



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL REVISION NUMBER 221 OF 2018

(From original order in Machakos Election Criminal Case No. 3 of 2017)

BETWEEN

STEPHEN OKOTH OMONDI.....1ST APPLICANT

BONFACE MUTUNGI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. By their Notice of Motion dated 18th September, 2018, the applicants herein seek the following orders:

- 1) **This Application be certified as urgent, service thereof be dispensed with and the same be heard ex parte at the first instance.**
- 2) **Pending the hearing and determination of this application inter partes, this honourable court be pleased to stay and/or suspend the orders of the trial magistrate issued on 17th September, 2018 in Machakos Chief Magistrate Court in Election Criminal Case No. 3 of 2017, directing the accused persons to appear at noon 19th September, 2018 to put up and close the defence case on the same day, and stay the trial and until this application is heard and determined.**
- 3) **The court be pleased to review the proceedings of the trial court and the ruling of the trial court issued on 17th September, 2016 putting the applicants' on their defence, as to the constitutionality and legality of the trial court's admission of the ballot papers and other related electoral material as evidence without the prosecution ever providing copies of the same to the applicants' or allowing them reasonable access to the same in the alternative.**
- 4) **That this honourable court do order the acquittal of the applicants' in Election Criminal Case No. 3 of 2017 after the review.**

2. The said application was based on the following grounds:

1. **Article 50 of the Constitution provides for the essential ingredients of the right to a fair hearing which pursuant to Article 25(c) cannot be limited. Part (2)(c) of Article 50 provides that every accused person has a right to have adequate time and facilities to prepare a defence. Part (2)(j) of the same Article provides that the accused person has a right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence whilst part (2)(k) of the same Article gives the accused persons the right to adduce and challenge evidence.**
2. **The investigating officer in his witness statement indicates the prosecution have had the documentary evidence in question since 31st August, 2017.**
3. **There exists an inventory of all the witness statements and documentary evidence provided by the prosecution to the applicants that is signed by both defence counsels in the trial. The documentary evidence in question was never supplied pursuant to the contents of the inventory. This is confirmed by the investigating officer's verbatim statements to the trial**

court on 1st November, 2017 as the record will reveal.

4. The documentary electoral evidence is not on the inventory thus have never been supplied to the applicants, to allow them prepare a defence, to allow them use the contents of the documentary evidence to challenge or adduce evidence when the prosecution was leading its case.

5. The applicants have been put on their defence with a case to answer without ever having chance to review crucial evidence the court has relied on to put them to their defence.

6. The duty to supply or allow reasonable access to the evidence in any criminal trial is the overwhelming duty of the prosecution, the applicants have no way of knowing what the prosecution intends to rely upon and cannot guess the same and apply to be supplied with the same.

7. On 2nd October, 2017 when the applicants were charged and admitted to bail, the trial court then ordered the prosecution to supply the applicants with all the witness statements, a copy of the charge sheet and all other documentary evidence the prosecution would be relying on.

8. On 19th October, 2017 the applicants again applied to be supplied the copies of any documentary evidence the prosecution intended to rely upon. The evidence in question has never been supplied or the applicants allowed reasonable access to the same.

9. When the evident in question was being produced and admitted into evidence the applicants raised timeous objections that were overruled.

10. On the basis of the evidence, the applicants were put on their defence on 17th September, 2018 and directed to put and close their defence to this case on 19th October, 2018.

11. That in the circumstances, the whole trial is a nullity without rectification given the overwhelming import of Article 25(c) of the Constitution on violation of Article 50.

12. The constitutional violations that will be apparent on review cannot be compensated for by damages and so the overwhelming disabilities the conduct of the prosecution have imposed on the applicants' legal capacity to participate effectively by challenging the prosecution's case, prepare a defence and have resulted into the applicants being put on their defence.

13. In the circumstances, the proceedings in the trial court in so far as relates to the evidence in question amounts to an egregious trial by ambush and negative surprise.

14. Prima facie, the proceedings before the trial court violate the applicants' right to fair trial.

15. It is only fair and just to review proceedings of the trial court and orders issued on 17th September, 2018 by the trial court.

16. The prosecution will not be prejudiced by the review of the proceedings of the lower court as sought.

3. The application was supported by the 1st Applicant herein who averred that he was the 3rd accused before the trial court. He however did not purport to be swearing the said affidavit on behalf of the 2nd applicant as well. The averments in the said affidavit were however a regurgitation of the grounds reproduced hereinabove.

