



REPUBLIC OF KENYA
IN THE HIGH COURT
AT MILIMANI
ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION
CORAM: MUMBI NGUGI J
ACEC REVISION NO. E003 OF 2021

KIPYEGON KOSKEI.....APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an application for revision of the ruling delivered in the Chief Magistrate's Anti-Corruption Court

Anti-Corruption Case No. 5 of 2020 at Milimani (Hon P.O Ooko SPM) dated 24th February 2021)

RULING ON REVISION

1. The applicant, Kipyegon Koskei, has filed a Notice of Motion application under Certificate of Urgency dated 12th April 2021 seeking the following orders:

a. THAT pending the hearing and determination of this review application, this Honourable Court be pleased to issue stay orders issued on 24th February 2021 in Milimani Anti-Corruption Case No. 5 of 2020: Republic –versus- Richard Topila & Kipyegon Koskei declaring the 3rd Prosecution witness Duncan Manyala a hostile witness.

b. THAT this Honourable Court do call for and examine the record in Milimani Anti-Corruption Case No. 5 of 2020: Republic – versus- Richard Topila & Kipyegon Koskei and revise, review and set aside the ruling dated 24th February 2021 declaring the 3rd Prosecution witness, one Duncan Manyala a hostile witness.

c. THAT this Honourable Court be pleased to grant such other or further orders as may be appropriate.

2. The application is expressed to be brought under the provisions of Article 27, 49(1)(h), 165(6) and (7) of the Constitution and sections 161, 163(1)(c), 362 and 364 of the Criminal Procedure Code (CPC). It is supported by an affidavit sworn by the applicant on the same date.

3. The facts forming the background to the application as they emerge from the affidavit in support of the application are that the applicant is the 2nd accused in **Milimani Anti-Corruption Case No. 5 of 2020-Republic v Richard Topila & Kipyegon Koskei**. On 16th February 2021, during the hearing of the prosecution's case, the prosecution bonded and presented its third witness, one Duncan Manyala, to provide his oral testimony. He was sworn in and the prosecution directed him in giving his evidence in chief before the court.

4. The Prosecutor, Ms. Kivali, however, cut short his testimony and sought for an adjournment which was granted by the court. The matter was stood over to 17th February, 2021. The application for an adjournment was based on the grounds that the oral testimony of the witness was in conflict with the statement that he had recorded at the Ethics and Anti-Corruption Commission offices.

5. When the matter came up for further hearing on 17th February 2021, the said Duncan Manyala was again called to take the witness stand. The prosecution, however, applied to have him declared a hostile witness and subject him to cross-examination on his statement under section 161 and 163(1) (c) of the Evidence Act. In its ruling dated 24th February 2021, the trial court allowed the application, a decision that the applicant is aggrieved by and seeks revision of.

6. Section 362 of the CPC vests in the High Court the jurisdiction to call for and revise orders of subordinate courts. The section states as follows:

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.

7. Under section 364, the CPC sets out the powers of the High Court on revision in the following terms:

(1) In the case of a proceeding in a 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—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

...

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

8. The above provisions empower the High Court, in exercising its powers of revision, to call for the record of a subordinate court and satisfy itself as to the ‘**correctness, legality or propriety**’ of any ‘**finding, sentence or order**’ of the trial court. The revisionary jurisdiction of the High Court is thus to be invoked only where the subordinate court has made a decision whose correctness, legality or propriety is in contention. It should not be a substitute for an appeal. In **George Aladwa Omwera v R [2016] eKLR**, the court cited with approval the decision of the Supreme Court of India in **Veerappa Pillai vs Raman & Raman Ltd and Others** 1952 AIR 192 in which it was held that:

“The supervisory powers are 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 be made....”

9. The court in **George Aladwa Omwera v R** (supra) concluded that the revisionary jurisdiction: “...is only exercised to correct the manifest error in the order of the subordinate courts.” It should not be exercised in a manner that turns the court exercising the powers of revision into an appellate court, nor should it be exercised mainly because the lower court has taken a wrong view of the law or misapprehended the evidence tendered.

10. In this case, the applicant is dissatisfied with the decision of the trial court to declare the third prosecution witness, Duncan Manyala, a hostile witness. The powers exercised by the trial court in declaring the witness hostile and allowing the prosecution to cross-examine him are conferred on the court by section 161 of the Evidence Act. This section grants the trial court the discretion to allow cross-examination of a party’s own witness. It provides that:

The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

11. The applicant has not placed before the court anything that demonstrates that the decision of the trial court allowing the prosecution to cross-examine its witness was either incorrect or that it had manifest illegality or impropriety. The decision of the court was a proper exercise of its discretion, granted by statute, to declare the prosecution witness a hostile witness. I agree with the observation of Odunga J in **Republic v John Wambua Munyao & 3 others [2018] eKLR** that:

“The exercise of discretion either way cannot amount to incorrectness, illegality or impropriety on the part of the trial court so as to warrant this Court exercising its revisionary powers to disturb the decision.”

12. I find therefore that the present application is without merit, and I accordingly decline to exercise the revisionary powers of the court under section 362 of the CPC.

DATED AND SIGNED THIS 28TH DAY OF APRIL 2021.

MUMBI NGUGI

JUDGE