



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL REVISION NO. 42 OF 2019

DIRECTOR OF PUBLIC PROSECUTION APPLICANT

VERSUS

IBRAHIM MWANZU CHENGO 1ST RESPONDENT

NANCY AYAKO OKELO 2ND RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Gekanana for both accused

JUDGMENT

The Director of Public Prosecution vide their letter dated 6.11.2019 moved this court pursuant to Article 165 (6) 27 of the Constitution and Section 362 of the Criminal Procedure Code seeking the following orders:

(i) That the honorable Court do call for and examine the subordinate court record in Criminal Case No. 62 of 2017 and Criminal Case No. 790 of 2016 to satisfy itself as the legality, propriety, correctness or justness of the proceedings more specifically, in Criminal Case No. 790 of 2016 an order on Denovo and Criminal Case No. 62 of 2017 recall of the complainant for further cross-examination.

The primary issue in this revision is the report whether the Learned trial Magistrate erred in exercising discretion to order that the trial start Denovo in Criminal Case 790 of 2016 and further that are victim of the sexual offence should be recalled back to court once more.

Background

In **Criminal Case No. 790 of 2016**, the accused namely **Nancy Ayako Okelo** is facing a charge of assault causing actual bodily harm contrary to Section 251 of the Penal Code. The trial began in earnest on 7.2.2017 and by 26.9.2017 all the witnesses lined up to testify on behalf of the prosecution had tendered their respective evidence to the trial court.

At the close of the prosecution case a Ruling by the trial Magistrate placed the accused on her defence. That part of the hearing has been pending since 21.11.2017 to date and there are no reasons to justify the inordinate delay.

On 2.10.2019 in an unfortunate turn of events instead the case for the defence permitted to proceed, the Learned trial Magistrate made an order pursuant to Section 200 of the Criminal Procedure Code to re-open the entire proceedings, despite objections by the prosecution counsel.

Further in Criminal Case No. 62 of 2017, the accused Ibrahim **Mwanzu** is charged with the offence of defilement contrary to Section 8 (1) and 4 of the Sexual Offences Act No. 3 of 2006. He pleaded not guilty on 29.12.2017 and the victim testimony was later recorded on 17.4.2018. In addition a second witness has already testified in support of the charge for the prosecution on 2.10.2019. The Learned trial Magistrate exercising discretion under Section 200 of the Criminal Procedure Code ordered that the trial should start Denovo without application.

Analysis

The legal framework and jurisdiction on Revision

What is ultimately important is the power of the High Court donated by the Constitution under Article 165(6) and (7) to exercise supervisory jurisdiction over subordinate courts. One of the golden thread for purposes of Sub-section (6) of this Article and Section 362 of the Criminal Procedure Code is for the court to call for the record of any proceedings before any court or person, body, authority referred to in clause (6) and may make any order or give direction it considers appropriate to ensure the fair administration of justice Section 362 of the Code confers the power to the court of examining the record to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed out as to the regularity of any proceedings such subordinate court. In the case of **John Kipngeno Koech & 2 Others v Nakuru County Assembly & Others 2013 eKLR**

“Jurisdiction is the practical activity granted to a formally constituted body to deal with and make announcements on legal matters and by implication to administer justice within a different area of responsibility. It is a scope validity, legitimacy or authority to preside or adjudicate upon a matter.”

From the provisions of Article 165 (6) (7) of the Constitution, the High Court is empowered to review proceedings of all subordinate courts or inferior tribunals in respect of irregularity, illegality and impropriety which may occur during the course of such proceedings. There is no dispute therefore the High Court is clothed with supervisory jurisdiction to oversight adjudicatory process of subordinate courts and other inferior judicial or quasi – judicial tribunals or authority. The first and foremost principle in Article 165 (6) & (7) of the constitution is undoubtedly delineation of the Appeal jurisdiction with that of revision to promote a cogent answer to the question as to whether what circumstances fall into revision category one such source provided for is in accordance to the judicial review system. The formulation of the features of review which automatically find its way to revisionary jurisdiction under Section 362 of the Criminal Procedure Code are clearly summarized by **Wade and Forsyth** in their text book on **Administrative Law 10th Edition (2009) Page 28-29** where its stated:

“The system of judicial review is radically different from the system of appeals. When hearing an appeal, the court is concerned with the merits of a decision: Is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal, the question is right or wrong? On review the question is lawful or unlawful?”

The rights of appeal are always statutory, judicial review, on the other hand is the exercise of the court’s inherent power to determine, whether action is lawful or not and to award suitable relief.

For this no statutory authority is necessary. The court is simply performing its ordinary functions in order

to enforce the Law.

