Nyaema v Director of Public Prosecutions (Miscellaneous Criminal Application E019 of 2022) [2022] KEHC 16549 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16549 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

MISCELLANEOUS CRIMINAL APPLICATION E019 OF 2022

JN KAMAU, J

DECEMBER 20, 2022

BETWEEN

NELSON ANYOKA NYAEMA ..... APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT

(Being an application for orders that the proceedings in Criminal Case Number 149 of 2021 Republic v Nelson Anyoka Nyaema commence de novo before a different court.)

RULING

Introduction

1. In his notice of motion dated November 15, 2021 and filed on November 16, 2022, the applicant sought for orders that this court be pleased to order the proceedings in Criminal Case Number 149 of 2021 Republic v Nelson Anyoka Nyaema commence *de novo* before a different court. He swore an affidavit in support of his application on November 16, 2021. He swore a further affidavit annexing the proceedings of the lower court on February 20, 2021. The same was filed on April 20, 2022.

2. He stated that he was charged with two (2) counts of being in possession of narcotic drugs and dealing with alcoholic drinks without license and his matter proceeded before the learned trial magistrate, Hon Cyprian Wafula, on October 26, 2021.

3. He averred that the said learned trial magistrate did not record all the evidential information challenging the prosecution's case particularly the evidence touching on the long standing grudge between him and the arresting officer. It was his contention that courts were courts of record and that should any part of the record fail to reflect the evidence as presented, it would skew the court's decision at all levels hence the miscarriage of justice.

4. He stated that the learned trial magistrate put him on his defence immediately the prosecution closed its case without according his advocate time to file written submissions or orally submit on the question of whether or not he had a case to answer, which he said led the court to arrive at a different conclusion

5. He was apprehensive that there might be a miscarriage of justice if the matter proceeded before the learned trial magistrate as he might not be fair. He believed that the learned trial magistrate had already made up his mind about his guilt yet he was to be presumed innocent until proven guilty as provided in article 50 of the *Constitution of Kenya*.

6. The respondent did not file any response to the said application. However, it filed its written submissions dated September 19, 2022 on September 20, 2022. The applicant filed its written submissions dated April 4, 2022 on April 5, 2022. This ruling is based on the said written submissions which both parties relied upon in their entirety.

Legal Analysis

7. The applicant submitted that he was not given an opportunity to submit on whether or not he had a case to answer which contravened his right to fair trial as enshrined in article 50 of the *Constitution of Kenya* and the procedure stipulated in section 211 (2) of the *Criminal Procedure Code*.

8. He pointed out that the proceedings were clear that the learned trial magistrate did not give his advocate the chance and/or opportunity to give his submissions on whether or not a *prima facie* case against him had been established which prejudiced him. He placed reliance on the case of *Kibera Karimi v Republic* [1979] KLR 36 where he stated that the holding was that submissions on the question of whether or not a *prima facie* case had been established ought not to be rejected.

9. He also referred to the case of *Doris Bochere Nyanchongi v Republic* [2015] eKLR where the court therein found that there had been a long standing grudge and that there was every likelihood that the case was motivated by blood between the families therein and hence faulted the trial court for not having adequately considered the said grudge.

10. He added that the learned trial magistrate did not consider some of the documents he had referred to and marked for identification which was against his right to adduce evidence as provided in article 50 of the *Constitution of Kenya*.

11. He also relied on the case of *Kinyatti v Republic* [1984] eKLR where it was held that an applicant had to make out a clear case before a transfer of any trial (*sic*) could be granted and that the apprehension of an impartial trial had to be reasonable. He thus urged this court to allow his application.

12. On its part, the respondent submitted that the prosecution adduced evidence by presenting two (2) witnesses who the applicant herein cross-examined. It argued that the applicant's counsel was present in court and did not make any submissions in respect of the prosecution's case. It referred this court to the case of *John Njenga Kamau v Attorney General & 2 others* [2015] eKLR where the court therein observed that there was no indication that the applicant therein requested to make any submissions at the close of the prosecution's case and was denied a chance to do so.

13. It also relied on the case of *Kossam Ukiru v Republic* [2014] eKLR where it was held that failure to record the exact words of section 211 did not prejudice the applicant therein as the provisions were explained to him.

14. It was emphatic that the learned trial magistrate did not take into consideration the documents that were marked for identification which the applicant wanted to produce prematurely and that if the trial had proceeded, he would have had a chance to produce the same.

15. It submitted that the application was not only a delaying tactic but that it was also an abuse of the court process. It thus urged this court to dismiss the present application.

