



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL REVISION NO. E011 OF 2021

FAHMI SALIM SAID.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

AND

FAHIMA MOHAMED SHALI.....INTERESTED PARTY

R U L I N G

1. By a letter dated 12th April, 2021, to the Deputy Registrar of the High Court under Certificate of urgency the Applicant Fahmi Salim Said prayed that Shanzu Principal Magistrate Court CR. Case No. 553 of 2020 be placed before the Judge for revision of ruling and order delivered on 8th day of April 2021 wherein it was ordered that the Applicant's bank releases his confidential documents to the Complainant within 7 days.

2. The Applicant was aggrieved by the said order and he sought revision on the grounds:-

a. That the learned trial Magistrate opted to descent into the area of investigations and clearly to offer assistance to one party at the expense of another party.

b. That the order clearly goes beyond what is expected of a trial Magistrate.

c. That by that order the trial Magistrate has made a judgment that the police and the ODPP are either incompetent and/or compromised and has turned the Complainant into an investigator.

d. That the order exposes the accused to the possibility of fabrication of evidence long after he has been charged.

3. The applicant argued that the order goes against the constitution and the expectation that the complainant and the police will have evidence before preferring charges. It was also argued further that the trial court had no authority to direct and control investigations.

4. The Applicant indicated that he had filed a petition regarding many other charges filed against him by the Complainant.

5. The Application for revision was opposed by the Replying Affidavit of Fahima Mohamed Shali –the Interested Party, sworn on 22nd April, 2021 in which it was averred that the Applicant had intentionally failed to disclose to the court that he had filed petition No. E016 of 2021 concurrently with the application for Revision and that both arose out of the same cause of action.

6. The Applicant was accused of forum shopping and that he had come to court with dirty hands and obtained *ex parte* stay orders and thus a misrepresentation was made to the Judge which led to issuance of stay orders.

7. The Interested Party argued that it was not true that the court directed DCI Forensic examination to examine and write a report for her to present to court. She averred that she sought court orders to obtain information respecting the bank accounts for the period covering commission of the offences by the Applicant. She was of the view that the law allows a victim of crime to seek information that would advance her constitutional rights. She argued that orders given didn't authorize her to conduct investigations but to advance her right to

access information.

8. The Interested Party averred that the trial court had jurisdiction to entertain her application. That the trial of the Applicant had not begun and that once the information is obtained he would be supplied with it and he would not suffer any prejudice.

9. The Interested Party further averred that the application for revision was frivolous, vexatious and an abuse of court process calculated to subject the administration of criminal justice to public odium, contempt and ridicule and should be dismissed.

10. The Respondents grounds of opposition dated 26th April 2021 were filed on 28th April 2021 as follows:-

i. That the applicant failed to disclose to the court that he filed constitutional petition No. E016 of 2021 in which he seeks conservatory orders to prohibit this prosecution in CMC CR. Case No. 565, 564, 553, 557, 567 and 566 all of 2020.

ii. That the applicant was denied interim conservatory orders pending the hearing of the petition including orders of stay the subject of this revision.

iii. That the applicant has subsequently filed this revision application in an attempt to circumvent the orders of the Learned Judge in the petition.

iv. That this Revision Application is made in bad faith and material non-disclosure of facts. Further, it is calculated as forum shopping for the applicant to obtain favorable orders.

v. That the applicant challenges the orders of 8/4/2021 issued by the trial court in CMC CR. Case No. 553 of 2020 through this application, despite, the fact that there is no error apparent on the face of the record nor are those orders illegal, incorrect or improper which is the correct purpose of a revision application.

vi. That the Applicant has neither filed an appeal nor a judicial review application challenging the orders by the trial court cementing their argument that the application is indeed frivolous, vexations and an abuse of the process of this court.

vii. That there is a real danger that this court may give conflicting orders if the Revision application is heard in exclusion of the petition filed on 9/3/2021.

viii. That the Respondent association itself with the interested parties Replying Affidavit deponed on 22nd April 2021 and has no objection to the interested party being granted access to information held in the Applicant's bank account for the period covering the commission of the offences.

