



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

MISC. CRIMINAL APPLICATION NO. 37 OF 2018

JOSEPH NDEGWA KAMAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant Joseph Ndegwa Kamau under Articles 22(d) 49(h), 50(2) (h) of the constitution and Section 81(b) 123(1) (2) of the criminal procedure code has filed a revision against the order dated 19th October, 2018 passed by the learned trial magistrate, Hon. Chesang in Criminal case number 237 of 2015. In the case the learned trial magistrate cancelled the bail terms of the applicant by remanding in custody. The applicant further depones in his affidavit. That on 19th October, 2018 he appeared before the learned Magistrate to seek an adjournment for reasons that his counsel was unable to attend court on that particular day. It is contended by the applicant that his request for an adjournment was turned down and instead the learned trial Magistrate proceeded with the hearing and some witnesses testified in absence of his counsel.

Further in support of the revision Mr. Edwin Mugu counsel for the applicant filed a supplementary affidavit to explain himself on the circumstances which led to his absence in court on the 19th October, 2018. Aggrieved by the said orders the applicant filed this revision before this court. As a procedural requirement under Section 362 of the criminal procedure code I called for the lower court record to carry out the objects of the provisions.

Determination

The powers of the High Court to exercise its revisional jurisdiction is traceable to Article 165(6) and (7) of the constitution. The constitution in these provisions vests the High Court with supervisory jurisdiction over subordinate courts or any person ordinarily exercising a judicial or quasi-judicial function but not over superior court. The second legal provision is the one followed in Section 362 of the criminal procedure code. In view of these two provisions it is required of the High court to examine the subordinate court records to establish whether there has been an illegality, impropriety or irregularity that has occasioned an abuse of the process or grave miscarriage of justice. The processes are therefore meant for the court to exercise its inherent jurisdiction to correct, vary, review or give any other directions depending on the facts of each case to ensure the ends of justice are met and to avoid an abuse of the court process.

It is a matter of prime importance when an application for revision has been made or the issue has come to the attention of the court *Suo Moto*, no order shall be made which is likely to affect the rights of a party without him or her being given an opportunity to be heard. The court in exercising discretion under Section 362 of the criminal procedure code is not authorized to convert a finding of acquittal of an accused person into that of a conviction.

Broadly speaking the grounds on which the High Court will interfere with the order, decision, proceedings, sentence, ruling are vaguely stated under Section 362 of the criminal procedure code. What constitutes illegality, irregularity and impropriety has been left for the interpretation of the High Court to consider their application within the specific circumstances of each case. The principal shortcomings of these phrases and words are the assumptions that every word and phrase has a true, single meaning capable of producing an answer to every conceivable situation to which the legislation may have to be applied. (See **Smith's judicial review of Administrative Action 4th edition by J. M. Evans**).

In my view I find the authoritative grounds deserving application are often those stated in Section 7 of the Fair Administrative Act 2015. The object of the Section is that it gives a concise indication of the substantive grounds that may constitute a legality, irregularity, impropriety, incorrectness or unjustness of the impugned order or proceedings. With regard to the scope of supervisory and revisionary jurisdiction Section 7 of the Act lays down the conditions which must be fulfilled before the order is revised or reviewed by the High Court by an inferior authority, person, tribunal or court. In respect to this matter it is appropriate to set out some of the grounds which form part of what I will derive my decision on this application.

In Section 7 of the Fair Administrative Act provides grounds for an aggrieved party to institute judicial review proceedings. i.e excess of jurisdiction, bias, taking into account irrelevant consideration in making the decision, abuse of power, for failure or neglect to take action, etc.

Going by the above grounds my attention having been drawn to Section 7 of the Act, it behoves on me to consider the approach adopted by the courts to enrich jurisprudence of this area of law.

In application for abuse of the process in exercise of discretion by a court, authority body or tribunal Lord Hallsbury on the case of **Shar Pe v Wakefield 1891 AC 173** expressed himself in the following passage.

“Discretion means which is said that something it to be done according to the rules of reason and justice, not according to private opinion, according to law and not heinous. It is to be, not arbitrarily, vague and fanciful, but legal and regular and it must be exercised within the limit, to which an honest man competent to discharge his office ought to confine himself.”

