



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL REVISION NO. 17 OF 2019

(From Original Conviction and sentence in Criminal Case No.466 of 2018 of the Principal Magistrate's Court at Wang'uru –G.M. Mutiso– P.M)

JAMES THIONG'O MUIRURI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. This is an application by James Thiong'o Muiruri who is the accused in Wanguru Criminal Case No. 466/2018 **State –v- James Thiong'o Muiruri** which is currently before Hon. Mutiso, Principal Magistrate. In the motion dated 15/11/2019, he prays that the orders issued by the trial Magistrate on 11/11/2019 cancelling his bond and remanding him in custody at G. K Mwea Prison pending the hearing and determination of the criminal case be reviewed and set aside. He contends that the orders are harsh, excessive, unreasonable and without sound legal basis under the circumstances.

2. He further prays that the retrial of the applicant for the offences of forcible detainer contrary to Section 91 of the Penal Code at Wang'uru Law Courts be heard by any other court/Magistrate other than the trial Magistrate, Hon. Mutiso.

3. The application is based on the grounds that the accused was charged with the offence of forcible detacher of a Rice Holding under Section 91 of the Penal Code and was arraigned in court on 13/8/2018 in Criminal case No. 466/2018. He denied the offence and was released on a cash bail of Kshs 10,000/- which he paid. The trial proceeded before the trial Magistrate and the prosecution closed its case on 29/5/19. The trial Magistrate proceeded to give a ruling that the accused has a case to answer and gave a date of 28/8/19 for defence hearing. However when the applicant appeared in court, the file was missing and he was referred to the registry by the trial Magistrate.

4. The file could not be traced and in the absence of the applicant a skeleton file was opened and a warrant of arrest was issued against him though he had not been notified of the date. The warrant of arrest was executed and he was presented in court on 11/11/2019 and his bond was cancelled. At the same time the trial Magistrate made a biased finding that the applicant was privy to the disappearance of the original court file from the registry a finding not based on any sound legal or factual basis and which finding will highly prejudice the applicant who cannot expect a fair trial before the trial court and his fundamental constitutional rights for fair trial and justice will be breached hence need for retrial before another Magistrate. He has been remanded in prison and this has had toll on his health as he has been unwell.

5. The appellant supports the application with his affidavit sworn on 15/11/2019 where he has reiterated the above grounds.

6. The State was served with the application. However when the application came up for hearing on 22/11/19 Mr. Ashmosi, Assistant Director of Public Prosecutions informed the court that he did not oppose the application. The court proceeded to give a date for the ruling.

7. I have considered the application. The issue which arises for determination is Revision. This is a supervisory jurisdiction over sub-ordinate courts by the High Court which is donated by Section 362 of the Criminal Procedure Code and **Article 165(6) of the Constitution**. The Article provides that:-

“The High Court has supervisory jurisdiction over the sub-ordinate courts and over any person, body or authority exercising a judicial or quasi. Judicial function but not over a superior court.”

8. While exercising this jurisdiction, the court may examine the records or orders of sub-ordinate courts and consider whether they are correct, legal or proper. The High Court after examining the records would then proceed to issue orders on revision if it finds that the proceedings are incorrect, illegal or have impropriety and/or irregular. **Section 364 (1)(a) & (b) of the Criminal Procedure Code**

provides:-

“(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.”

This provides for the orders which the court may make on revision.

9. Having considered the record before the learned trial Magistrate, on 16/10/19 when the court was informed that the court file went missing, the accused was not in court. It is not clear from the record why the warrant of arrest was issued it is not clear when the skeleton file was opened or whether the accused had been informed. The order was illegular as the accused was not given a chance to be heard.

10. The finding by the trial Magistrate that the accused willfully failed to attend court is not supported by evidence. The proceedings of 11/11/2015 show that the court was informed that the file went missing on 28/8/2019. The accused was told casually to come next week but was not given a specific date. The procedure is that if a file goes missing a skeleton file is opened immediately and the proceedings of that day are recorded. It is then in the skeleton file that the accused is informed of the next hearing date. The trial Magistrate is advised to ensure that this procedure is followed.

11. The finding by the trial Magistrate that he has reason to believe that the accused may have participated in the original filed going missing(sic) was illegal as it was not supported by any evidence. The accused has a right to be presumed innocent until he is proved guilty. The finding by the trial Magistrate amounts to finding the accused guilty without giving him an opportunity to be heard. He was denied a fair trial. He is not a custodian of the files and therefore the trial Magistrate ought to have ordered investigations on the missing before jumping into a conclusion.

12. A trial Magistrate has a duty to ensure that an accused person before him get a fair trial before making adverse orders. This is because the right to fair trial is among the rights and fundamental freedoms which cannot be limited. **Article 25(c) of the Constitution** provides:-

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(c) the right to a fair trial;

Justice must not only be done but must be seen to be done. This may not be achieved where the Magistrate has made unsupported finding.

13. In Conclusion:-

I find that the procedure by the trial Magistrate was illegular and the proceedings illegal for issuing Warrant of Arrest without giving the accused a chance to be heard. The application has merits.

I order that –

a. The order cancelling the bond for the accused is revised and set aside.

b. The bail for the accused is reinstated in the same terms and conditions, that is to say a cash bail of Kshs 10,000/-.

c. For justice to be seen to be done, the case to proceed before another Magistrate with Jurisdiction at Wang’uru Law Courts other than Hon. G. M. Mutiso.

Dated at Krugoya this 29th day of November 2019.

L. W. GITARI

JUDGE

29/11/19.

Read out in open court,

Accused present,

M/s Kiragu holding brief for Mr. Kahiga for Accused.

C/A Gichia.