Revision is thus a fundamental mechanism for keeping public bodies or authorities within the due bounds and for upholding the rule of Law. Instead of substituting its own decision for that of some other body, as happens when on appeal, the court on review is concerned only with the question whether, the impugned order, sentence or proceedings can be allowed to stand or not.

The principle behind revisionary jurisdiction is to keep subordinate courts and other inferior persons or authority to keep those powers conferred by the constitution and statute within the boundaries of their lawful authority.

It's also an inherent power of the High Court over such institutions to require them to act fairly, for proper purpose and with reasonableness. In the India case **Umaji Keshao Meshram & Others v Smt Radhikabai and another** the court held that supervisory jurisdiction shall be exercisable in cases occasioning grave in justice or failure of justice such as when:

“(i) The court or tribunal has assumed jurisdiction which it does not have.

(ii) The court or tribunal has failed to exercise a jurisdiction which it does have, such a failure occasioning a failure of justice and

(iii) The jurisdiction though available is being exercised in a manner which tantamount to overstepping the limits of jurisdiction.”

What must be stressed is the justiciable principle for the act to exercise discretionary jurisdiction over the subordinate courts under Article 165 (6) (7). The approach was as given by **Famwile L. J. in R v Shoreditch Assesalnt Committee Exp Morgan 1910 2KB 859**

“Subject on to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessities an authority to determine and enforce it; it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure, since a tribunal would be autocratic, not limited and it is immaterial whether the decision of the existence of its own jurisdiction is founded on law or fact.”

Given the above background the dispositions by the prosecution for the High Court to call for the record is on the strength of the decision made by the Learned trial Magistrate on Denovo pursuant to Section 200 of the Criminal Procedure Code.

To breathe life to the application a recital of the provisions under Section 200 (1) states subject to Sub-Section (3), where a Magistrate after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and exercises that jurisdiction, the succeeding Magistrate may:

“a) Deliver a Judgment that has been written and signed but not delivered by the predecessor or

b) Where Judgment has not been written and signed by his predecessor or the evidence recorded by that predecessor or re-summon the witnesses and recriminate the trial where a succeeding Magistrate commences.

The hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding Magistrate shall inform the accused person of that right.”

In every case whatever the directions a trial court takes to comply there are wide range of questions to be answered to wit:

(1) Fairness from the point of view of the victims.

(2) The substantial possibility that the witnesses sought to be heard for the second time are within the jurisdiction of the court and their attendance would be procured without unreasonable delay.

(3) The principle of legal certainty and finality of litigation.

(4) The right to equality of arms and the nature of our adversarial proceedings provides that the exercise of discretion gives meaning to Section 200 of Criminal Procedure Code with a view to balance the competing interest between the prosecution and the defence.

(5) Whether the accused will be prejudiced in his or her defence if exercise of discretion to re-open the trial is not permissible.

(6) Whether the purpose of re-opening the trial is to meet the ends of justice.

Whatever interpretation which ought to be accorded Section 200 of the Criminal Procedure Code. The time of interpretation should give effect the purposes and principles under Article 50 on a right to a fair hearing. The Supreme Court of India in **Natasha Singh v CB {2013} 5 SCC 741** considered this question and concluded as follows:

“Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person’s right to fair trial be jeopardized.”

The system of Law in Kenya is an adversarial legal system. The prosecution and defence present their cases to a court for determination. Trial courts may indicate issues or points or raise questions to clarify but it must not do the work of outside the question as to the extent to which courts exercise discretion in a matter under Section 200 of Criminal Procedure Code must ensure victims and witnesses feel safe and able to give evidence.

The importance of witnesses in the administration of criminal justice was boldly explained by **India Supreme Court in Swaran Singh v State of Punjab AIR 2000 5 SCC 68**

“The witness ... are a harassed lot. A witness in a criminal trial may come from a far-off place to find the case adjourned. He has to come to the court many times and at what cost to his own-self and his family is not difficult to fathom. It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and he gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired..... The witnesses are not treated with due courtesy and consideration; nor are they protected. Witnesses are required to come to the court unnecessarily and repeatedly as a large number of cases are posted and adjourned on frivolous grounds.”

This is the background against which a trial court should proceed to resolve the main question under Section 200 of the Criminal Procedure Code in appropriate cases not to render the proceedings a mistrial. Fairness, from the point of view of the victims and witnesses is a notion of equality of arms which is an essential feature of a right to a fair trial. It follows therefore, in my view that the exercise of discretion by the trial Magistrate to start the hearing of the case denovo was ill advised and I order that the same be quashed for lack of merit.

DATED, DELIVERED AND SIGNED AT MALINDI THIS 17TH DAY OF DECEMBER 2019.

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R. NYAKUNDI

JUDGE