Ruto v Republic (Criminal Revision E12 of 2021)
[2022] KEHC 10156 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEHC 10156 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL REVISION E12 OF 2021

JM NGUGI, J

JULY 28, 2022

BETWEEN

SIMON KIPRONO RUTO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant was charged with two counts in Molo Criminal Case No. 2704 of 2018. The first count was giving false information to a person employed in the public service contrary to section 129 (a) of the *Penal Code* while the second count was mining without a licence contrary to section 202(1) of the *Mining Act* No. 12 of 2016.

2. The applicant pleaded not guilty, and the matter proceeded to trial on February 12, 2020, August 6, 2020, November 25, 2020, February 11, 2021 and September 15, 2021before Hon. E. Nderitu- Chief Magistrate. The applicant was subsequently put on his defence on December 2, 2021.

3. In an application for revision by way of a letter to this court, the applicant is not only aggrieved by the ruling of the trial court that put him on his defence but also the proceedings of February 11, 2021 which he says visited a massive travesty of justice upon him. The letter dated December 4, 2021 written by the Applicant's lawyer seeks a review of the proceedings of February 11, 2021 and the ruling of the court issued on December 2, 2021.

4. The applicant writes that when the matter came up on February 11, 2021, the prosecution presented two witnesses i.e., Nabil Adamjee as PW8 and Jacob Muchai as PW9. Despite a strong protest from the defence, the applicant says PW9, who is the investigating officer was allowed to produce PEXH 2, a contested joint venture agreement dated May 8, 2017(hereinafter 'the Agreement') purportedly entered into between PW8 and the applicant.

5. The applicant says that the agreement, purportedly drawn by an advocate named Orina Erastus Menge is a forgery and he requested that the same be produced by its drawer so that thedefence could get an opportunity to challenge its validity through cross-examination, but the trial court overruled his objection and allowed its production.

6. The applicant contends that the agreement heavily implicates him in relation to the charge of mining without a licence. He argues that the court's decision on February 11, 2021severely prejudiced him and the production of the agreement heavily tilted the ruling of the Trial court towards finding that he had a case to answer.

7. The applicant decries having been charged with trumped up charges instead of being treated as a whistle-blower of PW8's illegal mining activities yet, instead the Prosecution had PW8 testify as its witness.

8. The State opposed the application through the affidavit of Annastacia Mumbe - Prosecution Counsel. The State's position is that a court may not entertain a request for revision of a finding, sentence, or order of the Subordinate court if the requesting party did not appeal even though he or she was able to do so. It cites section 364 (5) of the *Criminal Procedure Code* and the case of *Republic v Mohamed Rage Shide* [2016] eKLR.

9. The State contends that the High Court can only exercise revisionary powers set out in section 364 of the *Criminal Procedure Code* if the subordinate court orders or proceedings are found to be incorrect, illegal, marred by impropriety or generally irregular; grounds it says have not been demonstrated in this case.

10. To the State, the most appropriate recourse for the applicant would have been to file an appeal and not a review. The State believes that no prejudice has been occasioned to the applicant by the proceedings of February 11, 2021since the Applicant's counsel was allowed to cross examine PW9 about PEXH 2 and that the applicant can call Advocate Orina Rastus Menge during defence hearing and challenge the validity of PEX2.

11. The State further contends that the hearing of the case before the trial court is still ongoing and that the current application has caused immense delays. It prays that theapplication be dismissed.

12. The applicant filed submissions dated October 25, 2021. Although the Application relates to the proceedings of February 11, 2022 and the ruling on case to answer, I note that the applicant's submissions have delved into the entire proceedings before the trial court.

13. Essentially, the applicant argues that the prosecution did not prove either of the two counts. As to count i, the applicant submits that he made a truthful report to the police about motor vehicles transporting bauxite without proper documentation. This he contends was confirmed by PW6, PW12 and PW13 while PW2, PW3, PW4 and PW5 associated the said motor vehicles with PW8.

