



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO 231 OF 2017

SEBASTIAN KIEMA KYALO AND ANOTHER.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1 The Applicant, SEBASTIAN KIEMA KYALO, moved the Honourable court by way of revision through a letter dated 6th November, 2017 and anchored the application on Sections 362, 363, 364 and 365 of the Criminal Procedure code, Cap 75, Laws of Kenya.

2 The Applicant premised the application on four (4) grounds namely;

- (a) That the court acting as a criminal court has no jurisdiction to entertain a wage dispute between an employer and employee.
- (b) That the criminal process can never, and should never be used to compel a company or an individual to pay salary that is in dispute.
- (c) That the learned magistrate was wrong in finding that the charges were properly before the court, and were proper.
- (d) That the charges as drawn were insufficient to enable the accused to answer them as required by the Constitution and the law.

3 The applicant requested the Honourable court to vary or set aside the order dismissing its preliminary objections arguing that a finding be made that the charge sheet was defective and lacked sufficient details and proceed to grant an order that was just in the circumstances.

4 The functions of a court exercising criminal revision is limited to the supervision only to ensure that due process was followed by an inferior court. The power is donated by section 362 of the penal code which states 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.”

The court is being asked to exercise these powers.

5 The first complaint is that a court acting as a criminal court has no jurisdiction to entertain a wage dispute between an employer and an employee. The charges are a generis from the Labour Institutions Act, 2007.

Section 48 (i) (e) of the said Act states as follows;

“ Notwithstanding anything contained in this Act, or any other written laws;-

(a) the minimum rates of remuneration or condition of employment established in a wage order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;

(b) if the contract of an employee to whom a wage order applies provides for the payment of less remuneration, or does provide for the condition of employment prescribed in wage regulations order, or provides for a less favourable condition of employment,

then the remuneration and conditions of employment, established by the wages order, shall be inserted in the contract in substitution for those terms.

6 The substantive Law which employers must comply with in dealing with employees, and protected by it, is laid out in this section . Section 48 (2) of this Act serves as a warning to employers who fail to adhere to the law and by virtue of section 48 (2) (a) and (b) , are reminded that they commit an offence by their noncompliance.

The penalty for the breach is provided for under section 48 (3) of the same Act as follows;

“ If an employer is found guilty of an offence under subsection (2), the court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid”

By this trait of legislation, the conclusion is that the charges that have been framed against the applicants are proper and before a court of competent jurisdiction.

7 The law expands further and by virtue of section 48 (4) (e) and (h) of the Labour Institutions Act, any variation of the matters in section 48 (i) (c) and (c) and one having been found in breach and proved guilty by virtue of the provisions of section 48 (2), then a court is empowered to mete out both criminal and civil remedies.

Section 48 (5) goes on to give an employee more latitude to institute civil proceedings to recover from an employer, notwithstanding there being criminal proceedings.

Section 61 of the same Act, provides for a penalty where an offence has no specific sanction and provides for a fine not exceeding fifty thousand or imprisonment for a term not exceeding 3 months or to both.

8 By dint of Section 16 of the Act, the Chief Justice has power to designate any subordinate court to hear and determine labour relations disputes .This power has been resolved by the amendment of the Magistrate’s Courts Act which has expressly given magistrate’s courts power to hear and determine labour disputes.

The employment and Labour Relations Court Act has mechanism for appeals. Where would these appeals be coming from unless some inferior court has jurisdiction?

9 Having said the above, a glance at the charge and particulars thereto conform to the provisions of the law discussed herein. We find that the learned magistrate was right in her appreciation of the law and correctly dismissed the preliminary objection. The trial magistrate cannot therefore be faulted for doing so and or for having assumed jurisdiction.

10 Having come to such conclusion, I find that ground (b) and (c) which were also raised by the applicant, are academic and need not be discussed. They therefore fall by the way.

The other issue I find necessary to comment on is whether the charges as framed are sufficient to warrant an accused to take plea. A comparison of the matters stated in the charges with the sections relied upon, as discussed herein, show that the detail required of the prosecution to provide has been satisfied at the moment.

11 Taking into account the circumstances of the case, I find the application lacks merit, and hence I proceed to make the following orders;

(1 that the application for revision be and is hereby dismissed.

(2 the charge sheet is not defective and the matter to proceed for plea taking before the trial court.

Orders accordingly.

Ruling delivered, dated and signed this 18th day of May, 2018.

LADY JUSTICE D. O. CHEPKWONY

In the presence of:

M/s Ngina , counsel for the state

Mr Egunza, counsel for the applicant holding brief for Mr Ambwere, counsel

for the Applicant

Applicant – Present

