



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL REVISION NO. 124 OF 2018

RONALD NYAGA KIURA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No.413 of 2015 of the Principal Magistrate's Court at Runyenjes).

RULING

1. Ronald Nyaga Kiura, the applicant herein is facing the following charges vide **Runyenjes Senior Principal Magistrate's Court in Criminal Case No. 413 of 2015** namely:-

a) **Count I:**

Trafficking in narcotic drugs contrary to **Section 4 (a)** of the **Narcotic Drugs and Psychotropic Substances Control Act No.4 of 1994**.

The particulars as presented to the trial court are that the applicant on the 18th July, 2015 at around 15.20 hours at Ena Market Kawanjara Sub-Location within Embu County trafficked eight (8) stones of cannabis sativa "**Bhang**" in contravention of the law.

b) **Count II:**

Selling alcoholic drinks without licence contrary to **Section 7(1)(b)** as read with **section 62** of the **Alcoholic Drinks Control Act No. 4 of 2010**.

The particulars as per the charge are that the applicant on the same day and time was found selling alcoholic drinks namely "**Machore**" to wit 51 sachets by hawking while using a motor cycle Registration No.KAL 597Q make Yamaha without a licence contrary to the law.

c) **Count III:**

Selling alcoholic drinks in sachets contrary to **Section 31(1)** as read with **Section 31(3)** of the **Alcoholic Drinks Control Act No.4 of 2010**.

The particulars as per the charge sheet are that on the same date, time and place the applicant was found selling alcoholic drinks namely "**machore**" to wit 51 sachets in contravention of the law.

2. The applicant denied all the counts and the case proceeded for trial where the prosecution summoned a total of eight witnesses to prove their case against the applicant and upon evaluating the evidence the trial court ruled as follows:-

"I have read the evidence on record and the written submissions by the accused. I find that the prosecution has established prima facie case which warrants the accused person to be placed on his defence as he has a case to answer."

The trial court delivered this ruling on 1st December 2016 as per the court proceedings from that court.

3. The applicant felt dissatisfied with that finding and moved to this court vide Notice of Motion dated 2nd February 2017 brought under Article 10, 23, 25, 27(1), 47, 48, 50, 165(6) and (7) and 259 of the Constitution 2010 and Section 362 and 364 of Criminal Procedure Code asking the court to review the findings of the trial court with a view to setting it aside or quashing the said ruling. The grounds for reliefs

sought as listed on the face of the said application are as follows:

- a. That the trial magistrate made a ruling in total disregard that count I is defective in that it does not disclose the applicant's conduct that constituted trafficking contrary to section 2(1) of Narcotic Drugs and Psychotropic Substance (Control) Act 1994.*
- b. That the applicant will be embarrassed and prejudiced as he is unable to prepare for his defence.*
- c. That the trial Magistrate made the ruling in total disregard of the fact that there is no drug called cannabis sativa or bhang under Section 2(1) of the Act or 1st, 2nd or 3rd schedule.*
- d. The trial magistrate made the ruling in total disregard that the police failed to comply with Section 74A of the Narcotic Drugs and Psychotropic Substances (Control) Seizure, Analysis and Disposal Regulations 2006).*
- e. That the trial magistrate made the ruling in total disregard that there was no evidence that the applicant was in possession and selling illicit traditional liquor.*
- f. That the trial magistrate made the ruling in total disregard of the fact that the charge is defective as "Machore" is not listed as an alcoholic drink under Section 2 of the Alcoholic Drinks Control Act, and its sale is not criminalized.*
- g. That the trial magistrate disregarded the fact that Section 31(2) of the Alcoholic Drinks Control Act 2010 was repealed by Section 91A of the customs and Excise Act Cap 472.*
- h. That the trial magistrate made the ruling of total disregard that the packaging of alcoholic drinks in containers of not less than 200 ml is expressly permitted by law.*
- i. That the ruling is a travesty of justice as it infringes on the applicant's right to equal benefit of the law and fair trial guaranteed by Article 25(c), 27(1) and 50(2) (b) of the Constitution of Kenya 2010.*

4. In his affidavit in support of the application sworn on 2nd February 2017, the applicant has reiterated the grounds in the face of the application and deposed that he is not sure what to answer in his defence and that is why he has approached this court through this application.

