REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL REVISION NO. 1 OF 2018

DPP..APPLICANT

VERSUS

JACKSON CHERONO........RESPONDENT

RULING ON REVISION

1. The ruling in this matter relates to further issues for determination in this Revision are as follows:

> *(a) Whether the application for revision from a decision of the trial Court closing the case for the Prosecution upon refusal of adjournment as complaint; and if so*
>
> *(b) Whether the closure of the Prosecution's case upon refusal of agreement is an illegality null and void and subject to revision.*

2. In ***Wesley Kiptui Rutto & Anor. v. DPP,*** Kabarnet ***KBT HCCri. Revision no. 2 of 2017***, this Court dealt with the question of scope of revision powers of the Court, and held as follows:

> ***"The power of revision***
>
> *12. Sections 362 and 364 of the Criminal Procedure Code provide as follows:*
>
> ***"362. Power of High Court to call for records***
>
> *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.*
>
> ***363. ….***
>
> ***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.***
>
> *(c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.*
>
> *(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:*

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

[Act No. 10 of 1970, Sch., Act No. 19 of 2014, s. 20, Act No. 25 of 2015, Sch.]"

13. In applying subsection 5 of section 364 above in ***Republic v. Everlyne Wamuyu Ngumo*** *[2016] eKLR, Bwonwonga, J. revised an order for the release of a motor vehicle which the Director of Public Prosecutions (DPP) claimed was an exhibit in the case holding that the DPP had no right of appeal from such an order and it was, therefore, revisable in accordance with section 362 of the Criminal Procedure Code.*

14. I respectfully agree with Odunga, J in ***Director of Public Prosecutions v. Samuel Kimuchu & Anor.*** *[2012] eKLR that the revisionary power exists in interlocutory and final orders, when he held that-*

> *"From the foregoing it is clear that the High Court cannot exercise revisional jurisdiction in an order of acquittal. It may however exercise the said jurisdiction in case of a conviction or* ***<u>in any other order</u>****. Accordingly, I join* ***Ochieng, J.*** *in* ***Livingstone Maina Ngare's Case (supra)*** *in holding that the High Court should exercise its jurisdiction if satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required* ***<u>standards of correctness, legality and propriety."</u>***

15. I have considered the philosophy in the Malaysian case of ***Public Prosecutor v. Muhari bin Mohd Jani and Another*** *[1996] 4 LRC 728, 734-5 cited in* ***DPP v. Samuel Kimuchu****, supra, that –*

> ***"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. <u>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.</u> 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…. <u>This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case".</u>***

16. I find that the revisionary jurisdiction exists in cases of ***all orders, interlocutory or final,*** *of the subordinate court, save that an order of acquittal may not be revised to an order of conviction. Moreover, the Court may exercise its jurisdiction to revise an order* ***suo moto****, despite existence and or exercise of right of appeal by the party who brings the matter requiring revision to the attention of the court by application for revision or otherwise. This was the holding of H.M. Supreme Court of Kenya (Rudd, Ag. CJ. Connell and Pelly Murphy, JJ.) in* ***R. v. Ajit Singh s/o Vir Singh*** *[1957] EA 822, 824 when it considered the construction of then section 363 (5) of the Criminal Procedure Code (in the same terms as today's section 364 (5) of the CPC), as follows:*

> *" Subsection 5 of s. 363 is in the following terms:*

"(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

The construction of this sub-section is not free from difficulty. The opening words appear to indicate that it is concerned with cases where a right of appeal presently exists; but the last three words seem to imply that if the right of appeal had existed and if the party aggrieved has not taken advantage of that right while it existed, then proceedings by way of revision shall not be entertained at his instance.

We do not propose to say which construction is correct; nor do we propose to say whether, in the instant case, an appeal by way of case stated did in fact lie.

> ***<u>We are of the opinion that sub-s. 5 is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s. 361 and s. 363 (1). To hold that sub-s. 5 has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect – for instance in the case of a conviction where no offence known to the law has been proved – merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can, in its discretion, act sui motu even where the matter has been brought to its notice by an aggrieved party who had a right of appeal.</u>*** *In our view* ***Chhagan Raja v. Gordhan Gopal*** *(1936) 17 KLR 69 merely decided that, on the facts of that*

particular case, the court should not make an order in revision. ***It emphasises that the exercise of jurisdiction in revision is discretionary.***

In this case the decision was brought to the notice of the court by the Crown, and the court, in exercise of its discretion, decided to call for and examine the record under the powers conferred by s.361."

