REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. 386 OF 2018
REPUBLIC.....APPLICANT

VERSUS

EVANS MAIRURA OMWENGA.....RESPONDENT

(From the Ruling and Orders made in Eldoret Chief Magistrate's Criminal Case No. 6586 of 2014 in the by Hon N. Wairimu, PM on 31st October 2018)

RULING ON REVISION

[1] The Director of Public Prosecutions moved the Court vide a letter dated **13th November 2018** seeking for revision under **Sections 362** as read with **Section 364(1)(b)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. He accordingly prayed that the Court be pleased to call for the **Chief Magistrate's Criminal Case No. 6586 of 2014: Republic vs. Evans Mairura Omwenga**, for the purpose of satisfying itself as to the correctness, legality, and propriety of the ruling and order given therein on **31st October 2018** by Hon. N. Wairimu, Principal Magistrate.

[2] The application was premised on the following grounds:

> **[a]** That the accused was charged with several counts of forgery, making a document without authority and trespass, all of which are offences under the **Penal Code, Chapter 63** of the **Laws of Kenya;**
>
> **[b]** That the Prosecution called as a witness the document examiner who produced a first report sometimes in **June 2018;**
>
> **[c]** That when the Prosecution sought to recall the document examiner to produce a second report, the application was rejected by the trial magistrate;
>
> **[d]** That counsel watching brief then, with the leave of the court, made another application seeking to have the victim heard pursuant to **Section 9(2)** of the **Victim Protection Act, 2014,** and also for the victim to be allowed to adduce additional evidence in the form of a further report/testimony of the document examiner;
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> **[e]** That the learned trial magistrate however disallowed the application in a ruling delivered on **31st October 2018**, on the ground that the application amounts to having a parallel prosecution of the accused person;
>
> **[f]** That the learned trial magistrate failed to consider that the accused person was at all times during the trial ably represented by a team of counsel and is not likely to be disadvantaged or prejudiced;
>
> **[g]** That the learned trial magistrate failed to take into account that the nature of the case, the distress and repercussions to the victim and the fact that the Prosecution was at all times willing to give advance copies of all the documents and statements to the defence and sufficient time to prepare their defence and to cross-examine each witness;
>
> **[h]** That the learned trial magistrate erred in failing to realize the role of the victim's lawyer and effectively locking out the evidence by the Prosecution;

[3] Accordingly, the lower court record was called for and it reveals that the respondent was charged before the lower court with two counts; one of forgery of a document of title to land contrary to **Section 350(1)** of the **Penal Code;** and the other of conspiracy to defraud contrary to

Section 313 of the **Penal Code**. Both offences were alleged to have taken place on the **19th June 1996** at Ardhi House in Eldoret Township in connection with land parcel **LR No. Eldoret Municipality/Block 14/783.**

[4] The lower court record further confirms that the respondent denied those allegations; that his trial commenced on **15th September 2016**; and that so far 6 witnesses have testified before the lower court. In the course of the trial, an application was made by the applicant to have the document examiner recalled but was overruled. The Prosecution then sought to call the complainant to produce the document examiner's report pursuant to **Section 9(2)(a)** of the **Victim Protection Act**; which application culminated in the impugned ruling, dated **31st October 2018.** The pertinent part of the ruling and the ensuing order is replicated hereunder:

> **"...Having considered the above mentioned authorities and thoroughly considered the sentiments contained therein, I would make a finding that allowing the application by counsel watching brief will indeed amount to a parallel prosecution as it aims [to] include further evidence which has not been included by the prosecution. The application by counsel watching brief for the complainant is therefore disallowed as this would amount to having a parallel prosecution of the accused person..."**

[5] That is the decision that is the target of the instant revision application; and upon directions being given that the same be canvassed by way of written submissions, **Ms. Okok**, learned counsel for the applicant filed her written submissions on **9th September 2021**. She reiterated the grounds set out in the applicant's letter dated **13th November 2018** and submitted that the learned trial magistrate erred in disallowing the application to have the document examiner recalled. She relied on **Article 50(2) and (9)** of the **Constitution** in connection with the right to have adequate time to prepare for one's case; and to have reasonable access to evidence. **Sections 4(2)(b) and 9(2)(b)** of the **Victim Protection Act** were brought to the fore to underscore the applicant's submission that the broad spectrum of a fair trial includes taking into account the interest of the victim; while affording the accused adequate time and material to respond to those concerns. Counsel also cited the case of **Thuita Mwangi & 2 Others vs. Ethics & Anti-corruption Commission & 3 Others** [2013] eKLR for the proposition that, in so far as the Prosecution had not closed its case, it should be freely allowed to adduce additional evidence. Here is the excerpt that the applicant considered pertinent:

> **"The right to be provided with material the prosecution wishes to rely on is not a one off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence."**

