



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL REVISION NUMBER 219 OF 2018

(From original order in Kangundo Criminal Case No. 132 of 2017)

BETWEEN

FRANKLINE MUTHOKA MUMO.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING ON REVISION

1. By their Notice of Motion dated 17th July, 2018, the applicants herein seek the following orders:

1) THAT the court file in the Senior Magistrate's court at Kangundo, Criminal Case no. 132 of 2017 be called to the High Court of Kenya at Machakos for examination and revision.

2) THAT the Honourable Court be pleased to examine and revise the Order issued by Magistrate D. Orimba (SPM) at Kangundo putting the applicant on his Defence and substitute it with a no case to answer and accordingly acquit the applicant of the charge of malicious damage to property.

2. According to the applicant, he was charged with the offence of malicious damage to property contrary to section 339(1) of the *Penal Code* on 5th February, 2017 in the above mentioned matter. In support of that case the prosecution called 5 witnesses and via a ruling of 13th February, 2018, the learned trial magistrate ruled that a prima facie case had been established and that the applicant had a case to answer based on the said evidence.

3. According to the applicant, none of the prosecution witnesses testified having seen him damaging the said church property or that he was in possession of any weapon/device used in destroying the same. However, the learned trial magistrate failed to consider his evidence that PW5 was not a gazetted investigation officer under section 78 of the *Evidence Act*, hence the photographs presented as exhibits which informed the ruling were inadmissible as evidence. It was further contended that though PW5 testified that that the appellant owned up as the one who damaged the said property, this evidence was not corroborated by any of the witnesses.

4. It was further contended that though PW5 alluded to the fact that the applicant confessed to having damaged the said property, the purported confession does not meet the threshold under section 25A of the *Evidence Act*. Apart from the foregoing the applicant raised a myriad of issues which according to him the learned trial magistrate failed to consider in his ruling including the submissions of the accused which were not referred to in the ruling. He also took issue with the fact that there was no assessment report which informed the figure in the charge sheet.

5. It was the applicant's view, that the act of giving reasons for the finding of a case to answer itself suggests by implication that the court had accepted the prosecution case and that he has no shot at a fair hearing.

6. In opposing the application, it was contended through an affidavit sworn by **Mogoi Lilian**, the learned prosecution counsel, that the matter before the learned trial magistrate proceeded in accordance with the laid down rules of evidence and criminal trial procedure and on the face of the record, the trial court applied its mind correctly and justly to the evidence adduced and the submissions of the applicant. It was her view that the evidence adduced by the prosecution witnesses met the threshold of a prima facie case against the applicant.

7. According to the Respondent, the application is premature, improper and an abuse of the process meant to scuttle the case before the subordinate court. It was its case that the applicant should desist from disguising an appeal in form of revision and should await the final

verdict of the trial court and follow the right procedure if aggrieved therewith. To the Respondent, the fact that the applicant has been placed on his defence does not mean that he will be convicted.

8. It was contended that it is for the appellate court to minutely examine the evidence to determine whether the charge is proved to the required standard and if the applicant is aggrieved he can ventilate the grievances on the issues he has raised herein in an appeal.

9. In his submissions, the applicant through his learned counsel, **Mr Liko**, reiterated the contents of the supporting affidavit and submitted that **Hon. D Orimba**, the learned trial magistrate, in his ruling gave reasons for finding the accused has a case to answer. This in learned counsel's view amounts to a miscarriage of justice as the accused is now led to adopt a defence which fills in gaps in the Prosecution's case. In support of his submissions, he relied on the Court of Appeal decision in the case of **Anthony Njue Njeru vs. Republic Crim. App. No. 77 of 2006, [2006] eKLR** and the decision of **Ojwang, J.**, as he then was in **Republic vs. Kamiro Chege [2006] eKLR**.

10. It was submitted that in the ruling the honourable Magistrate made findings which are such that the applicant has even before giving his defence already been found guilty by the court. According to learned counsel, the elaborate reasons given by the court why the applicant has a case to answer, did not emanate from any witness. He then proceeded to examine the evidence on record and concluded that the same ought not to have been the basis of placing the applicant on his defence.

Determination

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

12. 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.

13. 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.

14. 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.

15. 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.

16. 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 ***in any other order***.

17. 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 revisional 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.”

18. 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 untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

19. On the merits, this application is based mainly on two grounds. The first ground is that by giving a detailed ruling, the learned trial magistrate has in fact considered the prosecution case and made findings thereon hence the applicant is now being called upon to fill in the gaps in the prosecution case. This submission calls for a consideration of what amounts to a *prima facie* case. Section 210 of the *Criminal Procedure Code* provides as follows:

If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

20. Therefore, at that stage what the court is called upon to decide is not whether the evidence presented by the prosecution is strong enough to lead to the conviction of the accused but whether the said evidence is sufficient to require an accused to make a defence. In my view, what the court is required at that stage is to consider, without the defence case, whether there is any need to hear the accused’s version. It may well be that notwithstanding the evidence of the prosecution, no case has been established to link the accused with the offence, so that it would be a waste of time placing the accused on his defence. This is what in legal parlance is commonly known as *prima facie* case or case to answer. In Republic vs. Abdi Ibrahim Owl [2013] eKLR a *prima facie* case was defined as follows:-

“*Prima facie*” is a Latin word defined by Black’s Law Dictionary, 8th Edition as “Sufficient to establish a fact or raise a presumption unless disproved or rebutted”. “*Prima facie* case” is defined by the same dictionary as “The establishment of a legally required rebuttable presumption”. To digest this further, in simple terms, it means the establishment of a rebuttal presumption that an accused person is guilty of the offence he/she is charged with. In Ramanlal Trambaklal Bhatt v. R [1957] E.A 332 at 334 and 335, the court stated as follows:

