REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CRIMINAL APPLICATION NO. E013 OF 2020

JOSEPH GITONGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

FRANCO MUCHUI NJAGI.....INTERESTED PARTY

RULING

1. The Applicant, being aggrieved by the decision of Hon. P.M Wechuli (S.R.M.), made on 19th October 2020 in **Tigania PM Criminal Case No. 31 of 2019 R v Franco Muchui Njagi and Joseph Gitonga,** has approached this court through an application under certificate of urgency dated 23/10/2020 pursuant to section 362 and 364 of the Criminal Procedure Code and Article 50(2)(b)(g) and (h) of the Constitution.

2. He seeks revision of the orders made on 19/10/2020 rejecting his application; reversal and/or setting aside of the said orders and in lieu thereto, the charge sheet be struck out or in the alternative he be tried separately from the co-accused.

3. The application is premised on the grounds on the face of the application and his supporting affidavit, sworn on 23/10/2020. The grounds contend that the charge sheet as framed did not disclose with sufficient detail the actual acts he was charged with and further that neither the covering report nor the complainant in her initial statement dated 24/09/2019 mentioned him as the defiler. He faulted the trial court for allegedly violating his constitutional right, by its failure to advise him of his right to legal representation, from the onset of the case. It is contended that the trial court made a mistake, by its refusal to allow his application to amend the charge sheet, which mistake this court is called upon to correct. He lastly asserts that it was embarrassing to be jointly charged with the interested party, for defiling his own daughter. He has exhibited an affidavit by the complainant in which the complainant implicates the co-accused and exculpates the current applicant.

4. In opposition to the application, the respondent filed grounds of opposition on 4/2/2021. The grounds urge the court to dismiss the application for being unmerited, incompetent and an abuse of court process. In the grounds, the prosecution further argues that any complaint about a defective charge is curable under section 382 of the Code; that no unequal or unfair treatment before the law has been demonstrated to order that the defence case proceeds.

5. The court, on 9/2/2021, directed that the application be canvassed by way of written submissions. The applicant did file submissions in which it is submitted that his constitutional right to legal representation at the state expense was violated by the trial court. The trial court is blamed for its failure to accord him preferential treatment because he is a person living with disability. The cases of **R v Alex Ngara Murimi & anor (2015) eKLR** and **Joseph Munyao Malebe & 2 others v R (1982) eKLR** were cited to buttress the submissions on when to consolidate and severe charges in a criminal trial. The provisions of article 50(2)h as well as section 38 of the Persons With Disability Act, were also cited for the submissions that the applicant being registered as living with disability was by law entitled to legal counsel at no expense, to suggest at the costs of the state.

6. For the respondent, the stand taken was that, the ruling dated 19/10/2020 was proper and sound in law. It cited the cases of **David Macharia Njoroge v R (2011) eKLR, Karisa Chengo & 2 others v R (2015) eKLR** and **Charles Maina Gitonga v R (2018) eKLR** for the proposition of the law that, the right to legal representation at the state expense was not an absolute and an inherent right available to the accused person. It was submitted that, the trial court took into account the provisions of section 124 of the CPC, in its ruling to dismiss the application under Section 89(5) of the Code. According to the respondent therefore, the defect in the charge sheet was curable under section 382 of the CPC, as it did affect the substance of the offence. The cases of **John Irungu v R (2016) eKLR, Isaac Nyoro Kimita & anor v R (2009) eKLR** and **Willie (William) Slaney v State of Madya Pradesh (A.I.R. 1956 Madras Weekly Notes 391)** were cited in support of that proposition. The application was viewed as a backdoor attempt to reopen the prosecution case by recalling the complainant, who had since gone back to live with the applicant. The court was urged to dismiss the application, in order to pave way for the defence hearing.

7. I have carefully considered the affidavits, the rival submissions of learned counsels together with the authorities relied on. I have also considered the record of the trial court as called and laid before the court.

8. The jurisdiction of this court for revision is invoked under **section 362 of the Criminal Procedure Code**. The same extends only to this court calling for and examining the record of the trial court for the purposes 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 proceeding of such court.

9. On 14/8/2020, instantaneously after the prosecution had closed its case, the applicant orally made an application to recall the complainant. The prosecution then informed the court that he had the information that the complainant had resumed her custody with the applicant. As a result, the trial court directed that the Investigating officer attends court and confirms the whereabouts of the complainant. It was then confirmed by both the prosecution and the applicant that the complainant was then living with him. With possession of such facts the trial court found that the application to recall was not in good faith and that the complainant could have then been subjected to undue influence.

10. When the complainant testified on 30/9/2019, the applicant had the opportunity to subject her testimony to cross examination. She admitted even during cross examination that both the applicant and the interested party had done bad manners to her. I find that to accede to the request to re-call such a witness would not only have occasioned delay of the conclusion of the trial court's case, but also occasion injustice to the complainant who I consider to be vulnerable.

11. Having critically analysed the impugned ruling, I find that the trial court appropriately addressed its mind to the provisions of section 214 of the Criminal Procedure Code. That section provides that; -

> **"Where, <u>at any stage of a trial before the close of the case for the prosecution</u>, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case."** See ***<u>Directorate of Public Prosecution (DPP) v Chief Magistrate's Court – Nyahururu [2019] eKLR.</u>***

12. Was any injustice and/or prejudice occasioned to the applicant, by the trial court's failure to afford him legal representation at the state expense? My answer is a resounding no. The position of the law has been and remains that, the right to legal representation at state expense is not inherent. It was contended that the applicant is a person living with disability, and as such, he was entitled to preferential treatment. However, **Section 38 of the Persons with Disabilities Act** is only applicable to persons charged with capital offences. That section provides that;

> **"The Attorney-General, on consultation with the Council and the Law Society of Kenya, shall make regulations providing for free legal services for persons with disabilities with respect to the following— (a) matters affecting the violation of the rights of persons with disabilities or the deprivation of their property; (b) <u>cases involving capital punishment</u> of persons with disabilities; and (c) such matters and cases as maybe prescribed in the regulations made by the Attorney-General."** Underlining mine for emphasis.

13. In urging the instant application no indication was made if the regulations have been put in place and what they say. But more importantly, such regulations would be of limited application in the cases of capital offences. I do hold that there has not been demonstrated a violation of any right of the applicant. In addition, I appreciate legal assistance to be available for demonstrated or legislated instances and that it remains the duty of the person seeking legal aid to demonstrate that he deserves same.

14. The court's powers on revision under section 362 of the Criminal Procedure Code must be confined to be invoked only to enable the Court satisfy 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 subordinate court. There ought to be presented and demonstrated glaring acts or omissions to merit revision and that power should never be employed as a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. Here I have failed to discern any glaring acts or omissions in the proceedings before the trial court, to warrant this court's interference.

15. Accordingly, I find and hold that the application is unmeritorious and the same is therefore dismissed.

DATED SIGNED AND DELIVERED IN OPEN COURT THIS 23RD DAY OF JULY 2021

PATRICK J.O OTIENO

JUDGE

<u>In presence of</u>

No appearance for the applicant

Mr. Maina for the state

PATRICK J.O OTIENO

JUDGE