REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL REVISION NO.11 OF 2019

(Application Originating from Nyahururu CM's Court CMCR.1424 of 2018 by: Hon. O. Momanyi - SRM)

APPLICANT.....REPUBLIC

- V E R S U S -

MOSES MACHARIA KIGO.....RESPONDENT

RULING

The undated Notice of Motion filed in court on 26/4/2019 is brought by the State (Applicant) against Moses Macharia Kigo, the (accused/respondent) under Article 50, 159(6) and (9) of the Constitution and Section 362 and 364 of the Criminal Procedure Code seeking the following orders:

> ***(1) .....***
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> ***(2) .....(spent)..***
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> ***(3) That the Hon. Court be pleased to issue orders staying the orders of Chief Magistrate's Court Nyahururu (Ocharo Momanyi – SRM) dated 19/12/2019 releasing exhibits in respect of Nyahururu C.M.Cr.1424/2018, Republic v Moses Macharia Kigo pending the hearing and determination of Nyahururu Criminal Case No.1424/2018;***
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> ***(4) That the Hon. Court be pleased to call for and examine the record of the criminal proceedings in Nyahururu Criminal Case No.1424/2018 Republic v Moses Macharia Kigo so as to satisfy itself as to the legality and correctness and or propriety of the order dated 19/12/2018 and 31/12/2018 by Ocharo Momanyi SRM;***
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> ***(5) The Hon Court be pleased to issue orders preserving the suspected sugar as an exhibit of court pending the determination of Nyahururu C.M.Cr.1424/2018 Republic v Moses Macharia Kigo;***
>
> ***(6) That the Hon court be pleased to order the transfer of the criminal proceedings in Nyahururu Criminal Case No.1424/2018 Republic v Moses Macharia Kigo to another magistrate of competent jurisdiction other than Ocharo Momanyi SRM and J.H.S. Wanyanga SRM.***

The grounds upon which the application is brought are that the court's order releasing the subject exhibits to the respondent was prejudicial to the applicant and that the release was incorrect, irregular and illegal and hence should be subject to this court's revisionary powers.

The application is supported by an affidavit sworn by **Ip. John Kamau Mugo** of the DCI – Nyandarua North. He deponed that the respondent was arrested with suspected contaminated sugar, green grams and rice which was subjected to tests by Kenya Bureau of Standards and Government Chemists as a result of which charges were preferred against the respondent before Hon Momanyi SRM, who after hearing the prosecution evidence, acquitted the respondent of Counts IV, V, VI and VII but placed him on his defence on counts I – III. The court also ordered the release of some exhibits which include the impugned sugar. It is the applicant's case that the court's order releasing the sugar is prejudicial to the prosecution because the sugar is still required as an exhibit in the three counts in which the respondent was placed on his defence.

Ms. Rugut further submitted that the prosecution will need to refer to the bags containing sugar as respects Count III, to ascertain whether standardization marks were fixed; that the sugar should not have been released but sent for further tests before it could be released to the respondent.

Counsel submitted that from an examination of the court record, it is their view that that courts which dealt with the matter will not be impartial if they hear the matter; that the decision to release the exhibits shows that the court will not be impartial.

Counsel relied on the decision in ***DPP v Gilbert M'Ringera Cr.Rev.169/2018*** where the court said that revisionary powers cannot be exercised on an acquittal but that where a person has been acquitted, the prosecution has a right to appeal. Counsel urged that they do not seek to revise the acquittal order but the order releasing the sugar; counsel also referred to ***Prosecutor v Lesinko CRA.Rev.9/2018*** which addressed the supervisory powers of the High Court and ***Joseph Ndubi Mbuvi v Republic Cr.Rev.4/2019*** where the court also observed that the High Court has no revision jurisdiction in an order of acquittal; that it may exercise the said jurisdiction in case of a conviction or over any other order.

