REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL REVISION NUMBER 4 OF 2019

(From original order in Machakos Chief Magistrate's Sexual Offence Case No. 11 of 2018)

BETWEEN

JOSEPH NDUVI MBUVI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. This revision arises from the ruling of the Learned Trial Magistrate, **Hon C K Kisiangani**, **SRM** in Machakos Chief Magistrate's Sexual Offence Case No. 11 of 2018**,** on 10th January, 2019 by which the learned trial magistrate placed the applicant on his defence and directed the applicant herein to supply the prosecution with witness statements and any other evidence the defence intended to rely on at the defence hearing. The court went further and made orders geared towards compelling the defence witnesses to record their statements and furnish the prosecution therewith within 14 days thereof.

2. The applicant challenges the said decision on the ground that the defence has no reciprocal duty to disclose its case or supply the prosecution with its defence including witness statements. It was therefore neither correct nor legal for the trial court to compel the applicant and his witness to record statements since that was contrary to the best interest of the applicant.

3. According to the applicant the ***Victims Protection Act*** of 2014 which was relied upon by the prosecution is subservient to the Constitution which confers rights to the applicant and confers no reciprocal rights to the prosecution or the victim. According to the applicant without appropriate amendments to the Constitution, the prosecution cannot claim any such rights and privileges. In this respect the applicant relied on **Thomas Patrick Cholmondeley vs. Republic [2008] KLR** and submitted that the learned trial magistrate exercised her discretion incorrectly and improperly hence her orders ought to be set aside.

4. In his further submissions, **Mr Mukula**, learned counsel for the applicant relied on Article 50(2) of the Constitution and averred that section 9 of the said Act does not provided that the victim should be supplied with the defence evidence. He further relied on the decisions in **Fredrick Kirime Mugiri vs. R [2016] KLR** and **Patrick Mugambi vs. R [2017] eKLR** and submitted that where there is a conflict between the rights of the accused and those of the state, those of the accused take precedence.

5. The revision was however opposed by the Respondent through the Learned Prosecution Counsel, **Miss Lilian Mogoi**. According to her, the right to fair trial is provided for in Article 50 of the Constitution and clause (9) of the said Article empowers Parliament to enact legislation to provide for the welfare of the victims. Pursuant to the said provision, Parliament has enacted the ***Victims Protection Act***, No. 17 under which section 9(1)(e) provides for the right of the victim to be informed of the evidence that the prosecution and the defence intends to rely upon and to have reasonable access to that evidence.

6. It was submitted that since a ruling having been made on a prima facie case and the matter was at the defence stage, the prosecution sought to be supplied with the defence statements and documents which order was made pursuant to the said Act. According to learned counsel, the right to fair trial does not only apply to the accused but applies to the other parties since there is need to prepare for the trial and the defence.

7. It was therefore submitted that the opposition to supply the same was not based on any law and learned counsel relied on **R vs. IP Veronica Gitahi & Another Mombasa HCCR Case No. 41 of 2014** in which the court set out the factors that would militate against the supply of the said statements which factors do not exist in this case. Learned counsel also relied on paragraph 45 of **Leonard Maina Mwangi vs DPP & Others Criminal Case No. 57 of 2016**, and submitted that the provision is meant to enable the prosecution prepare for the trial and that no prejudice has been shown by the decision to have the said statements supplied. In her view, it was only fair and proper

that the application be dismissed.

Determination

8. I have considered the material before, the submissions as well as the authorities cited and this is the view I form of the matter.

9. Section 362 of the ***Criminal Procedure Code*** provides as follows:

> ***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.***

10. Section 367 of the ***Criminal Procedure Code***, on the other hand, provides as hereunder:

> ***When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.***

11. A strict reading of section 362 of the ***Criminal Procedure Code***, however, does not expressly limit the High Court's revisionary jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings. Suppose a subordinate court would be minded to make an absurd decision of commencing a criminal trial by directing the accused to give evidence before the prosecution, I do not see why the High Court cannot call the proceedings in question to satisfy itself as to the correctness, regularity or legality of such order. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine ***the regularity of any proceedings of any such subordinate court*** as well.

12. However, section 364 of the ***Criminal Procedure Code*** provides that:

> ***(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.***

13. From the foregoing it is clear that the High Court cannot exercise revisionary jurisdiction in an order of acquittal. It may however exercise the said jurisdiction in case of a conviction or ***in any other order***.

14. It is, however my view that the 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 revisionary 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. Dealing with the right to appeal in interlocutory ruling in a criminal matter, the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley vs. Republic[2008] eKLR**, held that:

> **"We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under *section 84 (7)* of the Constitution. First 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. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."**

15. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:**

"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice…If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion…This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case".