14. The applicant cites the cases of *Mbogo Samwel Mungai* HCR Appeal No. 57 of 2004 and *Michael Wamwongo Karongo v Republic* [2013] eKLR in which the courts, reasoned that to constitute an offence of giving false information under section 129 of the *Penal code*, the giver of the information must know it is false. The applicant further submits that his report that the mined bauxite belonged to Olulunga Mining and Industries Limited was also truthful, since PW8 testified that although the license had expired, the area from where it was mined exclusively belonged Olulunga Mining and Industries Limited pending renewal of their license.

15. On count ii, the applicant contends that the prosecution ought to have established that he participated in activities defined as mining under the *Mining Act*. According to the applicant the testimony of PW2,

PW3, PW4 and PW5 was to the effect that it was PW8 who was involved in mining activities. The applicant argues that if PW6 implicated Ololunga Mining Industries, all the directors and the company ought to have been charged. He submits that the evidence of the two PW7s was to the effect that he -the applicant had complained about another person mining in an area reserved for Ololunga Mining Ltd.

16. It is, however, the evidence of PW8 and PW9 that is most relevant to this Application. PW8 is the person the applicant believes ought to have been charged with the offence while PW9 was the Investigating Officer in the matter. The applicant is particularly aggrieved by the production of PEXH2 -the Agreement by PW9 and the two witnesses' reliance on it.

17. The applicant submits that the said PEXH 2 holds no evidential value since it is a contrived document that ought to have been authenticated by the maker and should therefore be disregarded by thecourt. The applicant thus contends that the burden of proving facts which justify the drawing of the inference of guilt is on the prosecution and that he therefore ought to be acquitted.

18. The chronology of events before the Trial court is that applicant objected to the production PEXH2 on the ground that its maker had not been called to produce it. The ruling by the trial magistrate reads as follows:

I have duly considered the objection to the document and agreement entered into between the accused and PW8 and obtained by the current witness in the course of investigations. The defense counsel have duly cross-examined PW8, a party to the same and the current witness being the I.O and having obtained same in the cause (sic) of investigations is competent to produce same the objection is disallowed.

19. The prosecution's witness proceeded to produce a copy of the said agreement after which again, theapplicant objected and insisted on production of the original or a certified copy thereof. The trial court noted this objection and upheld it.

20. In asking that the court review the proceedings of the trial court on February 11, 2022and the finding of a case to answer, the Applicant is invoking both the supervisory jurisdiction of the High Court given under article 165(6) of *the Constitution* as well as the power for revision by the High Court given under section 362 of the *Criminal Procedure Code* which provides:

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.

21. In the instant case, the court is called to revise the correctness, legality and/or propriety of admitting the agreement without calling its maker and the subsequent finding that the prosecution had established a prima facie case against the applicant.

22. I will first address the objection raised by the State to these revision proceedings, which is a preliminary issue. The State is invoking the provisions of section 364(5) of the *Criminal Procedure Code* which provides as follows:

(5) 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

23. Accordingly, the first issue for determination is whether an appeal lies from the two rulings of the Trial Court: Admitting the agreement and on the finding of a case to answer.

24. There is no provision in the Kenyan Criminal Procedure Code to guide the filing of interlocutory appeals in criminal matters. Indeed sections 347 and 379 of the *Criminal Procedure Code* only provide for an appeal upon conviction. Accordingly, the practice established by the Kenyan Courts has been that interlocutory appeals should only be permitted where the trial court made an order in the course of the trial which violated the appellant's fundamental rights. This was the principle set out in *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR where the Court of Appeal, gave the reasons for allowing an interlocutory appeal as follows:

> In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the *Criminal Procedure Code* allows only appeals by persons who have been convicted of some offence. The appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal. But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant's fundamental rights guaranteed by section 77 of the Constitution. Whether that order was made pursuant to section 60 (1) of the Constitution, and we have found it could not have been made under that section, or whether it was made pursuant to the exercise of inherent jurisdiction as the learned Judge said he was doing, the effect of the order was to violate the appellant's rights under section 77. The appellant had two choices. He could have chosen to wait until after the determination of the charge against him and if he was convicted, he would be entitled to appeal on all aspects of the trial. Secondly, he had the option to appeal under section 84 (1) of *the Constitution*. He chose to exercise this option and it is to be noted that the trial Judge readily allowed him to appeal. The Judge must have been aware that his decision touched on the fundamental rights of the appellant guaranteed by *the Constitution* and hence he (i.e. the Judge) readily agreed to stop the trial and allow the appellant to exercise his right of appeal under section 84 (7) of *the Constitution*. It was for these considerations that we held the appellant had a right of appeal to the Court and that we, therefore, had jurisdiction to hear his appeal.