4. In the submissions filed on behalf of the appellants it was averred that the Applicants have come before this Court seeking redress on review of Election Criminal case no. 3 of 2017 under section 362 as read together with sections 364, 365 and 366 of the **Criminal Procedure Code** which empowers this Court to 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.

5. After setting out what in the applicants' view they were seeking which orders were clearly not exactly what was prayed for in the application, the applicants then proceeded to set out what according to them was the factual background. Once again the applicants set out factual matters which were not deposed to in the affidavit in support of e application. I must deprecate this rather dishonest attempt by counsel to introduce evidence in the submissions. Where the affidavit in support of an application is economical with the truth as is the case herein, the option is to seek leave to file a further affidavit rather than to attempt to introduce evidence by through the backdoor by way of submissions. This Court will therefore restrict itself to the averments contained in the affidavit in support of the application which affidavit I have noted was deposed to by only one of the applicants without pretending that the same was sworn on behalf of the 2nd applicant. The consequence of this is that the application by the 2nd applicant has no factual basis. However in the interest of justice I will consider both applicants' case on the basis that the said affidavit applies to both applicants.

6. Apart from the said ingenuous attempt to sneak in facts in the submissions, the applicants also relied on grounds and sought order which were not expressly sought in the application.

7. It was the Applicant's submission that the charge was defective. This is because the Investigating Officer testified on cross examination that he did not investigate or otherwise establish whether the applicants had reasonable cause for their alleged acts or omissions. Thus, the statement of particulars in the charge sheet is a ridiculous sham rendering the charge defective.

8. According to the applicant the most crucial documentary evidence relied upon by the trial court to put the applicants on their defence has never been supplied to the defence to this very day. They relied on **Ronald Nyaga Kiura vs. Republic [2018] eKLR**.

9. It was submitted that what is apparent from the above is that the unsupplied evidence which is obviously crucial to the case, overwhelmingly added the weight that led to the decision to put the applicants on their defence. While it was appreciated that this is not the trial court and cannot estimate by how much this unsupplied evidence added to that decision, it was contended that the Court cannot wish away the fact that it did so.

10. According to the applicants the curative provisions of section 382 of the ***Criminal Procedure Code***, cannot apply since the Court cannot donate on itself powers to investigate and supply the missing particulars of the essential ingredient neither can the trial court. Secondly any such 'cure' would be at best a fictitious invention of material facts which of course is not possible.

11. According to the applicants, on the totality of this case, that the failure to provide particulars of a preemptive ingredient of the offence renders the charge defective, materially negated the ability of the defence to offer a cogent defence as from the beginning of the hearing to this very moment of review.

12. The applicants relied on Article 50 of the Constitution and stated that the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence has over time crystalized notwithstanding the lack of a specific provision in the old Constitution. In this respect the applicants relied on **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, **R. vs. Ward [1993] 2 ALL ER 557**, **R. vs. Stinchcombe [1992] LRC (Cri) 68**, **Olum & Another vs. Attorney General [2002] 2 E.A. 508**, and **George Ngodhe Juma & two others vs. The Attorney General Nairobi High Court, (Misc. Criminal Application No. 345 of 2001)**.

13. According to the applicants what emerges from the said decisions are:

1. It is the duty on the part of the Prosecution to supply an accused person with all the relevant material in its possession, and to do so in advance of the beginning of the trial so that the party to be tried is made aware of the case to be advanced against him and to accordingly prepare his answer to that case.

2. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.

3. Failure to supply evidence, in itself amounts to a violation of the right to a fair trial within the meaning of articles 25 (c) and 50 of the constitution.

14. The applicants also relied on **Dennis Edmond Apaa & Others vs. Ethics & Anti Corruption Commission High Court at Nairobi Petition No. 317 of 2012 (2012)eKLR** and submitted that in the present case crucial evidence was not availed to the defence.

15. The applicants therefore urged the Court to order an acquittal given the overwhelming emphasis Article 25(c) places on the right to a fair trial and the powers vested on this Court by section 364 (1)(b) of the ***Criminal Procedure Code***. The Court was urged to take into account the grave nature of the violations of the applicants' right to a fair trial and the fact that the mistakes of the court should not be visited on the applicants.

16. The application was opposed by the Respondents through **Ms Mogoi**, the Prosecution Counsel. In his Replying Affidavit, **Anthony Njau**, the Prosecution Counsel deposed that the prosecution informed the defence of the all the documentary evidence the prosecution intended to rely on. According to him, the documentary material which were numerous, bulky and delicate thus rendering impractical to reproduce, to wit, Ballot counterfoils, ballot booklets and partly used ballot booklets. However, the prosecution did supply the applicants with a full and detailed inventory of the serial numbers for all those materials hence the applicants were made aware of the existence of this electoral material and that they were in the custody of the Investigating Officer.

