



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 11 OF 2020

PATRICK MWANGI KINYUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. The applicant moved this court vide an application dated 14/02/2020 and filed on the same date wherein he sought the orders that this court do examine the criminal records in **Embu Chief Magistrate's Court Criminal Case No. 463 of 2019 Republic –vs- Patrick Mwangi Kinyua** and declare the proceedings and the order issued on 12/11/2019 a nullity in law and do order a fresh trial before another magistrate other than Hon. T.K Kwambai, Senior Resident Magistrate.

2. The application was premised on the grounds on the face of the application and further supported by the affidavit by the applicant. In a nutshell, it was the applicant's case that he was charged with two offences being stealing by servant contrary to Section 281 of the Penal Code and conspiracy to defraud contrary to Section 317 of the Penal Code and that when the matter came up for pretrial, it was confirmed ready for hearing on the basis of the documents and the statements he had been supplied to the defence as well as the charge sheet. That however on the hearing date the prosecution tried to rely on new documents which had not been supplied to the applicant and after which the applicant's counsel on record sought for adjournment in order to be supplied with the same. The defence applied that the court file was placed aside for the documents to be supplied to the applicant and a new hearing date be given.

3. On the new hearing date, PW1 the prosecution witness referred to new documents and which documents the defense was not aware of and not supplied with and which included audit reports, appointment letters and contracts of employments. That the court however allowed PW1 to testify and further directed that the documents to be supplied later despite the applicant's advocates on record having objected due to their inability to prepare for their defense. That as such it was unfair that the matter proceeds while he was being supplied with documents as the case was ongoing. Further that his rights were being violated and thus the orders of the trial court of 12/11/2019 ought to be reviewed and set aside and the court declare the proceedings for that day a nullity.

4. The application was opposed vide a replying affidavit sworn by Ms. Mati for the Respondent and wherein she deposed that the applicant had not set out the grounds for revision as required by law as the trial magistrate had a duty to ensure that justice is not only done but seen to be done. Further that the applicant's counsel confirmed service of statements when the matter came up for pretrial on 22/08/2019 and the reasons as to why the audit report was not supplied was explained. Further that discovery was a continuous process and the prosecution is always at liberty to furnish documentary evidence at any time provided that the applicant's right to an adequate time to prepare for defense is not infringed and as such there was nothing incorrect, improper or illegal in declining a request for adjournment to the applicant on the account of the unavailability which would be produced at any time before its production as exhibit and/or testimony of its maker.

5. The application was canvassed by way of written submissions and wherein the applicant submitted to the effect that Article 50(2)(j) and (k) of the Constitution guarantees the right of an accused person to be informed in advance as to the evidence the prosecution intends to use and further to challenge the said evidence. It was his submissions that this was not ensured as he was ambushed with documents by prosecution through the evidence of PW1 and which action was in breach of right to a fair hearing as guaranteed in the Constitution. Reliance was made to the case of **George Mgodhe Juma & Others -vs- the Attorney General (2003) eKLR** where the court defined "fair hearing". He invoked the jurisdiction of this court which is bestowed by Section 362 and 365 of the Criminal Procedure Code. It was his further submission that by the court not standing down the witness despite his objection was against the rules of discovery as the prosecution did not make full discovery. Reliance was made on **R -vs- Raphael Muoki Kallingo (2015) eKLR**.

6. The respondent in opposition to the application submitted that the applicant did not prove any illegality, irrationality or procedural impropriety so as to benefit from the revision jurisdiction under Section 362 of the Criminal Procedure Code. Further that though there is a right to disclosure under Article 50(2) of the constitution, discovery is not endless without justification and that despite the discovery process being continuous it is not akin to open cheque subject to abuse. Reliance was made to the case of **Thuita Mwangi & 2 others -vs- Ethics and Anti-Corruption Commission & 2 Others**. The respondent further submitted that the audit report which the applicant was objecting

was to be produced by the maker at a later date and thus the applicant was not prejudiced in any way and there was no illegality by the trial court and that the applicant did not prove that there was any ambush.