11. The Applicant filed a Further Affidavit sworn on 17th May 2021 and said his complaint is in regard to the Ruling delivered in CR. Case No.553 of 2020 and that the Petition No. E016 of 2021 did not bar him from making any complaint about any subsequent decision made in any of the matters in the petition. It was averred that the fact that Order made on 8/4/2021 was to be complied with within 7 days made them file an application for revision under certificate of urgency and seek stay Orders.

12. The Applicant filed submissions in which it was argued that the Victim Protection Act does not provide that victims be turned into investigations and prosecutors in competition with ODPP & the police. It was submitted that if any order was to be issued then it ought to have been issued to the police but not the Interested Party. The Applicant's counsel argued that the order was irregular and reasons for reason that they have stated.

13. The Applicant further contended that there was a conspiracy to manufacture evidence against him after statements have been recorded and no bank transactions of the nature now called were ever mentioned. The Applicant stated that he was surprised that the DPP who had opposed the application by the Interested Party in the lower court was now was now in support of the same.

14. The Respondent and Interested Party filed submissions that were to take care of both petition No. E016 of 2021 and the Application for revision herein.

15. I have looked at both the Interested Party's and the DPP's submissions filed in Petition. No. E016 of 2020 and found nothing touching on the application herein.

16. In their oral submissions the interested parties counsel argued that they obtained orders made on 8th April 2021 pursuant to Victims Protection Act as the police were delaying in collecting the cheque and the Interested Party's case was almost being dismissed. It was also argued that the Applicant had raised similar issues in Constitutional

17. From the application for revision, the Replying Affidavit, and the Grounds of Opposition and submissions by the respective parties, the issue for determination is whether the granting of Orders of 8/4/2021 raised any impropriety, irregularity, illegally on error on face of the record that required correction and/or revision by this court.

18. The Order for which the Applicant seeks to be revised was made pursuant to s. 179 (1) and 180 of the Evidence Act which provides:

“s. 179 (1) On the application of any party to proceedings a court may order that such party be at liberty to inspect and take

copies of any entries in a banker's book for any of the purposes of such proceedings.”

“s.180 (1) where it is proved on oath to a judge or magistrate that in fact or according to reasonable suspicion the inspection of any bankers' book is necessary or desirable for the purpose of any investigation into the commission of an offence, the judge or magistrate may by warrant authorize a police officer or other person named therein to investigate the accounts of any specified person in any banker's book and such warrant shall be sufficient authority for the production of any such banker's book as may be required for the scrutiny by the office or person named in the warrant and such officer or person may take copies of any relevant entry or matter in such banker's book.”

19. It is the court's position that the application made by the Respondent/Complainant was in itself backed by the law, sound and proper save for the fact that the Orders of 8th April, 2021 ought to have been made by a judge or magistrate who was not in conduct of the trial to avoid the perception of bias on the part of the trial magistrate. Considering that the Applicant was the complainant in the proceedings, the Orders made ought to have been directed to the Investigating Officer or the DPP for purposes of orderliness.

20. The finding by the trial court that the victims are every bit a part of the criminal justice proceedings and entitled to the right to information as provided for in Article 35, 50 (1) and (9) of the Constitution of Kenya, 2010 was proper as was held in the Supreme Court decision in **Joseph Lendrix Waswa vs Republic (2020) eKLR** that:-

“66. The Trial Court being an impartial entity that oversees the progress of a case, has the ultimate function of determining the accused's guilt or innocence. Its aim is to establish the truth. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. Thus, the rights of the accused cannot be considered in isolation without regard to those of the victim. Victims too have a legitimate interest in the Court's exercise of its jurisdiction. The Criminal Justice system should cultivate a process that inspires the trust of both the victim and the accused.”

21. In conclusion, the application is allowed to the extent that the Orders issued on 8th April, 2021 should be directed at the Investigating Officer in Shanzu Magistrate's Court Criminal Case No. 553 of 2020 for purposes of ensuring that the ends of justice are met.

22. Shanzu Magistrate's Court Criminal Case No. 553 of 2020 to be placed before the Chief Magistrate on 4th of November, 2021 as per Orders made in judgment in High Court Petition No. E016 of 2021.

23. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF OCTOBER, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court assistant

Applicant – Present in person

Mr. Mulamula for Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE