



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MSC. CRIMINAL APPLICATION NO. E101 OF 2021

FRANCIS MWANGI KIBE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Francis Mwangi Kibe**, the applicant, was arraigned in court for the offence of obtaining goods by false pretence contrary to **Section 313** of the Penal Code. Having denied the charge, the court proceeded to hear the case.

2. On the 17th March 2021 the applicant sought to be furnished with the statement recorded by the Investigating Officer prior to the case proceeding which the prosecution undertook to avail. The trial court ordered the statement to be provided, but the case was to proceed. When the matter resumed at 12.30 pm. Mr. Ngunjiri learned Counsel who held brief for Mr. Michuki, for the applicant, notified the court that they had not been provided with the witness statement and the applicant (accused) would not be treated fairly in that regard. In the result the court ruled thus:

“I have heard the sentiments of the counsel. It is for Mr. Michuki Advocate for accused. The only reason for adjourning is the unavailability of the Investigating Officer’s statement which in my opinion will not be good reason to adjourn this case today. I therefore order that the case proceeds with the four (4) witnesses present in court today. Proceedings handwritten to be provided to counsel in”

3. Consequently, the applicant filed a Notice of Motion dated 25th March 2021 seeking revision of the directions of the trial court presided over by Hon. M. Nyakundi PM, that witnesses who testified could be recalled for cross examination and the respondent through the Officer Commanding the Station-Kabete Police Station to furnish the applicant with the investigating officer’s statement.

4. The respondent filed grounds of opposition where it stated that the court exercised its mandate to expedite trial in accordance to the constitution; the application is misconceived and misplaced as Section 362 and 364 of the Criminal Procedure Code (CPC) is not applicable in the circumstances; the applicant’s right per Article 50(2) of the Constitution has not been violated as alleged and that the application is an abuse of the court process.

5. The application was canvassed through oral submissions. Mr. Michuki learned Counsel for the applicant urged that the Investigating Officer who was also the Arresting Officer refused to furnish them with his statement. On the basis of the refusal the defence was not ready to proceed with the case on the 17th March 2021 and they indicated so. That the directions given by the Court violated the accused person’s right to fair trial as set out in Article 50 (2)(j)(k) of the Constitution. That the action of the prosecutor of denying the applicant statements rendered a fair trial impossible as it was not able to challenge what was being presented, yet the right to fair trial as seen in Article 25 of the Constitution cannot be derogated. Therefore, the applicant called upon this court to review the order that was illegal, improper, and incorrect.

6. On the question of jurisdiction having been questioned, in reply, relying on case law, the case of **George Aladwa Omwera -vs- Republic (2016) eKLR** and **Director of Public Prosecutions -vs- Marias Pakine Tenkewa t/a Naresho Bar Restaurant (2017) eKLR**, he urged the court to find that it has necessary jurisdiction to issue orders sought.

7. In response, Ms. Chege, learned prosecution counsel who relied on grounds of opposition filed, urged that the proceedings of 17th March 2021 were in order, that on the question of jurisdiction pursuant to Article 165 (6) and (7) of the Constitution, when Mr. Ngunjiri sought an adjournment on grounds that they did not have the Investigating Officer’s statement, the trial court placed the matter aside to 12.30 pm, later at 12.30 pm three(3) witnesses testified, however, it was not clear whether the earlier order had been complied with. That Mr. Ngunjiri sat in court as the witnesses testified but he opted not to cross examine them. And, after they testified the prosecution sought an adjournment and the defence counsel did not object. She urged further that in as much as the tenet of a fair trial is anchored on the Constitution which must be

complied with, statements for the three (3) witnesses had been provided and through the statements counsel should have sought sufficient instructions. Therefore, the application to recall witnesses to be cross examined having not been made before the trial court cannot be revised at this stage.

8. That as provided by **section 362** of the CPC, the applicant has not demonstrated the illegality, propriety of the proceedings in the lower court to invoke the provisions of the law.

9. With regard to prayer 3 of the application, she urged that the same be granted as the record was silent on whether or not the applicant had been supplied with the statement.

10. The jurisdiction of this court has been questioned by the respondent. The jurisdiction of this court to review proceedings of the subordinate court is provided for by the Constitution and Statute. **Article 165 (6) (7)** of the Constitution provides thus:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi judicial function but not over a superior court.

(7) For the purposes of clause 6 the High Court may call for the record of any proceedings before the subordinate court or person, body authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

11. **Section 362** of the CPC provides thus:

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.

12. From the above the court would be seized of jurisdiction to correct irregularities that are not in accordance with the fact; and even orders that are contrary to the law even if the case is ongoing. In the case of **Joseph Nduvi Mbuvi –vs- Republic(2019)eklr Odunga J** was of the following view:

“... The object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well”

13. **Section 364(1)** of the CPC provides that:

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 his knowledge

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

14. This means that this court is seized of jurisdiction to review any order that may arise in the course of proceedings of the subordinate court, as long as it is incorrect, illegal, or improper.

15. In the instant case the learned trial Magistrate appreciated the importance of the statement recorded by the Investigating Officer being supplied to the defence prior to the matter proceeding but in the same breath ordered the prosecution to proceed with the matter. I say so because the trial court directed the prosecution to furnish the defence with the witness statement but when the court resumed after a few hours it turned a blind eye on the defense and just proceeded with the case.

16. **Article 50 (2)(c)(j)** of the Constitution provides thus:

(2) Every accused person has the right to a fair trial, which includes the right—

(c) To have adequate time and facilities to prepare a defence;

(j) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

17. In the case of **Thomas Cholmondeley -vs- Republic (2018) eklr**, the Court of Appeal stated that:

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under..... our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the

relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.”

18. The Prosecution/State was obligated to supply the defence with all statements to be relied upon in support of its case during the pre-trial period. This was done which prompted the defence to point out that fact, the court understood the importance but nevertheless proceeded with the matter; knowing that it could even form a ground of appeal. In the case of ***Francis Muniu-vs- Republic (2017) eKLR*** Ngugi J had this to say:

“It is salutary practice for the Court to do so when it has given orders. Indeed, it is salutary practice for the Trial Court to satisfy itself that an Accused Person has all the reasonable facilities for his defence and all the prosecution disclosure documents before commencement of trial.”

19. In ***Francis Muruatetu and Another -vs- Republic (2017)*** the Supreme Court stated that:

“Indeed the ...[47] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.”

20. It was imperative for the applicant to be informed of how and why the Investigating Officer formed the opinion to charge him to enable him prepare for his defence. The right to fair trial called upon the Prosecutor/State to supply the applicant with all incriminating evidence that they failed to do. The trial court should not have condoned the reckless act of being in breach of the applicant's right.

21. Therefore, the decision of the learned Magistrate was illegal, incorrect and improper. I therefore call to this court the order granted by the trial court which I hereby quash and set aside. In the result, it is substituted by orders that:

(i) The State through the court prosecutor shall furnish the applicant with the statement recorded by the Investigating Officer in Kibera Criminal Case No. 832 of 2020. Republic -vs- Francis Mwangi Kibe.

(ii) Witnesses who testified on 17th March 2021 be re-called for cross-examination.

22. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 29TH DAY OF NOVEMBER 2021

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

COURT ASSISTANT – MUTAI

MR. MICHUKI FOR APPLICANT

MR. MUTUMA FOR ODPP