17. To the Respondent, the prosecution has always availed this electoral materials in Court to be marked by the witnesses and the applicants have never been denied access to electoral materials either in Court, within the Court's premises or at the DCIO's offices and the applicants did not object to the marking of the said materials by the prosecution's witnesses and cross-examined on the same intensely and at length.

18. The Respondent therefore prayed that the application be dismissed.

Determination

19. I have considered the material before, the submissions as well as the authorities cited and this is the view I form of the matter.

20. Section 362 of the ***Criminal Procedure Code*** provides 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.

21. Section 367 of the *Criminal Procedure Code*, on the other hand, provides as hereunder:

When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

22. A strict reading of section 362 of the *Criminal Procedure Code*, however, does not expressly limit the High Court's revisional jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings. Suppose a subordinate court would be minded to make an absurd decision of commencing a criminal trial by directing the accused to give evidence before the prosecution, I do not see why the High Court cannot call the proceedings in question to satisfy itself as to the correctness, regularity or legality of such order. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine ***the regularity of any proceedings of any such subordinate court*** as well.

23. However, section 364 of the *Criminal Procedure Code* provides that:

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

24. From the foregoing it is clear that the High Court cannot exercise revisional jurisdiction in an order of acquittal. It may however exercise the said jurisdiction in case of a conviction or ***in any other order***.

25. It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisional jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. Dealing with the right to appeal in interlocutory ruling in a criminal matter, the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley vs. Republic[2008] eKLR**, held that:

"We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."

26. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:**

"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case".

27. On the merits, this application is based on two grounds. The first ground is that the charge sheet is defective. First and foremost this ground was not the basis of the application as it was not alluded to either in the grounds or in the affidavit. It would seem that this ground was, with due respect, relied on as an afterthought. In any case a defect in a charge sheet should be raised before the trial court or on appeal. In my view, in the exercise of my discretionary revisionary powers I would not readily entertain applications for revision on the basis of alleged defect in a charge sheet.

28. The second ground was that the applicants were not supplied with the documentary evidence that the prosecution intended to rely on. In **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, the Court of Appeal held that:

“In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person; Muga Apondi, J ruled that the appellant had a case to answer and even if that order would be seen as being prejudicial that alone would not have entitled the appellant to appeal. But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant’s fundamental rights guaranteed by section 77 of the Constitution. Whether that order was made pursuant to section 60 (1) of the Constitution, and we have found it could not have been made under that section, or whether it was made pursuant to the exercise of inherent jurisdiction as the learned Judge said he was doing, the effect of the order was to violate the appellant’s rights under section 77. The appellant had two choices. He could have chosen to wait until after the determination of the charge against him and if he was convicted, he would be entitled to appeal on all aspects of the trial. Secondly, he had the option to appeal under section 84 (1) of the Constitution.”

29. What the Court was saying that an accused who is aggrieved by a decision that he contends violates his constitutional rights has the option to either appeal at the tail end of the trial or to appeal the decision. In this case the decision that the applicants seek to be revised was a decision placing them on their defence as opposed to the decision admitting in evidence the documents which were not supplied to them. In my view a decision placing an accused on his defence ordinarily ought to be appealed against as opposed to being subjected to an application for revision. I have considered the material placed before me and I am not satisfied that the same meets the threshold for revision. In my view the correctness contemplated is not be equated with an investigation as to whether the decision in question is right or wrong. As to the legality or propriety of the decision placing the applicants on their defence, no sufficient material has been placed before me to make such a conclusion. As to whether the proceedings before the trial court were regularly conducted, the Respondents’ position is that the documents in question are available for scrutiny by the defence. That being the position nothing stops the applicants from seeking to peruse the same and even take copies if necessary for the purposes of their defence. It is however my view that to terminate the subject proceedings on that ground when the documents have always been at the disposal of the defence would occasion injustice. It must be noted that even where an application for revision is allowed it does not necessarily lead to the termination of the proceedings in question since section 367 of the ***Criminal Procedure Code*** empowers the Court to make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

30. In the premises I find no merit in this application which I hereby dismiss. For avoidance of doubt however, the Respondents must afford the defence access to the documents it relied on in support of its case and where necessary avail the same to the defence to make copies thereof.

Read, signed and delivered in open Court at Machakos this 29th day of November, 2018.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Loki for Mr Roy Mwamba for the Applicants

Miss Mogoi for the Respondent

CA Geoffrey