B. Application of the law and determination

7. I have analyzed the application herein, the reply by the Respondent and the rival submissions by the parties herein. I note that the application was brought under Section 362 of the Criminal Procedure Code. This section bestows this court with jurisdiction 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. As it can be seen from this section, this court's jurisdiction therein is not only exercisable where the subordinate court has made a finding, sentence or order but it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.

8. The application herein is in regard to the proceedings and orders of the trial court made on 12/11/2019. As such the application is properly before this court in accordance with the revisionary powers of the court.

9. As was well submitted by the parties herein, Article 50(2)(j) of the Constitution of Kenya guarantees the rights of an accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. The applicant however deposed and further submitted that on the material day, PW1 was referred to documents which were not provided to them on the day of pretrial *to wit* an appointment letter, audit report and contracts of employment. The respondent did not controvert this but only submitted that the audit report which the applicant was objecting was to be produced by the maker at a later date and thus the applicant was not prejudiced in any way or ambush.

10. I have perused the trial court records more so the proceedings of the date in question annexed to the application and I note that PW1 in cross examination produced a copy of the audit report and the same was marked as "PMFI 4." However, the counsel for the accused opposed to the production of the same on the basis that the said audit report was not part of the documents provided during pre-trial and thus it would be difficult for him to put up defence or cross examine the witness.

11. Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence and which should be viewed as being an advancement of the right to have adequate time and facility to prepare a defence under sub-article 2(c).

12. The right to a fair trial is among those rights under Article 25 of the Constitution which cannot be limited or taken away from a litigant in any manner. It is not just a fundamental right but one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights. It is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse. (See **Francis Karioko Muruatetu & another v Republic [2017] eKLR**).

13. Under Article 21 of the Constitution, this court and indeed the trial court being a state organ has a fundamental duty to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. Further under Article 23 and 165 therein, this court has jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This is in addition to the revisionary jurisdiction under Section 362 of the Criminal Procedure Code.

14. The importance of pre-trial conference is recognized in the **"Guidelines relating to active case management of criminal cases in Magistrate's Courts and the High Court of Kenya (clause 5.3)"** issued by the then Chief Justice –Dr. W. Mutunga.

15. It is my opinion that by the prosecution having not supplied the said documents more so the audit report to the applicant herein was indeed a prejudice to him. If the trial was to proceed with the document being produced by the witness in the dock without the having set its eyes on it. It was his right to challenge evidence by the prosecution by cross examining the witness on the audit report before the court. In my view, cross-examination would only have been made possible if the defence had received the documents in advance as it would have given them time to read through the said document and prepare for the applicant's defence.

16. By the court having allowed the witness to proceed and testify without the applicant herein having been given adequate time to prepare to challenge the evidence by PW1, the directions and order to that effect was incorrect, illegal and improper as the same was in breach of the applicant's right to a fair trial. On the same breath, it is my view that the proceedings which followed the said order in relation to the testimony by the said PW1 were also irregular.

17. The respondent's submission that a document may be produced by the maker during the hearing without it having been served on the defence is incorrect. The defence has a constitutional right that cannot be taken away to be given a fair hearing.

18. The court further failed in its fundamental duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights as provided for under Article 21 of the Constitution.

19. From the record I note that PW1 was the General Manager of the complainant company and as such was a key witness in the trial. He was to explain how the auditor was outsourced and the procedures followed in determining that the applicant stole or defrauded the company.

20. I reach a conclusion that the trial magistrate erred in denying the applicant his constitutional rights of a fair hearing which error this court ought to rectify.

21. It is my finding that this application has merit and it is hereby allowed in the following terms: -

That proceedings of the entire trial court of 12/11/2019 are hereby nullified and that Embu CM Criminal Case No. 463 of 2019 will be heard by another magistrate in the station.

22. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF AUGUST, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriithi for Applicant & Ms. Mati for the Respondent through Video Link