



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.29 OF 2018

PETER NJOROGE GICHUNGU.....1<sup>ST</sup> APPLICANT

SIMON KAGECHU MUNGAI.....2<sup>ND</sup> APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, Peter Njoroge Gichungu and Simon Kagechu Mungai are facing a charge under the **Prevention of Terrorism Act**. This is in Nairobi Chief Magistrate's Court Criminal Case No.1133 of 2016 (Milimani). On arraignment before the trial magistrate's court, the Applicants pleaded not guilty to the charge. Several witnesses have been heard. The Applicants were aggrieved by the decision of the court delivered on 11<sup>th</sup> January 2018. This decision allowed the alleged confessions by the Applicants to be produced as evidence before court. The Applicants questioned this decision on the basis that the said alleged confessions were obtained by duress and after they had been tortured by the arresting and investigating officers. The Applicants insisted that the alleged confessions were not voluntarily given and further that it was given after the Applicants had been unlawfully detained for a period of more than 24 hours after their arrest. The application was served upon the Director of Public Prosecutions.

During the hearing of the application, this court heard oral rival submission made by Mr. Chacha for the Applicants and the response thereto made by Ms. Aluda. The issue for determination by this court is whether this court has jurisdiction at this stage of the proceedings to consider the Applicants' application. The Applicants invoke this jurisdiction under **Section 362** of the **Criminal Procedure Code** that provides that:

“**Section 362** of the **Criminal Procedure Code** provides thus:

*“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.”*

In Republic –vs- James Kiarie Mutungei [2017] eKLR Nyakundi J held thus:

*“The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits... In considering similar provisions under the Indian Criminal Procedure Code and applicable statute on revisional powers, the Supreme Court in the case of Sriraja Lakshmi Dyeing Works v Pangaswamy Chettair [1980] 4SCC 259 said as follows:*

*“The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. The question of the extent of appellant or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words to satisfy itself under section 25 read as which has similar provisions with our section 362 of the criminal Procedure Code (Cap 75 of the Laws of Kenya) (emphasis mine) is essential a power of superintendence. The scope of*

***the revisional powers of the high court where the high court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, which is quite obviously as much wider jurisdiction. That jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional court is not a second court of appeal (emphasis supplied.)”***

In the present application, it was clear to the court that the Applicants are challenging the decision of the trial magistrate’s court in admitting into evidence the confessions that they allegedly made while they were in police custody. The Applicants were particularly aggrieved by the fact that the trial magistrate did not call the arresting and the investigating officers to testify in the trial within trial before rendering the Ruling. The Applicants had alleged that the said two officers had either tortured them or subjected them to intimidation or put them under duress before presenting them to the officers who recorded their alleged confessions.

The Applicants were further aggrieved that the video recordings which were allegedly made while the Applicants were in police custody were not produced before the said alleged confessions were admitted into evidence. In essence, the Applicants are saying that the said alleged confessions ought not to have been allowed into evidence because they were obtained contrary to the law. On its part, it was the prosecution’s case that the said confessions were properly interrogated by the trial magistrate before they were admitted into evidence.

As stated above, this court’s revisional jurisdiction is restricted into determining the legality, propriety or correctness of the decision made by the subordinate court. The yardstick that this court will use in determining whether it can exercise its jurisdiction in deciding whether an interlocutory Ruling in a trial within a trial should be interfered with is where there is an obvious and blatant breach of the law. Where the court will be required to evaluate the evidence that has been adduced before the subordinate court to determine whether the decision was made “legally, with propriety or correctly”, this court will down its tools because it will lack jurisdiction. That jurisdiction is preserved to the appellate court that shall hear and determine the appeal should the aggrieved party be convicted.

In the present application, it was clear to the court that the issues that the Applicants seek determination are issues that call for this court to evaluate the evidence and render its decision while the trial is still pending before the subordinate court. This court does not have jurisdiction to render such decision based on disputed facts. The Applicants will have the opportunity to cross-examine the investigating and arresting officers when they shall present their evidence before the trial court. The Applicants are not foreclosed from interrogating the video evidence that shall be presented before court by the investigating officer and other witnesses that the prosecution shall call. The allegations that the Applicants were tortured are serious. This court can only address such issue in the proper forum: as an appellate court and not in an application for revision pursuant to an application made seeking to challenge an interlocutory Ruling made in the course of a trial.

The application, in the circumstances, lacks merit and is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH 2018**

**L. KIMARU**

**JUDGE**