[6] Mr. Nyachiro, learned counsel for the respondent opposed the application. He defended the decision of the learned trial magistrate and reiterated her stance that to allow the application for the victim to produce the document examiner's report would be tantamount to a parallel prosecution. He relied on **Bungoma HCCR No. 34 of 2014: Republic vs. Joseph Lentrix Waswa** and **Nairobi High Court Criminal Case No. 56 of 2011: Republic vs. Paul Mwangi Macharia** and submitted that, in a criminal trial, the evidence can only be presented by the prosecuting counsel and not by the victim as guided by counsel watching brief for the victim; and that the victim's participation cannot be active and parallel to that of the prosecutor. He conceded however that the **Victim Protection Act** recognizes that counsel for the victim is at liberty to raise points of law at any stage of the proceedings and to file submissions at the close of the prosecution case as well as final submissions should the accused be placed on defence.

[7] In the premises, the single issue for determination is the question whether a perusal of the record of the lower court, and in particular the ruling dated **31st October 2018**, evinces any error in terms of correctness, legality, and propriety. In this connection, I am entirely in agreement with the position taken by **Hon. Muriithi, J.** in **DPP v Jackson Cherono [2019] eKLR** that

> **A revision in a criminal trial is a "judicial review" for ascertainment of the legality of the process and order of the criminal trial Court."**

[8] Hon. Odunga, J. took the same view in **Joseph Nduvi Mbuvi v Republic** [2019] eKLR thus:

> **"In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.**

[9] Indeed, Sub-Articles (6) and (7) of **Article 165** of **the Constitution** provide that:

> **(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 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.**

[10] For purposes of criminal matters, **Section 362** of the **Criminal Procedure Code** recognizes that:

> **"The High court may call for and examine the records 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."**

[11] In the same vein, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

> **"In the case of a proceeding in 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."**

[12] A perusal of the lower court record shows that an application was made for the recall of a witness which was declined after a merit consideration. Indeed, in her submissions, Ms. Okok made it clear that her complaint was in connection with the learned trial magistrate's appreciation of the role of the victim in the proceedings before her. Accordingly, she argued that:

> **"...Section 9(2)(b) of the Victim Protection Act allows the court to ensure that no party suffers prejudice and as such there is no conflict with Article 157 of the Constitution which vests prosecutorial powers on the Director of Public Prosecutions. The victim has a right to be heard at any state of the proceedings in a trial and their views taken into account before a decision is arrived at pursuant to that section. The learned trial magistrate erred by limiting the extent of the victim's participation in the trial..."**

[13] Since the lower court gave reasons for its decision, I take the view that the proper course for the applicant to take was by way of appeal instead of review. Indeed, **Section 364(5)** of the **Criminal Procedure Code** is explicit that:

> **"When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."**

[14] I note that in Bungoma HCCR No. 34 of 2014: Republic vs. Joseph Lentrix Waswa an appeal was filed from the decision of the trial court when the right of the victim to participate in criminal proceedings was questioned. In that matter, the Court of Appeal had occasion to pronounce itself on the matter thus:

> **"The constitutional and statutory role of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process. The nature and scope of the victim's intervention prescribed by the VPA should be interpreted in conformity with the Constitution and implemented by the trial court at the appropriate stages of proceedings as the justice of each case requires. It is the duty of the trial court to conduct a fair trial and to protect and promote the principles of the Constitution *(Article 159(2) (e))"***

[15] *The Court further stated that:*

> **We have been asked in this appeal to set the full parameters of the extent of the victim's participation in the trial process. Other than what we have said above, we recognize that the issue of victim's participation would arise in infinite variety of factual situations where the trial court would be required to offer guidance to ensure a fair trial to an accused person.**
>
> **A rigid prescription would not only limit the exercise of rights and the judicial discretion of the trial court but would also impede the administration of justice and the development of the law. It is preferable that the exercise of the victim's rights should be determined by the trial court as occasion arises and as the justice of each case requires."**

[16] It is manifest therefore that where a trial court takes a decision as to the right of the victim of a crime to participate in the trial either individually or through counsel, which is thereafter impugned, the matter boils down to the merits of such a decision and should ideally be challenged on appeal. Needless to say that the scope of revision is limited. Accordingly, I share the viewpoint taken by Hon. Wakiaga, J. in *George Aladwa Omwera vs. Republic [2016] eKLR*, in which he cited the decision of the Supreme Court of India in Veerappa Pillai vs. Remaan Ltd for the holding that:

> **"The supervisory power is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order should be made…"**

[17] In my careful consideration therefore, in so far as the Court is now being asked to consider and revise the decision of the learned trial magistrate on the merits, revision is not apt. Thus, it is my finding that the application dated 13th November 2018 is entirely misconceived and is, therefore, for dismissal. The same is accordingly dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JANUARY 2022.

OLGA SEWE

JUDGE