The application was opposed. The respondent swore a replying affidavit dated 29/4/2019 in which he gives the history of this matter since the court made its order acquitting the respondent of Counts IV – VII on 19/12/2018 and ordering release of the exhibits till the exhibits which had been carried away by the DCI. The exhibits (sugar) were returned to court on 25/4/2019; that this application is an abuse of the court process and made in bad faith because the DPP had intimated right from the onset that they did not intend to appeal the ruling of 19/12/2018 and that the exhibits ordered to be released do not in any way touch on Counts I – III where he was placed on his defence; that an order of revision cannot be issued in view of his acquittal.

Mr. Gakuhi Chege, counsel for the respondent considered all the charges that the respondent faced and observed that the exhibits produced in respect of Counts IV, V, VI and VI were not ordered to be released save for the sugar which was applicable to Count VII where the respondent was acquitted; that exhibits relating to Counts I – III in which the respondent was placed on his defence were not ordered to be released; that after the ruling of 19/12/2018, the DPP through a letter, intimated that it did not intend to appeal the decision of Hon. Momanyi subsequent to which exhibits were released.

Counsel observed that it is after the investigation officers were convicted for contempt of court for taking away the subject sugar that they filed an application seeking to challenge the impugned order but this court struck it out on 5/4/2019; that the applicant realized that it had reached a dead end then they brought this application which shows that the applicant is not acting in good faith.

Counsel also submitted that the reports from the Government Chemist and KEBs JKM 3 and 4 by **Benard Nguyo** and **Kefa Ombachi** are not part of the record of the trial court and are not relevant to this application, the reports being mere opinions made after the order of 19/12/2018. He urged that there is nothing for revision as the court acted within the law.

Counsel further submitted that Section 364(5) of the Criminal Procedure Code provides that where an appeal lies and none is filed, no revision shall be entertained at the instance of a party who could have appealed; that the applicant having failed to appeal, cannot come under Section 364 and this court cannot exercise revisionary powers against an order of acquittal; that if the appellant wanted to challenge the release of exhibits, it should have filed an appeal as the release of exhibits cannot be separated from the order of acquittal.

Counsel relied on the decisions of:

1. ***Republic v Mohamed Rage Shide Cr.Rev.9/2010 (Garisa);***

2. ***Republic v William Said Maghanga Cr.Rev.165/2016 (Voi);***

3. ***Republic v Joseph Ndubi Mbuvi v Rep (Supra) (Machakos);***

4. ***DPP v Gilbert M'Ringera – Supra (Meru).***

All the above decisions held that the High Court cannot, under its revisionary jurisdiction revise an order of acquittal.

I have considered the rival submissions and the authorities that have been cited.

Article 165(6) and (7) of the Constitution bestow upon the High Court supervisory jurisdiction over subordinate courts and any other body or person exercising judicial or quasi-judicial functions. The High Court can call for the record of any of the proceedings before such court and give directions or make an order it considers appropriate.

The above provisions are replicated in Section 362 and 364 of the Criminal Procedure Code which were invoked by the applicant.

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."***

From a reading of the above provision, it seems that the High Court can call for any criminal proceedings at any time to ascertain the correctness, regulating and legality of the proceedings. That is what the applicant has invited this court to do.

In ***Joseph Ndubi case***, the court cited the Malaysian case of ***Public Prosecutor v Muhari bin Mohd Jani and another (1996) eLRC 728*** where the court stated the object of revision proceedings as follows page (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 interests 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."

In sum, revision powers are meant to prevent a miscarriage of justice.

Section 364 Criminal Procedure Code sets out the revision jurisdiction of the court. It reads as follows:

> ***"364***
>
> ***(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;***
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> ***(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;***
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> ***(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."***

Although the High Court has wide powers in the exercise of its revisionary powers, there are also limitations to the said powers listed in the same section.

All the decisions that were cited to this court, that is, ***DPP v Gilbert M'Ringera***; ***Joseph Ndubi Mbuvi v Republic; Prosecution v Stephen Lesinko***, the court's rightly held that the High Court in its revisionary jurisdiction cannot reverse or alter an order of acquittal to one of conviction.

