



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CRIMINAL DIVISION

CRIMINAL REVISION NO.336 OF 2019

ANTHONY MACHARIA.....1ST APPLICANT

BASHIR AHMED MBURU.....2ND APPLICANT

VERSES

REPUBLIC.....RESPONDENT

RULING

The Applicants, Anthony Macharia and Bashir Ahmed Mburu are facing the charge of **obstructing inspection officer** contrary to **Section 67(E)(2)(b)** of the **Insurance Act**. The particulars of the offence are that on 23rd August 2019 at Direct Line Assurance Company Limited offices at Hazina Towers within Nairobi County, the Applicants, jointly with others not before court, willfully obstructed Teresa Mburu, the officer in-charge inspection team from Insurance Regulatory Authority, in the execution of inspection work to be done at Direct Line Assurance Company Limited in respect to insurance regulations. The Applicants pleaded not guilty to the charge. Trial has commenced before the trial magistrate's court.

On 5th November 2019, while the Applicants' counsel was cross-examining a prosecution witness, the prosecution objected to the line of questions that learned counsel for the Applicants was asking the witness. In particular, the prosecution objected to the Applicants' counsel cross-examining the witness in respect of matters which did not relate to the events that took place on 23rd August 2019. The trial court upheld the objection and directed that the Applicants' counsel to restrict himself to the issues that were germane to the charge. The ruling stated thus:

“I have evaluated the application and the response. The complainant is indeed the IRA in this case. The PW1 is a witness. It is clear that twelve other matters pending in the High Court concerning the 2 parties. The issues being raised by the defence in cross-examination can be dealt with conclusively in submissions so that we do not argue the defence case during the cross-examination of the prosecution. I will request that we stick to the issues of the date in court when the matter occurred.”

This ruling provoked the present application for revision. The application is predicated upon **Article 165(6) & (7)** of the **Constitution** and **Sections 362 and 364** of the **Criminal Procedure Code**. The Applicant craved for an order from this court to have the above ruling set aside and substituted by an order directing that the Applicants be not restricted to cross-examining the prosecution witness in regard to matters which occurred prior to 23rd August 2019. The Applicants stated that the restriction placed on their counsel's cross-examination negatively impacted on their right to fair hearing as recognized under **Article 50** of the **Constitution**. The grounds in support of the application are stated on the face of the application.

Of interest in this ruling is the assertion by the Applicants that there exists civil cases pending before the Commercial and Admiralty Division of the High Court touching on shareholding of the insurance company. It is apparent that the Applicants formed the view that IRA was acting in a partisan manner in the dispute between the contesting shareholders. In that regard, the Applicants formed the view that the charge brought against them by the complainant was in furtherance to this partisan approach to the shareholding dispute. It is this aspect of the case that the Applicants desired to cross-examine the prosecution witness. The application is supported by the annexed affidavit of Bashir Ahmed Mburu. A list of authorities was also filed.

The application is opposed. The prosecution filed grounds in opposition to the application. It was the prosecution's view that the application for revision was an abuse of the court's process as it was purposely meant to delay the just conclusion of the criminal trial. The prosecution stated that the questions that the Applicants sought to ask from the particular witness were irrelevant to that particular witness hence the determination by the court. The prosecution asserted that the Applicants had not demonstrated any breach of their rights to fair trial as contained under **Article 50** of the **Constitution**. The prosecution stated that the Applicants' counsel had been granted leeway to cross-examine the particular witness for a period of four (4) hours. It was in that regard that the prosecution urged the court to dismiss the present

application.

During the hearing of the application, this court heard oral rival submission made by Dr. Kamau Kuria and the response thereto made by Ms. Chege for the State. This court has carefully considered the said submission. It was clear to the court that the main issue for determination is whether the trial court, by making the ruling that is being sought to be impeached, breached the Applicants' right to fair trial. According to Dr. Kuria, the Applicants' counsel should not have been restricted at all in the questions that he sought to ask the prosecution witness in cross-examination. Learned counsel relied on **Section 6** of the **Evidence Act** which provides that:

“Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.”