16. Article 50 (1) of the *Constitution of Kenya, 2010* provides as follows:-

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

17. Article 50 (2) (c) of the *Constitution of Kenya* states that:-

> " Every accused person has the right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence."

18. It therefore follows that there must be fairness at every stage of the trial and the accused person given adequate time to prepare its case. In the mind of this court, this preparation includes time to convince the trial court that the prosecution has not demonstrated a *prima facie* case requiring him to be acquitted under section 210 of the *Criminal Procedure Code* cap 75 (laws of Kenya). This is the expectation of every accused person. No accused person would want to be put on his defence even if he was to eventually be acquitted after the hearing of his defence under section 215 of the *Criminal Procedure Code*.

19. Notably, section 210 of the *Criminal Procedure Code* provides that:-

> " If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward (emphasis court), it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

20. A perusal of the proceedings of October 16, 2021 shows that the learned trial magistrate delivered a ruling in which he found the applicant herein to have a case to answer immediately the prosecution closed its case. The court then explained the provisions of section 211 of the *Criminal Procedure Code* to him whereupon his counsel indicated that he would adduce sworn evidence and call two (2) witnesses in support of his case. The matter was fixed for hearing on November 10, 2021.

21. However, on the said date, the applicant's counsel informed the trial court that he was away and wished to be in court physically to proceed with the hearing. This was on the virtual platform. When the prosecution proposed that the applicant's counsel proceed online, the said counsel averred that he had not prepared his witnesses. The matter was then adjourned to November 17, 2021. On the said date, the applicant's counsel informed the trial court that it had filed the present application which had raised issues on the conduct of the learned trial magistrate.

22. Notably, the applicant was represented by counsel on October 26, 2021. She did not object to the ruling by the learned trial magistrate and proceeded to take a date. The applicant did not also appear to be ready on the hearing dates that were fixed by the court. It did appear to this court that the applicant was determined not to proceed with his defence hearing and proceeded to file the present application.

23. Failure to give the applicant's counsel an opportunity to submit on whether or not a *prima facie* case had been made against the applicant had the potential of the trial court appearing biased when it was not necessarily so biased. Notably, bias is a perception and must not necessarily be real.

24. Although litigants must not be allowed to forum shop, where the procedure has not been strictly followed, they may escape the dragnet and be granted the orders they have sought if the circumstances are such that prejudice could be inferred from the omission and/or commission of a trial court.

25. Whereas the applicant's counsel stringed the trial court for about a month, this court took the view that the ruling on the applicant having a case to answer was done irregularly. His counsel blundered by not raising the issue leading the trial court to believe that all was well when it was not.

26. It must be appreciated that litigants must not suffer due to the blunders of their advocates. Cases belong to parties and/or litigants and they must feel that they have been given full opportunity to present their cases. Indeed, justice must not only be done but it must be seen to have been done.

27. If Criminal Case Number 149 of 2021 Republic v Nelson Anyoka Nyaema was to proceed before the learned trial magistrate for the defence case, the applicant will never feel that he had justice because he was never given an opportunity to submit as provided in section 210 of the *Criminal Procedure Code*. Whichever way one looks at it, even if the applicant's counsel had applied to submit after the said ruling, it would have been futile because the mind of the trial court was already known by that time. This may have influenced the failure by the applicant's counsel to raise the issue of submissions at that stage.

28. The present application was filed within two (2) weeks of the delivery of the said ruling and was thus filed without delay. As the prosecution only had two (2) witnesses who were available allowing for an expeditious disposal of the matter herein, this court formed the opinion that this was a suitable case for it to exercise its discretion to allow the matter be heard afresh to ensure that the applicant's rights under article 50(1) of the *Constitution of Kenya* were guaranteed. Notably, this court did not see any prejudice that the respondent would suffer if the case was heard *de novo*. If there was any prejudice, the respondent did not demonstrate the same.

Disposition

29. For the foregoing reasons, the upshot of this court's decision was that the applicant's notice of motion application dated November 15, 2021 and filed on November 16, 2021 was merited and the same be and is hereby allowed in terms of prayer No (3) therein.

30. It is hereby directed that this file be placed before the Chief Magistrate at Nyamira Law Courts on January 17, 2023 for allocation to another magistrate other than the learned trial magistrate who heard the case on October 26, 2021.

31. It is so ordered.

DATED AND DELIVERED AT NYAMIRA THIS 20TH DAY OF DECEMBER, 2022.

J KAMAU

JUDGE