



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[Coram: A. C. Mrima, J.]

CRIMINAL REVISION NO. 39 OF 2020

FREDRICK OMONDI CLEMENT.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This revision is in respect of *Migori Chief Magistrates Criminal Case No. 215 of 2019 Republic vs Fredrick Omondi Clement* (hereinafter referred to as "**the criminal case**").

2. The accused person in the criminal case, one Fredrick Omondi Clement, was charged with the offence of threatening to kill contrary to **Section 223(1)** of the **Penal Code**. He denied the charge and was tried.

3. At the close of the prosecution case the trial court rendered a ruling on whether the prosecution had established a *prima-facie* case so as for the accused person be placed on his defence. That was on 25/09/2019.

4. In a brief ruling the court delivered itself as follows: -

Having considered evidence by the prosecution, I do find that the accused person has a case to answer under Section 210 Criminal Procedure Code.

5. The trial court (**Hon. M. M. Wachira, SRM**) was however transferred before the accused person tendered his defence. The criminal case was taken over by **Hon. Areri, Principal Magistrate** who duly complied with the provisions of **Section 200** of the **Criminal Procedure Code**. The hearing was to continue from where it had reached.

6. On 19/02/2020 **Hon. Areri** noted that indeed the accused person had been placed on his defence under **Section 210** of the **Criminal Procedure Code** instead of **Section 211** of the **Criminal Procedure Code**. The Learned Magistrate then forwarded the criminal case to the High Court for revision.

7. The power of this Court to supervise the subordinate courts on revision is provided for in **Article 165(6)** and **(7)** of the **Constitution** and in **Section 364** of the **Criminal Procedure Code**. The purpose is to ensure checks and balances on the administration of justice in the subordinate courts. **Article 165(6)** and **(7)** states as follows: -

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a 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 any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

8. **Section 364** of the **Criminal Procedure Code** provides as follows: -

(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 conviction, exercise any of the powers conferred on it as a court of appeal by Section 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.

c) in proceedings under section 203 or 296 (2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organization Crimes Act, the Proceeds of Crime and Anti-money Laundering Act, the sexual Offences Act and the Counter - Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(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.

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence of which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

9. What this Court must therefore ascertain is where the error in placing the accused person on his defence under **Section 210** of the Criminal Procedure Code instead of **Section 211** of the Criminal Procedure Code can be cured under **Section 382** of the Criminal Procedure Code.

10. **Section 382** of the **Criminal Procedure Code** provides as follows: -

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

11. **Section 210** of the **Criminal Procedure Code** provides as follows: -

If at the close of evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

12. On the other hand, **Section 211** of the **Criminal Procedure Code** provides as follows: -

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in Court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

13. The foregone is the law. Can it now be held that the error committed by the trial court caused any failure or miscarriage of justice to the accused person? The principle of miscarriage of justice was discussed by the Court of Appeal in **Nairobi Criminal Appeal No. 198 of 2010 Republic vs. Edward Kirui (2014) eKLR** as follows: -

21. A miscarriage of justice is the result of, inter alia, an unfair trial and the trial under consideration was such as unfair trial with regard to the prosecution and the victims of the murder which the trial judge found was committed. Both the victims and their families were deprived of fairness and the public saw a deprivation of justice. A fair trial will attempt to ascertain the truth.

“It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted ... Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or a mere farce and pretense The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.”

We have no hesitation to state that the case of Republic v Edward Kirui occasioned great miscarriage of justice.

14. There is only one option available to a trial court under **Section 210** of the Criminal Procedure Code. It is to dismiss the case and acquit the accused person. A trial court cannot therefore place an accused person on his/her defence under **Section 210** Criminal Procedure Code. That is the preserve of **Section 211(1)** of the Criminal Procedure Code.

15. The error is therefore not a superficial one. It runs through to the heart of a fair trial. A court invoking **Section 210** of the Criminal Procedure Code and failing to acquit an accused person occasions a failure of justice. **Article 50** of the **Constitution** guarantees the right to a fair trial. The right to a fair trial includes the right of an accused person to be tried within the confines of the law. Placing an accused person on his defence under a wrong provisions of the law therefore contravenes the right to a fair trial and renders the trial a nullity. It is an error which cannot be cured under **Section 382** of the **Criminal Procedure Code**.

16. The accused person in the criminal case was yet to be present his defence.

17. In the circumstances, in order to uphold the rule of law and ensure a fair trial is rendered to the parties the following orders do issue: -

a) The ruling delivered on 25/09/2019 placing the accused person on his defence under Section 210 Criminal Procedure Code be and is hereby set-aside and vacated;

b) The court now seized of the Migori Chief Magistrates Criminal Case No. 215 of 2019 Republic vs Fredrick Omondi Clement shall proceed to review the prosecution evidence and render a ruling on whether the accused person ought to be placed on his defence, subject to compliance with Section 200 Criminal Procedure Code, if not yet. For avoidance of doubt, this ruling shall not sanction the re-opening of the prosecution’s case.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 25th day of February, 2020

A. C. MRIMA

JUDGE