REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J.

ACEC NO 7 OF 2019

REPUBLIC.....APPLICANT

VS

FELIX OBONSI ONGAGA.....1ST ACCUSED

DANIEL STEPHEN OUMA.....2ND ACCUSED

PETER MUKANGU MWANGI.....3RD ACCUSED

ANTHONY NYAGA MWANGI.....4TH ACCUSED

BENARD NYARIKI KEBWAGE.....5TH ACCUSED

(Being an application for revision of the ruling of Hon. Thomas Nzyoki (SPM) dated 5th March 2020 in ACC No. No 1 of 2019).

RULING ON REVISION

1. By a letter dated 12th March 2020, the applicant, the Director of Public Prosecutions (DPP), seeks revision of the ruling of the trial court in Anti-corruption Case No. 1 of 2019- **Republic v Felix Obonsi Ongaga & Others**. The application is brought under sections 362 and 364 of the Criminal Procedure Code (CPC). The applicant states in the letter that it wishes to bring to the attention of the court the said ruling and to ask this court to call for and examine part of the ruling and satisfy itself as to its legality, propriety and correctness.

2. The DPP submits that the learned trial Magistrate misdirected himself on the provisions of section 68 of the Evidence Act in so far as the second prosecution witness, PW 2, is concerned. The DPP asks the court to revise part of the order in which the trial court held that some documents that the prosecution sought to produce through PW2 were inadmissible and are excluded from the record. The applicant submits that the trial court misdirected itself on the provisions of section 68 of the Evidence Act with regard to the production of certified copies of documents which the author of the documents made reference to. The applicant sets out the documents in contention as being MFI6A, MFI7, MFI 7a, MFI 8, MFI 8a, MFI 9, MFI 9a, MFI 10, MFI 10a, MFI 12, MFI 13, MFI 13a, MFI 13b MFI 13c, MFI 13d, MFI 14 MFI 15, MFI 16, MFI 17, MFI 17a.

3. The applicant argues that as PW2 was the acting CEO and e-author of the documents in question, he was familiar with the contents of the documents. In its view, the provisions of section 68 of the Evidence Act are therefore inapplicable in the circumstances.

4. The applicant asks this court to issue an order of revision setting aside the ruling and orders of the trial court and makes an order directing that PW2 exhibits the said documents as it is clear that he is the author of the documents. A copy of the ruling of the trial court is annexed to the application for revision.

5. I have considered the application for revision and the ruling in respect of which the applicant asks this court to exercise powers of revision under sections 362 and 364 of the CPC. These sections provide as follows:

362 Power of High Court to call for records section

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.

364 Powers of High Court on revision

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

(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:…

6. In the application before me, the applicant has not pointed out in what manner the decision of the trial court is either incorrect, illegal or lacking in propriety. In my view, the applicant is essentially appealing against the considered ruling of the trial court with respect to the admissibility of certain exhibits, and the application of section 68 of the Evidence Act. Essentially, this application challenges the merits of the decision made by the trial court. I say this having considered the ruling of the trial court, in which it concluded as follows:

"In conclusion, the prosecution is bound by the law and tasked to ensure strict compliance with the provisions of the Evidence Act with regard to the admissibility of documents. The preparation of certificates in respect of computer print outs and the certifying of copies in respect of official document ought to be meticulous and thorough. Her admission of evidence is not a mere procedural matter but a crucial legal process that safe guards the fairness of the trial and ensures that justice is done to the parties. The law is clear that any shortcomings arising from non compliance with the statutory law may not find redress under article 159(2) of the Constitution.

In the upshot I hold the objection raised by the defence has merit. As such the documents sough to be produced through PW 2 are inadmissible and shall be excluded. I so order."

7. The question is whether the applicant can properly challenge such a ruling in what amounts to an appeal on merit disguised as an application for revision. In his decision in **Republic v John Wambua Munyao & 3 others [2018] eKLR** Odunga J observed as follows with respect to the exercise of the High Court's powers of revision:

"it is my view that that jurisdiction should not be invoked so as to micro-manage the lower courts in the conduct and management of their proceedings for the simple reason that if every ruling of the lower court and which went against a party were to be subjected to the revisional jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion.

34. Where an issue arises as to whether the decision of the Court below is correct in its merits either as a result of wrong exercise of discretion or otherwise, but which decision does not call into question, its legality, correctness or propriety, the right approach is to appeal against the same preferably at the conclusion of the proceedings or in limited instances before then. (Emphasis added)

8. However, except in very limited circumstances, interlocutory appeals are not permissible under the CPC. This is for the reason that such applications would render it well-nigh impossible for a trial court to proceed with and complete a trial. This emerges from the decision of the Court of Appeal in the case of **Thomas Patrick Cholmondeley vs. Republic [2008] KLR** in which the Court of Appeal, in considering an interlocutory appeal by the accused person, expressed the following view:

""In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person;…..the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused."

9. In his decision in **John Njenga Kamau v Republic [2014] eKLR**, Kimaru J considered section 347 and 354(3) of the Criminal Procedure Code and expressed the following view with respect to interlocutory appeals:

"…It is clear from the foregoing provisions of the Criminal Procedure Code that only a party who is convicted can file an appeal to this court. The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court's considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused

persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case.” (Emphasis added).

10. The present application asks the court to revise the decision of the trial court without showing the illegality, impropriety or incorrectness that the applicant complains of. Indeed, a consideration of the application shows that the challenge to the decision is with respect to the merits of the decision. It is therefore not a proper subject for revision.

11. In any event, as has been observed in a number of cases by our courts, to entertain such applications, whether presented in the form of an application for revision or as an interlocutory appeal, would result in micro-management of the trial process-see for instance the case of **Joseph Nduvi Mbuvi v Republic [2019] eKLR** and **ACEC Miscellaneous Application No. 46 of 2019- Mukuria Ngamau & another v Republic.**

12. In my decision in **ACEC Appeal No. 24 of 2019- James Ambuso Omondi v Republic** in which the appellant was challenging a decision of the trial court to allow the admission in evidence of some documents produced by the prosecution, I took the view, which I still hold, that the High Court cannot, at an interlocutory stage, whether in exercise of powers of revision or appeal, direct the trial court on which exhibits to admit or not admit into evidence. To do so would amount to micro-management of the trial court and take away the discretion of the trial court. A party dissatisfied with a decision made in the course of the trial regarding the admission or rejection of documents in the course of a trial must await the conclusion of the trial and, should it still desire to do so depending on the outcome of the trial, file an appeal raising the issue in its grounds of appeal.

13. I accordingly find no merit in the application before me. I decline to call for and examine the record of the trial court in ACC No. 1 of 2019 to examine the correctness, legality or propriety of any part of or the entire decision of the court made on 5th March 2020. The application for revision is accordingly dismissed.

Dated and Signed at Nairobi this 16th day of March 2020

MUMBI NGUGI

JUDGE