This decision supports the submission by the applicants that the High Court's jurisdiction for revision is not ousted by possibility of an appeal. As emphasised in the ***Ajit Singh*** *and the* ***Muhari bin Mohd Jani*** *decisions, the Court has a wide discretion to revise orders of the trial court and the discretion is to be exercised on a case by case basis having regard to the different circumstances of each case.*

17. In addition, Article 165 (6) and (7) of the Constitution of Kenya 2010 entrenches the supervisory jurisdiction of the Court in the following terms:

"165 (6) The High Court has ***supervisory jurisdiction*** *over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and ***may make any order or give any direction it considers appropriate to ensure the fair administration of justice.****"*

*18. Clearly, the court has jurisdiction under the Constitution and statute to revise the order before the court. The only question is whether the court will, in discretion, exercise that jurisdiction. That discretion is to be exercised judicially in the light of the settled principles of the court with regard to the nature of order sought to be revised, and whether the decision is "****a finding, sentence or order which is manifestly incorrect****" or it has resulted in an miscarriage of justice, or, in the words of the applicants, it has caused an injustice to the accused. In the particular case before this court, and in deciding whether to exercise discretion to revise the order in question, it appears to me that the question to be answered is whether the revision of the order rejecting a submission of no case to answer would micro-manage the trial of the case before the Magistrate's Court, whether the trial court's decision of rejecting the submission of no case to answer was "****a finding, sentence or order which is manifestly incorrect****", or one that would result in an injustice or miscarriage of justice, which this court in its supervisory jurisdiction cannot allow to stand. In this regard, as discussed below, there is a matter of applicable judicial policy on the procedure in cases of findings on a submission of no case to answer."*

3. Section 347 and 348A of the Criminal Procedure Code sets out the matters for which an appeal shall lie as follows:

"***347.*** *(1) save as is in this part provided:*

(a) A person convicted on a trial held by subordinate Court may appeal to the High Court

(b) (Repealed by as of 2003 section 93)

(c) An appeal to the High Court may be on a matter of fact or well as a matter of law."

348A. Right of appeal against acquittal, order of refusal or order of dismissal

(1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law. (2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately. [Act No. 13 of 1967, s. 3, Act No. 12 of 2012, Sch, Act No. 19 of 2014, s. 19.]*."*

4. There is no right of appeal from a decision of the trial Court on the closing the Prosecution's case upon refusal of adjournment, as there is yet no conviction or acquittal upon which an appeal in accordance with section 347 and 348A may be lodged. With respect, the Prosecution was right in seeking revision of the order of the trial Court rather than attempting an invalid appeal. In making his submission as to appropriateness of an appeal rather than the *"narrower review"*, Counsel was mistaken as to the nature of revision as distinguished for *"review"* in civil cases. A review in civil cases is a re-look of a matter on the facts before the Court. A revision in a criminal trial is a *"judicial review"* for ascertainment of the legality of the process and order of the criminal trial Court. See difference between review and appeal in civil cases in ***NBK v. Njau*** C.A. No 211 of 1996 [1997] eKLR.

5. Section 362 of the Criminal Procedure Code is clear on the scope of revision in criminal trial 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."

On the facts

6. The order of the trial Court challenged in this revision application was in material terms as follows:

> *"As much as the Prosecution indicated to Court in the morning that three witnesses were present. The said witnesses have not been seen by Court. The only two indicated on the charge sheet have been called out by clerk and there is no response. Since there is no Prosecutor in Court and 1 witness having testified for the prosecution. I therefore decline to further adjournment. The accused is entitled to a fair and just and expeditious trial. The Prosecution case is therefore closed."*

7. In arriving at this conclusion, the trial Court cited ***R. v. Benedict Kalowe Kaweto*** (2008) eKLR per Lenaola, J. (as he then was) that:

> *"No Court shall be held at ransom by the Prosecution and each Magistrate is entitled to ensure order and decorum in his Court."*

8. With respect, the broad policy statement of the decision is acceptable with a rider only that the action taken by the Court in dealing with the perceived being *"held at ransom"* be in accordance with the law.

