



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.521 OF 2020

JAMES NTHUKU KITHINJI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, James Nthuku Kithinji is facing a charge of **assault causing actual bodily harm** contrary to **Section 251** of the **Penal Code**. When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. The prosecution witnesses have already testified. After the close of the prosecution's case, the Applicant made submission on no case to answer. After considering the application, the trial court ruled that the prosecution had established a *prima facie* case to entitle the court place the Applicant on his defence. Aggrieved by this decision, the Applicant moved to this court by way of an application of revision under **Sections 362** and **364** of the **Criminal Procedure Code** and **Article 165** of the **Constitution**. The thrust of the Applicant's application for revision is that the trial court had failed to evaluate the evidence adduced by the prosecution witnesses and thereby reached the erroneous determination that he had a case to answer. The Applicant cited several authorities in support of his case for the revision of the trial magistrate's decision.

During the hearing of the application, this court heard oral rival submission made by Mr. Chege for the Applicant and Mr. Momanyi for the State. Mr. Chege lamented that the trial court had failed to consider the submission made by the Applicant before reaching the impugned decision. He pointed out that the medical report presented in court in support of the complainant's allegation that he had been injured were contradictory and conflicting. Further, the prosecution had not established, to the required standard, that indeed the Applicant had assaulted him. He noted that despite the fact that no other witness came forward to testify that he had witnessed the assault take place, the trial court erroneously went ahead and placed the Applicant on his defence, it is on that basis, and the written submission presented to court, that the Applicant urged the court to set aside the Ruling of the trial court and instead make a determination that the Applicant had no case to answer.

Mr. Momanyi for the State opposed the application. He submitted that the application made before court was premature. He likened the Applicant's application to a runner starting the race before the gun to start the race had been fired. He pointed out that the trial court had not made any finding in regard to the innocence or guilt of the Applicant. The trial court had not assessed or evaluated the evidence to make a determination that can make this court invoke its revisionary jurisdiction. He stated that when an accused is placed on his defence. It gives him an opportunity to present his defence and cannot be said to constitute a miscarriage of justice. He was of the view that the application was a tactic to delay the just conclusion of the trial. He urged this court to dismiss the application.

This court has carefully re-evaluated the submission made by the parties to the application, both oral and written. The issue for determination by this court is whether the Applicant made a case for this court to revise the order placing him on his defence by the trial magistrate's court. The Applicant invoked this court's jurisdiction under **Section 362** of the **Criminal Procedure Code** that provides that:

“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.”

In **Republic –vs- James Kiari Mutungei [2017] eKLR** Nyakundi J held thus:

“The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits... In considering similar provisions under the Indian Criminal Procedure Code and applicable statute on revisional powers, the Supreme Court in the case of **Sriraja Lakshmi Dyeing Works v Pangaswamy Chettair [1980] 4SCC 259** said as follows:

“The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. The question of the extent of appellant or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words to satisfy itself under section 25 read as which has similar provisions with our section 362 of the criminal Procedure Code (Cap 75 of the Laws of Kenya) (emphasis mine) is essential a power of superintendence. The scope of the revisional powers of the high court where the high court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, which is quite obviously as much wider jurisdiction. That jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional court is not a second court of appeal (emphasis supplied).”

The Applicant, complained that the trial court did not evaluate in detail the submission that he had made when the prosecution closed its case. The Applicant was of the view that had the trial magistrate properly evaluated his submission, the trial court would have reached a determination that he had no case to answer. In essence, the Applicant is saying that he ought to have been acquitted at that stage of the trial instead of being placed on his defence. The prosecution on his part, formed the view that the application before the court was prematurely presented since no determination had been made regarding whether the Applicant had been declared guilty or not.

This court agrees with the prosecution that the Applicant jumped the gun when he made the present application before this court. While exercising its revisionary jurisdiction, this court is not required to delve into the merits or otherwise of the prosecution’s case lest it is embarrassed should it be called upon to render a determination should an appeal be filed. The Applicant’s submission required this court to consider the merits of the prosecution’s case. This court cannot do so at this stage of the proceedings. In any event, there were no reasons placed before this court by the trial court to enable the court re-evaluate whether the determination to place the Applicant on his defence was merited or not. It has been held by various courts that it is not mandatory or even advisable for a trial court to give detailed reasons while placing an accused on his defence because to do so may cause embarrassment to the court when making the final determination.

In **Wesley Kiptui Rutto & Another vs Republic [2017]** eKLR Muriithi J held thus:

“21. Sitting with Chesoni J (as he then was) Trevelyan, J in Festo Wandera Mukando v. R [1976-80] 1 KLR 1626, 1631 to the same effect said:

“[W]e were once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the Court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgment. Where a submission of “no case” is rejected, the Court should [say] no more than it is. It is otherwise where the submission is upheld when reasons should be given: for then it is an end to the case or the count or counts concerned.”

In the present application, it is clear to this court that the trial magistrate did not err when it placed the Applicant on his defence without giving reasons. After the close of the defence case, the trial court may or may not convict the Applicant. This court lacks jurisdiction at this stage of the proceedings, and in a revision application to look into the merits constituting the facts that the prosecution is relying on in support of its case. It is only when the case has been finally concluded, that this court’s appellate jurisdiction can be invoked to have for all issues of fact and law to be considered. This court agrees with the prosecution that the Applicant put the horse before the cart when he filed the present application before this court.

In the premises therefore, the application lacks merit and is hereby disallowed. The file is ordered returned to the trial magistrate’s court for hearing and determination. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF JUNE 2020

L. KIMARU

JUDGE