5. In his written submissions made through counsels, the applicant has contended that the ruling delivered placing him on his defence does not accord to the law and wants this court to revise the ruling based on the provisions of Article 23, 25, 50, 165 (6) and 7 and 259(1) of the Constitution.

6. It is also submitted that count I is too general and lacks specificity on the mode of trafficking the applicant is alleged to have been involved in and therefore not clear to enable the applicant to defend himself appropriately. The applicant has cited the provisions of **Section 2(1)** of the Narcotic Drugs and Psychotropic substances (control) Act 1994 that gives the definition of what "**trafficking**" means and contended as per the decision in *Gabriel Ojiambo Nambesi -vs- Republic [2007]* and *David Andoh -vs- Republic [2009]* the charge in count I was defective because the charge was not well framed in his view.

7. He has also submitted that he is charged with trafficking non-existent drug, "**cannabis sativa** or "**Bhang**" (P Exhibit 9) which in his view is not outlawed under **Section 2 (1)** of the cited Act or any of the cited schedules. He has relied on the decision of *James Atieno Odera - vs- Republic [2012] eKLR.*

8. The applicant has also faulted the production of cannabis (P.Exhibit 7) during trial arguing that the production was in violation of **Section 74 A** of the **Narcotic Drugs and Psychotropic substances Act, 1994** and that PW3 -**Stephen Matinde** was not competent to carry out analysis of the exhibits tendered.

9. The applicant also says that in respect to count II and III the trial court failed to appreciate that the prosecution did not establish ingredients of the offence.

10. He has also stated that no "**Machore**" drink was produced as exhibits in court and that what was only produced are empty plastics and that the Kshs.3000 coins found with the appellant was not prima facie and of selling alcoholic drinks. He has also questioned whether "**Machore**" is an alcoholic drink saying the same is not criminalized in law. He also contends that the law permits the machore to be packed in containers not less than 200 ml.

11. On the basis of the above the applicant is asking this court to revise the ruling made by the trial court because he feels the ruling has fettered his right to a fair trial.

12. The Respondent has opposed this application through a Replying Affidavit of Brenda N. Nandwa, the learned prosecuting counsel sworn on 19th April 2017 and the written submissions dated 4th December 2017.

13. On the question of defective charge sheet, the Respondent has submitted that the applicant ought to have raised the issue earlier and that the defect is curable under **Section 382** of the **Criminal Procedure Code**.

14. The State has disputed that **Section 31(2)** of **Alcoholic Drinks and Control Act** was repealed. They have submitted that the same was

amended to allow packaging in glass or polyethylene. In their view selling alcohol in sachet is completely outlawed and that the applicant was selling alcoholic in contravention of the law.

15. On the question of the 1st count, the Respondent has contended that cannabis is drug which has various descriptions and that the street name is bhang and that the same is a drug clearly stated under First Schedule of the Act.

16. The Respondent has further submitted that the grounds raised in the application are grounds of appeal and the same do not satisfy the provisions of **Section 362** of the **Criminal Procedure Act**. In their view a prima facie was established by the evidence they presented before the trial court and have cited the authority in the case of ***Ramanlal T Bhatt- vs- Republic [1957] EA 332*** where the Court of Appeal rendered itself on the meaning of prima facie case and the threshold required to establish the same.

17. They have denied that the charges presented before court lacked details or specificity to enable the applicant answer to it.

18. This court has considered the application presented before me and the submissions of both counsels. The applicant has invoked this court's revisionary powers under both **Sections 362** and **364** of the **Criminal Procedure Code** and supervisory powers **Article 165 (7)** of the **Constitution**.

19. Under revisionary powers, **Section 362 Criminal Procedure Code** stipulates 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.**" (emphasis).*

The applicant herein moved this court sitting in Embu and for the reasons recorded in the proceedings in this application, this matter was forwarded here for determination. The lower court file in respect to which the applicant was found to have a case to answer was also forwarded to this and I have had occasion to peruse through the typed proceedings. I have noted that the applicant as observed above was charged with three counts and upon hearing eight witnesses, the trial court found that the applicant has a case to answer.

20. As I cited above the power to revise an order or a finding of a subordinate court can be exercised in regard to checking its legality, correctness or its propriety. The regularity of the proceedings is also subject to revision by this court.