“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a *prima facie* case is made out if, at the close of the prosecution, the case is merely one “which on full consideration might possibly be thought sufficient to sustain a conviction.” This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is “some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”. A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence..... It is may not be easy to define what is meant by a “*prima facie* case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

21. This is my understanding of the holding in Ronald Nyaga Kiura vs. Republic [2018] eKLR where in paragraph 22 it is stated as follows:

“It is important to note that at the close of prosecution, what is required in law at this stage is for the trial court to satisfy itself that a *prima facie* has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of Section 211 of the Criminal Procedure Code. A *prima facie* case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebuttal is offered by an accused person. This is well illustrated in the cited Court of Appeal case of RAMANLAL BHAT -VS- REPUBLIC [1957] EA 332. At that stage of the proceedings the trial court does not concern itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.”

22. Similarly, in Festo Wandera Mukando vs. The Republic [1980] KLR 103, Trevelyan and Chesoni, JJ held that:

“...we 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 judgement. Where a submission of “no case” is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned.”

23. Similar view was adopted by the Court of Appeal decision in the case of Anthony Njue Njeru vs. Republic Crim. App. No. 77 of 2006, [2006] eKLR where it was held that:

“Taking into account the evidence on record, what the learned Judge said in his ruling on no case to answer, the meaning of a prima facie case as stated in Bhatt’s case..., we are of the view that the appellant should not have been called upon to defend himself as all the evidence was on record. It seems as if the appellant was required to fill in the gaps in the Prosecution evidence. We wish to point out here that it is undesirable to give a reasoned ruling at the close of the Prosecution case, as the learned Judge did here, unless the Court concerned is acquitting the accused.”

24. Applying the same decision, Ojwang, J., as he then was in Republic vs. Kamiro Chege [2006] eKLR, said:

“Whenever the Court rules that there is a case-to-answer and puts the accused to his defence, a detailing of its assessment of evidence could lead the accused to adopt a specific strategy of defence; and this could amount to a filling-in of gaps in the prosecution case.”

25. In my view, where clearly the prosecution’s case as presented even if it were to be taken to be true would still not lead to a conviction such as where for example an accused has not been identified or recognised and there is absolutely no evidence whether direct or circumstantial linking him to the offence it would be foolhardy to put him on his defence. There is no magic in finding that there is a case to answer and a case to answer ought only to be found where the prosecution’s case, on its own, may possibly, though not necessarily, succeed. An accused person should not be put on his defence in the hope that he may prop up or give life to an otherwise hopeless case or a case that is dead on arrival. I therefore agree with the position adopted by the High Court of Malaya in Criminal Appeal No. 41LB-202-08/2013 – Public Prosecution vs. Zainal Abidin B. Maidin & Another that:

“It is also worthwhile adding that the defence ought not to be called merely to clear or clarify doubts. See *Magendran a/l Mohan v Public Prosecutor [2011] 6 MLJ 1; [2011] 1 CLJ 805*. Further, in

***Public Prosecutor v Saimin & Ors [1971] 2 MLJ 16 Sharma J* had occasion to observe:**

“It is the duty of the Prosecution to prove the charge against the accused beyond reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer.”

26. To my mind, it would be undesirable for the trial court to subject the evidence adduced by the prosecution to a minute scrutiny before arriving at its decision as to whether or not a *prima facie* case has been established unless the trial court is certain that such a scrutiny is likely to lead to a finding in favour of the accused. Otherwise the court may end up in an undesirable situation where it would in effect be sitting on appeal on its decision when it eventually delivers its final judgement. In arriving at the finding that there is a case to answer the trial court ought to refrain from making any definitive finding as regards the prosecution evidence. I however find nothing wrong in the trial court merely regurgitating the evidence so far adduced without making any findings thereon. The basis for my decision is that the burden is on the prosecution throughout the case to prove every element or ingredient of the offence charged beyond reasonable doubt. Accordingly, notwithstanding the fact that an accused has been placed on his or her defence, even if the accused decides to remain silent, the court is still under an obligation to subject the evidence to scrutiny in order to make a finding as to whether the said burden and standard has been satisfied.

27. In this case, the learned trial magistrate only reproduced the evidence that was adduced by the prosecution without making any findings thereon. Although the defence has taken issue with what was reproduced in my view, that does not mean that the learned trial magistrate has made up his mind as to the nature of the evidence and its weight.

28. As regards the second ground, the defence seems to be of the view that the trial court ought to have made a decision as to the admissibility and the weight of the evidence at that stage. With due respect such an approach is wholly inappropriate at that stage of the proceedings. As already stated above such approach may end up embarrassing the trial magistrate when considering the totality of the evidence after hearing the defence case.

29. I have on my part considered the evidence on record, and I am unable to interfere with the finding of the learned trial magistrate at that stage of the proceedings. Depending on the facts and the law, nothing bars the trial court from acquitting the applicant even if no evidence is forthcoming from the applicant considering the burden and standard of proof in a criminal case. In other words, the standard as to whether or not a *prima facie* case has been established is not beyond reasonable doubt so as to automatically lead to a conviction if no defence evidence is adduced or even if the evidence adduced is considered weak since the weakness of the defence case does not elevate an otherwise substandard prosecution case to the level of attaining a conviction.

30. I have said enough to show that this application was prematurely filed, it is devoid of merits and cannot succeed.

31. In the premises the application fails and is hereby dismissed.

32. It is so ordered.

Read, signed and delivered in open Court at Machakos this 30th day of May, 2019.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Liko for the applicant

Mr Mwakio for Miss Mogoi for the Respondent

CA Geoffrey