The judicial authority exercisable by Judges and Magistrates is clothed with immense discretionary powers to do or undo and act as one seems fit to achieve the interest of justice. The profound statement of Chief Justice **John Marshall’s Ink in the case of Osborn v Bank of Us 22 US 739, 866 1824** sets the frame on how judicial discretion is to be exercised:

“Judicial power, as contra distinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will no feeling, when they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law, and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge, always for the purpose of giving effect to the will of the legislature, it in other words, to the will of the law”

As stated by Professor Jerome Frank in his Article ‘Are Judges Human’

“The effect on legal thinking of the assumption that Judges behave like human beings 80 U PAL REV 1931 was right when he stated that the more one thinks about the role of the judges in a common law system the more one must wrestle with the issues of character, personality, politics, and personal convictions on that role. That all of these matter in some way to judicial decision making is in escapable. One cannot ignore the reality that Judges are human. The difficult is in determining how individuality, character or personality matter, how judicial character might legitimately and usefully play a role in the exercises of judgment from the bench”

Given this background the question I pause is to what extent did the learned trial Magistrate shift the discretion from doing justice to that of occasioning a miscarriage of justice. In his affidavit evidence the applicant has deponed and alluded to the chain of events of the proceedings before the trial court. He points out in the affidavits that though the case was part heard the learned trial magistrate acting that she is on transfer scheduled the hearing to the 19th October, 2018 which was not convenient to his legal counsel. This was on grounds that he was engaged elsewhere in the High court at Nairobi in a succession cause No. 588 of 1996 and ELC 1457 of 2016.

The applicant further depones that on the appointed day his counsel was not able to attend court as his pleas to have the case adjourned was turned down and an order for the hearing to proceed made without the presence of his counsel.

Bearing in mind that counsel had sought an adjournment on the court imposed date. The learned trial magistrate to flex her judicial muscle to substantially order for cancellation of the bail terms of the applicant. As a result the applicant was remanded in prison custody pending the determination of his case.

The troublesome nature of this revision admittedly is the manner in which the learned Magistrate went about exercising discretion and in the process violated fundamental rights under Article 29 on the right to freedom and security of the person, which includes the right not be deprived of freedom arbitrarily or without a just cause. Secondly, an infringement of Article 27 on the right inherent to human dignity and the right to have that dignity respected and protected. Thirdly, the right to equality and freedom from discrimination in Article 27(1) of the constitution where every person is equal before the law and has the right to equal protection and equal benefit of the law. Fourth, the right to fair trial under Article 50 of the constitution is sacrosanct the applicant has a right to be presumed innocent until proven guilty. He had a right to legal representation. The right to attend and participate in all the scheduled trials. The right to cross-examine the witnesses lined up by the state to testify against him on the indictment. In the course of any criminal proceedings constitution embodies the rights under Article 50 as non-derogable and must and must not only be observed but guaranteed by every judicial officer worth the oath of office he or she holds.

Needless to say that equality of arms requires that for the administration of justice to function the notion of a fair hearing where the interest of parties of the proceedings must be protected and guaranteed. There is no right under Article 50 for any particular reason to enjoy superior advantage to his or her adversary.

The court in the case of **Republic v the Staff Disciplinary Committee of Maseno University and others Ex parte prof. Okelo, Misc. application 227 of 2003 UR** Emphasized ***“that where the key elements of discretion affects the legal interest of rights of a person. The decision maker must comply with the requirements of natural justice and fairness”***

It is also equally important to refer to the extracts by Nyarangi, JA in the case of **David Nyongesa and others v Egerton University 1990 KLR 692** where he Held inter alia

“Wish to rest my decision on the ground that the applicants were not heard. There is no doubt that there was a failure of natural justice -----

Each organ which dealt with the applicant was required to act honestly and fairly by requiring each of them to be given an opportunity to be heard and stating their view of the case before proceeding to decide the matter”

In the instant case the moment the applicant appeared before the trial court to have his case adjourned on grounds that his counsel was engaged elsewhere the penalty was to cancel his bail terms. It is not the law in Kenya in a country that subscribes to the rule of law that a person right to freedom and liberty under Article 29 be arbitrarily taken away without being given an opportunity to be heard before imposing the order of deprivation.