16. In this case, what falls for determination is whether the defence is obliged to disclose its statements and documentary evidence upfront. Article 50 of the Constitution provides as hereunder:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. information shall be given in language that the person understands.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

(6)A person who is convicted of a criminal offence may petition the High Court for a new trial if—

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

(b) new and compelling evidence has become available.

(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

17. It is therefore clear that Article 50(2) only applies to the accused person. Accordingly, Article 50(2) of the Constitution which provides for right to be ***informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence*** can only inure to the benefit of the accused. The prosecution cannot therefore rely on the said provision as a basis for seeking that it be informed in advance of the evidence the accused intends to rely on and to have access to the same. In **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, the Court of Appeal held that:

> **"We start from the point that in each and every criminal prosecution, the burden of proof of guilt is invariably upon the prosecution and at no stage does that burden shift to an accused person whether the accused person be the meanest beggar on our streets, or Lord Delamere whose grandson the appellant is said to be. So if at the beginning of the trial, the Constitution obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko's position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by the Constitution. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced… Muga Apondi, J, appreciated that Parliament had not conferred on the prosecution the same rights as those conferred on accused persons. He, therefore, resorted to his inherent jurisdiction as a court and since he thought it would be convenient for the prosecution to have the same privileges as those of the accused person, the learned Judge would himself confer such powers on the prosecution through the exercise of his inherent jurisdiction. That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of the Constitution. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association… It is the state who has the capacity to deprive individual Kenyans of their rights guaranteed by sections 70 to 82 inclusive of the Constitution… We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in the Constitution and it ought not to be allowed to claim the same privileges… In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and the Constitution, wisely in our view, does not give the prosecutors such powers. They cannot be given through the inherent power of the court.**

18. It is therefore clear that under the above Article the right to disclosure is only exercisable in favour of the accused. Whereas Article 50(1) of the Constitution provides for fair hearing generally, as the Court of Appeal appreciated that right cannot be stretched to confer upon the prosecution the right to be informed in advance of the evidence the accused intends to rely on, and to have reasonable access to that evidence or reciprocity of statements.

19. The Prosecution however relied on Article 50(9) of the Constitution as read with section 9(1)(e) of the ***Victim Protection Act***. Article 50(9) empowers Parliament to enact legislation providing for the protection, rights and welfare of victims of offences. In my view that Article is intended for the protection of the rights and welfare of the victims and nothing more than that. It cannot be extended to encompass the right of the prosecution to the evidence the accused intends to rely on and to access the same. On the other hand, section 9(1)(e) of the said Act provides that:

A victim has a right to —

(e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;

20. The Court of Appeal in the **Thomas Patrick Gilbert Cholmondeley vs. Republic** (supra) was clear in its mind that since there is a presumption of innocence that the Constitution bestows upon an accused person, there is no case that an accused person can be expected to disclose in advance. To the extent therefore that section 9(1)(e) of the ***Victim Protection Act*** expects that an accused will in advance inform the victim of the evidence he intends to rely on, and to have reasonable access to that evidence, those provisions clearly contravene both the spirit and the letter of the Constitution and to that extent it is null and void.

21. I therefore agree with **Kimaru, J** in **Patrick Mugambi vs. R** that:

> **"Where the exercise of right to fair trial by the accused conflicts with that of the victim, then the right of the accused shall take precedence or shall prevail…[The] accused person, cannot be compelled to disclose to the victim or for that matter the prosecution, the evidence that he may or may not adduce in his defence [as]…this would be in breach of his constitutionally guaranteed right to fair trial as provided by Article 50(2) of the Constitution."**

22. It is on the same grounds that I agree with **Mabeya, J Fredrick Kirime Mugiri vs. R** (supra). It is therefore with greatest respect that I disagree with the positions adopted by **Lesiit, J** in **Leonard Maina Mwangi vs DPP & Others** (supra) and **Muya, J** in **R vs. IP Veronica Gitahi & Another Mombasa** (supra).

23. Section 367 of the ***Criminal Procedure Code*** empowers the Court to make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith. Just like **Kimaru, J** in ***Mugambi Case***, I find that the order issued by the trial court on 10th January, 2019 in Machakos Chief Magistrate's Sexual Offence Case No. 11 of 2018 – **Republic vs. Joseph Nduvi Mbuvi** – was illegal and improper. The said order is hereby called to this court by an order of revision under section 362 of the ***Criminal Procedure Code*** and the same is set aside. It is substituted by an order dismissing the victim/prosecution's application to be supplied in advance with the evidence that the accused may or may not adduce during his defence.

24. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 26th day of February, 2019.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Mukula for the Subject/Applicant

Miss Mogoi for the Respondent

CA Josephine