In this case, the respondent was acquitted on Counts IV – VII and this court has no power to reverse the acquittal into a conviction. It means that revision does not touch on merits of the case but a review will lie on errors of law and fact.

The Court of Appeal in ***Bichange v R (2005) 2KLR4*** explained the relevance of Section 364(4) as follows:

> ***"The meaning of the section is plain. Where an accused person has been acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction. The trial magistrate had acquitted the appellant on the main charge of defilement under Section 145 of the Penal Code. In view of the provisions of Section 364(4) of the Criminal Procedure Code, Tuiyot, J had no power and was not entitled to convert that acquittal into a conviction."***

Secondly, the court cannot make an order to the prejudice of the accused person unless he has had an opportunity to be heard either personally or through an advocate. In this case, the respondent has been heard but the court will have to determine whether the court would make the order to revise the release of sugar to the respondent upon acquittal on Counts IV – VII.

The third meaning of the above provision is that when an appeal arises from such sentence or order of the subordinate court and no appeal is preferred, the revision cannot be sustained at the instance of the party who could have appealed.

In this case, the magistrate made a determination acquitting the respondent on Counts IV – VII. The State by its letter dated 21/12/2018 clearly intimated that they did not intend to appeal. Although the State seemingly changed its mind and filed an appeal in Misc.7/2019 which only challenged the order made by Hon. Wanyanga on 22/2/2019, but this court struck it out by its ruling of 5/4/2019 for incompetence. As if this was an afterthought, the applicant brought this application about 5 months after the lower court's ruling on 19/12/2018. Although the applicant contends that they are not challenging the acquittal but only the release of the sugar, the question is whether the release of the impugned sugar can be severed from the order of acquittal.

Ms. Rugut submitted that release of the sugar to the respondent will be prejudicial to the State because the sugar is required in the defence on Counts I – III because the prosecution will require to refer to the bags as relates to Count III in which it was alleged that they lacked standardization marks. To this allegation, Mr. Gakuhi Chege replied that the sugar is the subject matter in Count 7 where the respondent was alleged to have offered for sale substandard goods being sugar and the court having found that the prosecution failed to establish a prima

facie case against the respondent, acquitted the respondent and ordered release of the sugar back to the respondent. Counsel further told the court that exhibits in respect of the other charges are yet to be released. Counsel considered the exhibits produced in each charge. There is no evidence to support the contention by Ms. Rugut that the sugar is required during the defence in Counts I - II.

From a reading of the charges, there is no evidence that the bags of sugar were supposed to be released for purposes of confirming whether a standardization mark had been made on them. The particulars of the charge would have disclosed that. The charge that touched on bags of sugar is Count VII on which the respondent was acquitted.

It is obvious that the applicant was aggrieved by the decision to acquit the respondent and the way to challenge their grievance was through an appeal. For that reason, I find that the acquittal of the respondent on Count IV to VII and the order to release the exhibits were part and parcel of the court's order which was appealable but the applicant opted not to appeal. They cannot purport to sever the acquittal and release of exhibits to challenge it through a revision order for reasons already stated.

The applicant has introduced other reports prepared by **Kefa Ombachi** and **Benard Nguyo** from KEBs and Government Chemist, dated 18/4/2019 and 17/4/2019 indicating that the sugar is not fit for human consumption. However, these are tests done after the sugar was produced in court and was carried away by the investigating officers on 19/12/2018. The reports are of no relevance to the decision of the court made on 19/12/2018 and cannot be a basis for the application to have the court stay the release order. The opinion found in the letters in any event does not fault the decision of the court made on 19/12/2019.

The other prayer is that Hon. Momanyi who is hearing Criminal Case No.1424/2018 be barred from hearing the said case and that Hon. Wanyanga SRM, should also be barred from taking over the case because he found the investigation officers in the case guilty of contempt and fined them.