25. The court however cautioned against the filing of interlocutory appeals in criminal trials reasoning that:

> First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused.

26. The above caution and principle has subsequently been applied by the Court of Appeal in *Martin Makhakha v Republic* [2019] eKLR and the High Court in *Evans Odhiambo Kidero v Republic* [2019] eKLR.

27. The instant case does not disclose any violation of the applicant's fundamental right by the trial court. Accordingly, an appeal does not arise as a matter of right or by virtue of the exception given in the above cited authorities. The application for revision is therefore not barred by section 364(5) of the *Penal Code* and I will consider the application on its merits.

28. The second issue is whether the admission of the agreement into evidence is a decision amenable to the discretionary revision powers of this court. The applicant objected to the production of the document on the basis that the Prosecution did not call its maker. The trial courtwas of the view that one of

the parties to the agreement was a witness to the said agreement and that the investigating officer had obtained it in the course of investigations and overruled the objection.

29. The court in *Njuguna Mwangi & another v Republic* [2018] eKLR commented as follows on objections to production of exhibits:

> In a situation such as the instant case which is challenging the admission of certain exhibits for failure to comply with certain legal requirements or standards before production and admission, it is perfectly within the purview or discretion of the trial court to determine the element of admissibility based on the relevant law. The consequence of such admission improper or otherwise, would attract a ground of appeal by either party upon conclusion of the case depending on whether there is a conviction or not.

30. In Mark Lloyd Steveson v R[2017] eKLR, I had this to say about this issue:

> For clarification, it is important to state the trite position that the High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances. While difficult to determine with mathematical precision when the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown, grave injustice might otherwise result or where justice might not by other means be attained. As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below. Hence, the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with due regard to the salutary general rule that appeals are not entertained piecemeal. (Internal quotations omitted)

31. While this court has revisionary powers, such power is not to be applied to nit-pick proceedings before subordinate court. In my view, this case represents a case where it would be a lot more fruitful for the applicant to let the trial conclude and then prefer an appeal if aggrieved by the final decision. He would have the benefit of placing before the High Court, the trial magistrate's thinking on the points he raises here – chiefly whether the charge sheet raises any offence in view of the evidence presented, and secondly, whether the Agreement admitted into evidence is properly authenticated and whether it is of sufficient probative value in the case. At that stage, he will have the advantage of raising the question whether the prosecution marshalled sufficient admissible evidence to prove the charge beyond reasonable doubt.

32. As things stand, the applicant is requesting the court to review a finding of a trial court that there was prima facie case sufficient to put him on his defence. In doing so, theapplicant solely relies on his argument that the agreement produced in the trial court was wrongly admitted in evidence. This argument would require a robust leap of faith and logic: an assumption that the agreement in question was the pivot that persuaded thetrial court to make a finding that a prima facie case has been established. Needless to say, such a gymnastic leap is impermissible in the exercise of the court's revisionary powers.

33. In any case, it is not all lost for the applicant as the court observed in *Njuguna Mwangi & another v Republic* (supra):

> The production and admission of the said exhibits does not amount to condemnation of the accused person. It is not automatic that the applicants will be adversely affected by being convicted. In case of a conviction based on those exhibits, theapplicants shall have a remedy

by way of an appeal. The power to admit exhibits or not is purely a matter of interpretation of the law by a trial court.

34. The applicant still has an opportunity to persuade the court that the impugned agreement is inauthentic or that it should be accorded very low probative value. The trial court has not yet ruled on those questions.

35. The upshot is that the request for revision dated 04/12/2021 is hereby dismissed. The matter before the Trial court shall proceed for defence hearing.

36. Orders Accordingly.

DATED AND DELIVERED AT NAKURU THIS 28TH DAY OF JULY, 2022

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JOEL NGUGI

JUDGE