REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO. 213 OF 2018

JACQUILINE NAMUKALI NANJALA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicant herein who was the 7th accused in Kakamega EACC Case No. 1 of 2017 has filed an application dated 21st June, 2018 seeking for review of the lower court's proceedings on the grounds that the applicant was not accorded a fair trial before the trial court in that despite electing to the trial court that she would give a sworn statement in her defence pursuant to Section 211 of the Criminal Procedure Code, the trial court closed the defence case before taking her evidence. The applicant contends that at no time did she expressly or impliedly waiver her right to be heard in her defence. She submits that Article 50 (2) of the Constitution of Kenya 2010 accords an accused person the right to a fair trial which entails both parties being heard without any bias. The applicant sought for the following orders:-

(a) The trial in Kakamega EACC Case No. 1 of 2017 was not fair.

(b) The proceedings in that case was a mistrial.

(c) The accused conviction and subsequent sentence be declared null and void.

(d) The accused person, the applicant in this case, be acquitted.

(e) In the alternative the court do remit the Kakamega CM's EACC Cause No. 1 of 2017 to another for trial de novo.

2. I have perused the lower courts record. There were 8 accused persons in the case. They were initially represented by two advocates, Mr. Madialo and Mr. Kituyi. The two advocates remained in record when the prosecution witnesses No. 1 to 10 were heard. Though not expressly stated in the record Mr. Kituyi appears to have pulled out of the case after the 10th witness was heard. Mr. Madialo continued to remain in record for the accused. The evidence of PW11 to PW15 was taken with Mr. Madialo being in record for all the accused persons.

3. The prosecution closed its case on 22/8/2017. Mr. Madialo made submissions on a no case to answer for all the accused persons. The court did proceed to place the accused to their defence on the 30/11/2017. On 5/3/2018 the provisions of Section 211 of the Criminal Procedure Code were explained to the accused. All of them including the applicant individually elected to give sworn statements and call no witnesses. The court proceeded to hear the evidence of Accused No. 1, 2, 3 and 4. After the 4th accused testified on 6/3/2018, Mr. Madialo told the court that:-

"That will mark the close of our defence. May we be allowed to file written submissions."

Consequently the other accused persons including the applicant did not thereby testify in the case. Thereafter Mr. Madialo filed submissions. Later the court delivered its judgment on the 7/6/2018. The applicant and her co-accused were convicted. It is after the conviction and before the sentence was pronounced that the applicant filed the instant application.

4. Section 362 of the Criminal Procedure Code gives powers to the High Court to 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.

5. Article 167 (6) and (7) of the Constitution grants the High Court supervisory jurisdiction over subordinate courts and for that purpose may call for the record of any proceedings from a subordinate court so as to satisfy itself of the things stated in Section 362 of the CPC.

6. When exercising its powers of revision provided by Section 362 of the CPC the court has to always to bear in mind that such powers should not be exercised so as to turn a revision into an appeal. The revision should only be limited to rectifying a manifest error in the proceedings. In **George Aladwa Omwera –Vs- Republic, High Court Milimani Criminal Revision No. 277 of 2015 (2016) eKLR,** Wakiaga J. held that:-

> ***"In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.***

In **Veerappa Pillai –Vs- Remaan Ltd** the Supreme Court of India has this to say:-

> ***"The supervisory powers is 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….."***

7. From the above it can be seen that the court can only intervene in an application for revision so as to correct an error that is apparent on the face of the record which constitutes a gross violation of a fair trial and that has resulted to manifest injustice.

8. The applicant does not deny that Mr. Madialo was acting for her in the case. She does not allege that Mr. Madialo did not have instructions from her to close the case before she testified. Whenever an advocate appears for a party and addresses the court on an issue, it is to be assumed that he does so with express instructions of the party. In fact the advocate acts as the mouth piece for the party. Though the applicant had previously indicated that she was to give a sworn statement in the case, she retained the right to change her mind not to give evidence in the case. This is what appears to have happened when Mr. Madialo sought to have the defence case closed without the applicant and the other accused persons testifying in the case. The trial court could not have known why the accused had changed their mind not to testify in the case as that was an issue between an advocate and his clients. The court only recorded what was communicated to it by the applicant's advocate. As long as the court had performed its duty of explaining the provisions of Section 211 to the accused, the rest was left to the accused and their advocate to conduct their case the way they wanted. Unless proved otherwise it is to be assumed that Mr. Madialo acted on the instructions of his clients in closing the case before they testified. The applicant has not shown that she had not given her counsel such instructions. The court did not thereby commit any error in closing the prosecution case as requested by the defence counsel.

10. It is instructive to note that the application is not supported by any affidavit yet it also raises issues of facts. Furthermore, the applicant waited until after she was convicted to come up with this application. If she was actually aggrieved by the act of the court in closing the defence case before she testified, she had sufficient time to approach the court for review orders before delivery of the judgment. That she never did so is manifestation that she did not have any complaint at that stage. The application can only have been made as an afterthought after conviction. The same is unmerited.

11. In the premises it is my finding that the applicant has not established that there was any violation of her right to fair trial. The application is accordingly dismissed.

Delivered, dated and signed in open court at Kakamega this 26th day of February, 2020.

J. NJAGI

JUDGE

In the presence of:

No appearance for Applicant

Mr. Mutua for State/Respondent

Applicant - present

Court Assistant - Polycap

14 days right of appeal.