Housing Financing Corporation of Kenya v Shadrack Savali Mwongami & Another Criminal Revision Nos. 23 and 31 of 2020, is instructive and persuasive. In that revision a mid-trial or interlocutory order of a trial court was set aside because it amounted to a final order and had the effect of prejudicing the fair hearing of the case.

Grounds 2, 3 and 5 of the notice of motion did not arise from the ruling and order of the trial court and for that reason I hereby dismiss them for lacking basis in the issues raised by the accused/applicant.

Other matters of concern

Counsel for the accused/applicant has cited the Chief Magistrate Court, Makadara as the respondent. In applications for revision there are only two parties namely the accused and the Republic. The trial court is not a party and should not have been cited as a party. The Office of the Attorney General should not have been served with the application because counsel for the Republic in all criminal revisions is the Office of the DPP, which always should be served in applications for revision. The then counsel on record for the prosecution (Ms. Joy) was wrong in law in informing the court that the DPP was not a party to the instant revision.

In the instant application I treated the appearance of the Attorney General in this revision as that of an amicus curiae. Additionally, I found his grounds of opposition to be useful.

In the premises, the applicant's application fails and is hereby dismissed in its entirety.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT NAIROBI THIS 31ST DAY OF JANUARY 2022.

J M BWONWONG'A

JUDGE

In the presence of:-

Mr. Kinyua: Court Assistant

Mr. Mtange for the accused/applicant.

Ms. Mumbi on behalf of Attorney General for the Respondent