Section 81 of the Criminal Procedure Code provides for change of venue of act by the High Court. It provides:

> ***"Section 81(1). Whenever it is made to appear to the High Court-***
>
> ***(a) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or***
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> ***(b) that some question of law of unusual difficulty is likely to arise; or***
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> ***(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or***
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> ***(d) that an order under this section will tend to the general convenience of the parties or witnesses; or***
>
> ***(e) that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order:-***
>
> ***(i) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;***
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> ***(ii) that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;***
>
> ***(iii) that an accused person be committed for trial to itself.***
>
> ***(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative.***
>
> ***(3) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Director of Public Prosecutions, be supported by affidavit."***

What is recusal? Black's Law Dictionary 8th Edition (2004) defines recusal as:

> ***"Removal of oneself as Judge (Magistrate) or policy maker in a particular matter especially because of conflict of interest."***

From the above definition, it is clear that circumstances calling for recusal of a Judge will vary, from one case to another inter alia perception of fairness, of conviction, of bias, monetary interest, of moral authority to hear the case, e.t.c. The object of recusal of a judicial officer from a matter is to ensure that justice is done between the parties. Justice should not only be done but be seen to be done.

In the American case of ***Perry v Schwarzenegger 671 F. 31 1052 (9th Circuit Feb 7, 2012)*** the court held that the test for establishing a judge's impartiality is the perception of a reasonable person, this being a "***well-informed, thoughtful observer who understands the facts and who has examined the record and the law, and thus, unsubstantiated suspicion of personal bias or prejudice "will not suffice".***

In ***Rep v David Makali and 3 others CRA.No.s Nairobi 4 and 5 of 1994*** Tunoi JA cited the proposition of Lord Denning M.R. in the English case of ***Metropolitan Properties Co. (F.G.C.) Ltd v Lannon and others (1969) 1 QB 577*** which summarized the legal position in Kenya when he said:

"That being the position as I see it, when the courts in this country are faced with such proceedings as these, [i.e. proceedings for the disqualification of a judge] it is necessary to consider whether there is a reasonable ground for assuming the possibility of bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must be specifically alleged and established. It is my view that where any such allegation is made, the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their cases before a court or quasi -judicial tribunal, they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to a bias in the mind of the Judge, Magistrate or Tribunal."

It means that when faced with such a case, the court needs to examine the facts, and consider whether any reasonable, fair minded man would impute bias or likelihood of bias.

In deciding to transfer a case, in ***Patrick Ndegwa Warungu v Republic Mbaki CRA.440/2003*** the court stated as follows:

"The principles upon which transfer may be granted has been crystallized in several authorities the leading one being SHILENJE v THE REPUBLIC [1980] KLR 132 which lays down the law that for the High Court to order a transfer, there must be reasonable apprehension in the applicant's or any right thinking person's mind that a fair and impartial trial might not be had before the magistrate whether one takes the incidences individually or collectively. Concomitantly there must be something before the court to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.

I derive much help from Sir H.T. Trinsep and Sir John Wrodroffes i.e. the former's commentary and Notes (14th Edition) (1906) and the later Criminal Procedure in Briston India (1926).The principles which come out clearly are that the High Court will always require some strong grounds for transferring a case from one judicial officer to another. The court has to consider whether there has been any real bias in the mind of the presiding judge and/or magistrate and also whether incidences have happened which might create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than the mind of the accused. On the evidence before me, in light of the provision of section 87 of the Criminal Procedure Code, I take the view that the withdrawal of the applicant's bond on allegations of the complainant does not constitute enough reason to transfer the case bearing in mind the fact that the magistrate after the result of the investigation reinstated the applicant's bond.

That speaks well of the magistrate. It is a clear evidence of impartiality and proper administration of justice. Equally, on the evidence before me, I am not prepared to hold that the magistrate's rejection of the complainant's application does constitute bias when seen against the background that previously (in the same court) the complainant had withdrawn the case involving the complainant and in less than a month the same parties were back in court seeking reinstatement of the charge and continuation of the case to its logical conclusion.