9. The question therefore becomes one of the legality of the action taken by the trial Court.

10. In this case, the DPP by letter dated 23/1/2018 sought revision of the order by the trial Court set out above complaining that:

> *"The Court proceeded to close the Prosecution case in the absence of the Prosecutor and put the ruling on case to answer for 28th February 2018. In my view, there is no law that allows a Magistrate to close a Prosecution case on behalf of the Prosecution. Secondly, the Prosecution ought to have been given a last adjournment before the case was dismissed for whatever reason. Thirdly, all the other matters listed for hearing on the material date indicating some with witnesses present were adjourned except this particular one."*

11. The Respondent filed a Replying Affidavit sworn on 9/7/18 in which he contested the facts of the circumstances surrounding the making of the order by the trial Court, pointing out that the Prosecution had previously been given a last adjournment; that the Prosecution had failed to take the Court seriously and had in fact shown disrespect towards the Court by failing to attend the Court; and urging that the ruling of the trial Court could only be challenged by way of appeal and not by revision.

12. I would agree with submissions by Counsel for the Respondent that the issues of alleged bias on the part of the Court and alleged disrespect and failure to take the Court seriously to attend the Court proceedings are matters suitable for an appeal on the merits when the Court examines the facts of the case. However, the issues before the Court are crystal clear issues of legality of the order of the trial Court in closing the case for the Prosecution upon refusal of adjournment in the absence of the Counsel for the Prosecution.

13. As held in KBT Criminal Revision No. 3 of 2018, ***R. v. Thomas Kipramoi*** of 26/7/18, the trial must be alive to the presence of the complaint in a criminal case whose interest although advanced by the Prosecution stands to suffer when the criminal complaint is dismissed for reasons other than merit of the case. Unlike the plaintiff in a civil suit who may sue his Counsel for professional negligence in the event of Counsel mishandling his case the same is not open to the complaint in a prosecution when charge is dismissed for reason of failure of the Prosecution to attend Court for whatever reason.

14. As an officer of the Court, the Prosecution is subject under sections 55 and 56 of the Advocates Act to the discipline of the Court and the trial Court in this case could have taken action against the DPP in a manner that, leave intact the complainant's case in the criminal trial.

15. Criminal process is not all and only about the fair trial of the accused; there is also the interest of the complainant victim of the criminal offence as attested to the emerging judicial system of recognition of the victim's interest by such legislation as Victim Protection Act No. 17 of 2014, particularly section 4 (2) (b) thereof) and the very provision for victim impact statements in criminal proceedings. See Part X of the Judiciary Criminal Procedure Bench Book, 2018, at pp. 93-4. Section 4 (2) (b) of the Victim Protection Act, 2014 provides as follows:

> "(2) Subject to subsection (1), ***a court,*** administrative authority or person performing functions under this Act shall ensure that—
>
> (a) ….;
>
> ***(b) Every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken;"***

16. The DPP's allegation of bias on the part of the trial Court is not proper subject of a revision. The Counsel may have taken it up by an application for recusal of the trial Court, and this Court cannot deal with the question except in a valid appeal for determination thereon.

Conclusion

17. On the decision of the trial Court subject of the revision, I think it is plainly wrong to close the case for the Prosecution without regard to the interest of the complainant in the criminal complaint subject of the charge. The Court may have considered granting the complainant leave to prosecute the case privately in accordance with the law, and then deal with the defaulting Prosecutor in accordance with the provisions of the Advocates Act as officer of the Court.

18. The order closing the Prosecution case was made without jurisdiction and it must be declared null and void, as section 207 of the Criminal Procedure Code as interprets such closure by the Prosecution itself. Upon refusal of the adjournment, the Court shall have called

upon the complaint to prosecute the case as a private Prosecution, and the Prosecution would only have been closed upon the complaint indicating that he had no further witnesses to call.

19. On the principle for the interference with the discretion of a trial Court set out in ***Mbogo v. Shah*** (1968) EA 93, this Court feels justified to interfere with the discretion of the trial Court in refusing the adjournment for the Prosecution and therefore directs that the trial Court's ruling of 22/1/18 be set aside and the criminal trial proceedings from the position it had reached before the said ruling. See KBT HC. Cr. Revision No. 3 of 2018, supra.

Orders

20. Accordingly, for the reasons set out above, the trial Court's ruling and order of 22/1/18 is quashed and set aside. The criminal trial shall resume from the position it had reached before the said ruling before the same trial Court.

Order accordingly.

DATED AND DELIVERED THIS 26TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Wambeyi Makomere & Co. Advocates for the Respondent.

Ms. Macharia, for the Applicant.