When the applicant came to court on 19th October, 2018 seeking to be heard on matter torching his proceedings, one essential part of the case is that he had no prior notice that his deprivation of his liberty and freedom was at stake. The mere aspect of the trial Magistrate proceeding on transfer would not have thwarted the legitimate expectation of the applicant that his bail terms under Article 49(h) of the constitution were still applicable pending the outcome of his case. (***See Keroche Industries Ltd v Kenya Revenue Authority and others misc. application No. 1214 of 2004***) The right of equality before the law under Article 27 of the constitution counter maids that in applying the law judicial officers shall perform the duty without discrimination.

The discretionary on this revision will remain incomplete without making reference to the nexus between the right to a fair trial and legal representation. The constitution 2010 under Article 50(g) ***“an accused person has a right to legal representation of his choice and in (h) to have an advocate assigned to him by the state and at state expense. If substantial injustice would otherwise result -----”***

For instance the applicant had already retained services of an advocate to represent him in the ongoing criminal proceedings before the trial court. This right on legal representation is expressly entrenched in our constitution. The enforcement of this right is a matter for the trial Magistrate in this case of the applicant. The right to counsel in our constitution is an important element to guarantee a right to a fair trial and cannot be taken away arbitrarily without one process. Considering the vulnerability of many citizens who lack legal knowledge on how courts work, legal representation remains one of the fundamental aspects of the rule of law.

For these reasons, the right to legal representation is an enabling right and foundation of enjoyment to a fair trial more so in a criminal justice set up. The court in the case of ***Juma and others v A. G. 2003*** held as follows:

“it is an elementary principle in our system of administration of justice that a fair hearing within a reasonable time, is ordinarily a judicial investigations and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgement, a right to argue that a decision be made in accordance with the law and evidence”

From what the judges have stated above in the interest of the impugned criminal proceedings they encompasses the following elements. The applicant complained of the case proceedings and the state allowed to present evidence of witnesses without the opportunity of his counsel to test it through cross-examination. This was an applicant who had paid for an advocate to represent him in the criminal trial pending determination. The applicant application to have the case adjourned to ensure his counsel attends the next scheduled hearing was dismissed by the learned trial Magistrate. The applicant was only told that his bond has been cancelled and served with a remand order. From the record he was not informed of the reasons for detention or of denying involvement of his counsel in the subsequent proceedings.

It is common knowledge that when a party engages legal counsel to provide legal representation his role mainly remains passive with appropriate considerations during the trial. The information requiring the material evidence and the case file in respect of the charges remains the purview of his counsel. On the appointed day the applicant could not be in a position to properly appreciate the factual and legal basis of the charges in order to cross-examine the witnesses. By informing the applicant at a short notice that his case will proceed with or without his counsel was a violation of Article 50(a) (c) (g) (k) in conjunction with Article 27(1) of the constitution.

In Tangible terms I adopt the passage by Denning LJ in the case of ***Republic v Northumberland Compensation Appeal Tribunal exparte Shaw 1952 1 KB 338 1 ALL ER 122*** and Court of Appeal decisions in ***Agip Kenya Ltd v Highland Tyres Ltd 2001 KLR 630*** and ***Mbogo & another v Shah 1968 EA 93***.

The upshot of this revision is that the irregularities, errors and illegalities are of a nature that they cannot be cured by the provisions Section 382 of the criminal procedure code. The subject matter relief emphases infringement of a right to fairness due process, the lack of the rules of natural justice and right to equality before the law. Accordingly the decision to cancel the bail terms of the applicant be and is hereby quashed as void abinitio as being wrongful exercise of discretion by the trial court. That the evidence of an advocate hired by the applicant not to participate in the criminal proceedings is a violation of his rights enshrined in Article 50(2) (g) of the constitution.

The part heard criminal proceedings in Cr. Case No. 237 of 2015 be transferred to another trial magistrate to commence under Section 200 of the Criminal Procedure Code. The costs of this application in the cause.

Dated, signed and delivered in open court at Kajiado this 23rd day of October, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Meroka for DPP

Mr. Jaoko