Whether one takes the two incidences individually or collectively there is no evidence to show that the magistrate is in any way partial or unfair. Finally, there is nothing before me to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made."

The applicant applies that this case be transferred from Hon. Momanyi to another court of competent jurisdiction. The reason for the said application is because he ordered the release of the sugar and so the applicant is apprehensive that justice will not be done. This case must be put in context. This case has reached the stage whereby the court had to decide whether or not the respondent had a case to answer. Based on the evidence, the court decided that the respondent had a case to answer on Counts I – III, while he acquitted the respondent on Counts IV – VII and ordered release of the exhibits beingone sugar. It was the duty of the magistrate to make a decision one way or the other and it is trite that a judge/magistrate can be right or wrong in his/her decision. That is why we have appellate jurisdiction.

The fact that the magistrate made the decision to acquit and release the sugar does not make him biased towards the applicant. Of course, in most cases, losing litigants are usually inclined to impute bad faith, bias or even wickedness on the court instead of considering the weakness in their case. Acquitting one or convicting is a direct consequence of the magistrate's work and in my view, a reasonable and right thinking person cannot impute bad faith or bias on the magistrate for merely doing their work.

Further to the above, the stage at which the case had reached, it is expected that the magistrate would have made a decision one way or other. If judicial officers were asked to disqualify themselves from cases because they made an unfavourable decision to put an accused on his defence, then no case would ever proceed beyond the ruling. As noted earlier, if the applicant was aggrieved by the magistrate's decision, they had a right of appeal which they failed to exercise. In the case of ***Republic v Hashimu (4961) EA 656***, a Tanzanian court held that the applicant seeking a transfer must make out a clear case before a transfer of any trial is granted and the apprehension in his and that he will not have a fair and partial trial before the magistrate from whom he seeks to have the trial transferred must be reasonable.

In this case, the applicant has not demonstrated the reasonableness of their apprehension and I find no good ground laid before this court for the transfer of the case to another magistrate.

As regards the request that if transferred, the case should not be heard by Hon. Wanyanga, no explanation was given why the said magistrate could not take over the case. Hon. Wanyanga handled the case when Hon. Momanyi was away. The subject sugar had not been released as had been ordered by the trial court. Hon. Wanyanga found the investigating officers guilty of contempt of court after they failed on several occasions, to produce the impugned sugar in court in accordance with the court order of 19/12/2018 made by Hon. Momanyi. Again this order was made based on facts on record. The court may have been right or wrong in making the said decision but the applicant had a right to appeal which they attempted to exercise vide their application dated 12/3/2019 which resulted in the ruling of 5/4/2019 striking out the application for incompetence. So far, there is nothing placed before this court that makes it appear that the magistrate was biased or is likely to be biased and that it is expedient that the ends of justice will be served if an order of transfer is made.

This case commenced before Hon. Momanyi on 19/6/2018. Some of the exhibits produced before the court, that is, rice, green grams and sugar are perishable goods. Any further delay in hearing this matter will render the said products to expire even before the court ascertains whether or not they are unfit for human consumption and that would be prejudice to the respondent. It means that the matter must proceed to its logical conclusion as quickly as possible. An application to have the case transferred to another magistrate would only serve to delay the matter further bearing in mind it is at defence stage. Under Article 159 2(a) courts are enjoined to dispense justice without undue delay for justice delayed is justice denied.

In the end, I find no merit in the application to have the order releasing the sugar stayed or for the transfer of the case from Hon. Momanyi SRM. This court has no jurisdiction to revise an order of acquittal.

The case will proceed before Hon. Momanyi and be concluded within the earliest possible time.

Signed and Dated at NYAHURURU this 24th day of May, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Ngethe holding brief for Mr. Gakuhi Chege for the respondent

Ms. Rugut for the State/Applicant

Soi – Court/Assist