21. I have looked at the grounds raised by the applicant and the accompanying arguments put forward and I am not persuaded that they touch on any of the grounds open for a revision under **Section 362** of the **Criminal Procedure Code**. I have checked at the proceedings and noted the applicant did not raise any issue regarding the defect in the charge sheet when the plea was taken and even if he realised later that the charge sheet was defective, he can still raise it in his defence. The trial court can tender its decision. The Respondent has contended that the defect cited in the charge is curable under **Section 382**. Again I cannot be invited at his stage to exercise either revisionary power or supervisory to render a decision on the same because doing so would be premature and may have undesired effect of fettering the applicant's right of appeal at the end of trial depending on the outcome of the same.

22. It is important to note that at the close of prosecution, what is required in law at stage is for the trial court to satisfy itself that a prima facie has been made out against the accused person sufficient enough to put him on his defence pursuant to the provisions of **Section 211** of the **Criminal Procedure Code**. A prima facie case is established where the evidence tendered by the prosecution is sufficient on its own for a court to return a guilty verdict if no other explanation in rebutted is offered by an accused person. This is well illustrated in the cited Court of Appeal case of ***RAMANLAL BHAT -VS- REPUBLIC [1957] EA 332***. At that stage of the proceedings the trial court does not concerned itself to the standard of proof required to convict which is normally beyond reasonable doubt. The weight of the evidence however must be such that it is sufficient for the trial court to place the accused to his defence.

23. The issues raised in this application like whether cannabis sativa or bhang is a drug within the meaning of **Section 2(1)** of **First Schedule** or whether "**machore**" is an alcoholic drink within the meaning of **Section 2** of the **Alcoholic Drinks Act** and other issues are issues that have been raised prematurely and improperly because this court can only exercise its appellate jurisdiction to determine them. The issues ought to be raise and canvassed at trial and if the applicant is aggrieved, he cannot ventilate the grievance vide an application for revision because under **Section 365(5)** he cannot raise issues that can be raised on appeal and he after the trial court has substantively rendered itself.

24. The only bone of contention which the applicant should have raised legitimately is the fact that in its ruling, the trial court inadvertently failed to indicated that it was placing the applicant on his defence in all the three counts. Based on the evidence tendered by prosecution witnesses, particularly the arresting officer (PW1, PW2, PW5 and PW7) and the expert witnesses (PW3, and PW4) evidence presented in my view established a prima facie case sufficient enough to place the applicant on this difference on all the counts facing him. I am not persuaded that the proceedings or the charges presented to court prejudiced him or infringed any of his constitutional right particularly his right to fair trial. The applicant is not fettered in anyway from defending himself, against the charges facing him and raising the issues he has raised in this application or perhaps other relevant issues to defend himself.

I have deliberately avoided making any observation regarding the merits or demerits of the grounds raised in this application in order to avoid prejudicing any of the parties in the trial court because the trial court has not pronounced itself on the same and it will do so at the conclusion of the trial

25. In the premises the application dated 2nd February, 2017 is disallowed save that the general finding of the trial court that the applicant had a case to answer is set aside and substitute it with a finding that the applicant has a case to answer in all the three counts facing him.

Dated, signed and delivered at Chuka this 30th day of July, 2018.

R.K. LIMO

JUDGE

30/7/2018

Ruling dated, signed and delivered in the open court in presence of the applicant in person and Machirah for State/Respondent.

R. K. LIMO

JUDGE

30/7/2018,

30/7/2018

Coram:

Before Hon. Justice R.K. Limo (J)

Prosecutor- Mr. Machira/state counsel

C/A Martha/Mwaniki

Applicant - present

Machirah for Respondent

Applicant in person - present

Ronald Nyaga:

My advocate has stated that if the ruling is delivered a copy of the same be given to him.

Court:

Ruling dated signed and delivered in the open court in presence of the Applicant in person and Machirah for State/Respondent.

R.K. LIMO

JUDGE

30/7/2018

Machirah:

We apply for a copy of the ruling for onward transmission to our colleague in Embu.

Court:

A copy of the ruling shall be supplied to the both the applicant and the Respondent. I further direct that the lower court file herein be returned forthwith to the lower court at Runyenjes Law Courts with a view to expediting the proceedings pending therein and to avoid unnecessary delays. I direct that the case pending before the trial court against the applicant be mentioned on 1/8/2018 before the trial court for further orders with a view to fixing the case for hearing and disposal.

R.K. LIMO

JUDGE

30/7/2018