It is instructive that **Section 6** of the **Evidence Act** is under **Chapter 2** of the **Evidence Act** that deals with admissibility and relevance of evidence. If I understood Dr. Kuria correctly, he is saying that a trial court cannot restrict defence counsel under any circumstances when cross-examining a prosecution witness, because, he asserts, counsel should have latitude to ask questions which may point to underlying issues which may not have been brought out in examination in chief related to the events of the particular day. On the other hand, Ms. Chege for the State, while opposing the application, submitted that learned counsel for the Applicants was granted ample time to cross-examine the particular witness. The issue in dispute was not that the counsel was restricted in cross-examining the particular witness on relevant issues, but rather the fact that learned counsel was asking the particular prosecution witness questions of fact that the witness was not privy to.

This court has perused the proceedings of the trial court leading to the impugned ruling that is being challenged on this application for revision. Before delving on the issue raised, it is important for this court to state that as a matter of policy, this court in exercise of its supervisory jurisdiction of subordinate courts as provided under **Article 165(6) & (7)** of the **Constitution** and **Section 362** of the **Criminal Procedure Code** is required to exercise such power with restraint so as not to unnecessarily disrupt and interfere with pending criminal trials upon interlocutory application being made to it challenging certain aspects of the proceedings. This court agrees with the holding by the court in **Ebrahim, R (On the application of) v. Feltham Magistrates' Court & anor [2001] EWHC Admin 130**;

“We think it helpful to restate the principles underlying the jurisdiction. The Crown is usually responsible for bringing prosecutions and, prima facie, it is the duty of a court to try persons who are charged before it with offences which it has power to try. Nonetheless the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of the process. This power is “of great constitutional importance and should be...preserved”: per Lord Salmon in DPP v Humphrys [1977] AC 1 at p 46C-F. It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. We must therefore stress from the outset that this residual (and discretionary) power of any court to stay proceedings as an abuse of its process is one which ought to be employed in exceptional circumstances, whatever the reasons submitted for invoking it. See Attorney-General Reference (No.1 of 1990 [1992] QB 630, 634G.”

It should also be noted that to ensure that the criminal trial process is fair to an accused, the **Constitution**, the **Criminal Procedure Code** and other **Statutes** and decided cases have put in place legal safeguards in the trial process itself that protects the rights of an accused person during the entire proceedings. A court having supervisory powers, when a challenge on such proceedings before a trial court is brought before it, should not therefore proceed on the assumption that the criminal trial process itself was, on the face of it, or was inherently unjust. In other words, the High Court exercising its supervisory powers of magistrates' court, should exercise with circumspection its powers unless it is established that the trial process that is being challenged is so antithetical to the right to fair trial of the Applicant as guaranteed by the **Constitution** and **Statute** that the court should have no option but to appropriately intervene.

In the present application, it was clear to this court that the trial court did not err when it directed counsel for the Applicants to restrict himself to questions touching on the events that led to the charge being brought against them. The particular witness on the stand was not aware of some of the issues that were being placed to him to answer on cross-examination. Indeed, the trial court acknowledged that the facts that the Applicants' counsel was seeking to obtain on cross-examination from the particular prosecution witness were issues the defence will have ample opportunity to present to the court at the appropriate time. Further, the value of the evidence elicited from cross-examination can only be assessed after the conclusion of the trial itself. Therefore, it would be remiss on the part of this court to allow the disruption of the criminal trial process itself by allowing an application challenging an interlocutory ruling of the trial court when no obvious ground has been laid that the Applicants' right to fair trial had been infringed. I think the observation made by the court in **The Oriental Fire and General Assurance Ltd vs Govinder & Others [1969] EA 116** is pertinent in this application. The court held thus:

“Cross-examination may sometimes let in evidence which could not be admissible in examination in chief, but here the cross-examination took place after objection had been taken to the admission of the evidence and, moreover, was only directed to the right of the witness to refresh his memory from a written record, not to the substance of the evidence. In any case, the evidence was clearly inadmissible against the third respondent. There is no authority for saying that the opportunity, not exercised, to cross-examine can make admissible evidence that is otherwise inadmissible and the court has no hesitation in rejecting that proposition.”

It is clear from the above reasons that the application is for disallowing. The same is disallowed. It is dismissed. The trial court's file is sent back to the trial court to fix dates when the trial shall continue to its conclusion. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MARCH 2020

L. KIMARU

JUDGE