REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 115 of 2016

MUSHARAF ABDALLA alias SHUKRI alias

SHARRIF ABDALLAH MUALIM alias

ALEX SHIKANDA alias RASHID SWAITAN alias

ALI alias BONIE alias BLACKY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Background

Musharaf Abdalla, the Applicant herein filed an application dated 12th April, 2016, pursuant to Section 362 of the Criminal Procedure Code seeking the revision of an order by the trial magistrate in Milimani Criminal Case 1427 of 2012 which he submitted had adverse ramifications on a just and fair trial. He premised the application on grounds; that himself and his two other co-accused were arraigned in court on 17th September, 2012 where they were charged with several offences; that by the time of filing the this application, the trial had proceeded to the defence hearing and that on 2nd February, 2016 during his defence hearing he called a witness, Abdi Majid Yassin Mohammed, the 3rd accused as a defence witness 4. Further that while the learned State Counsel was cross-examining the witness on the contents of his statement under inquiry, the witness disputed its authenticity. Despite this objection, the learned State Counsel sought to have the witness produce the statement as a prosecution exhibit. The applicant once again vehemently protested to its production. After arguments by both parties, the learned trial magistrate delivered a ruling on 1st April, 2016 holding that the statement was admissible as a prosecution exhibit. The Applicant was aggrieved by the ruling, culminating into filing the current application. He has urged this court to examine the proceedings and satisfy itself as to the correctness, legality and/or propriety of the ruling and proceedings of the trial court.

In the application he set out specific issues for revision, namely;

1. Whether it was legal, proper and correct for the trial magistrate to compel the defence witness to produce the exhibit on behalf of the prosecution which was intended to be relied upon against his co-accused.

2. Whether it was proper and correct for the learned trial magistrate to regard the disputed statement under inquiry taken while the witness was in custody as an ordinary witness statement.

3. Whether it was proper and correct for the learned magistrate to compel the witness to produce a statement under inquiry without observing that the procedure and safeguards against the production of such a statement was not observed.

4. Whether the learned magistrate violated the witness' constitutional right to refuse to give self incriminating evidence guaranteed under Article 50(2)(l) of the Constitution.

In light of these submissions he sought certain prayers, namely; that this court reviews or revises and sets aside the ruling and order of the trial court and further that this court orders that the exhibit in question be expunged from the record of proceedings.

The application was canvassed before me on 8th March, 2017. The Applicant represented himself while the respondent was represented by learned State Counsel Ms. Nyauncho. The applicant submitted that he had not been supplied with the confession statement despite requests to be supplied with all the prosecution witness statements and exhibits. He submitted that the witness denied the content and signature on the statement and further that the statement had been recorded by the witness as a suspect not as a witness and was not meant as a confession. It was therefore unprocedural for the trial court to allow its production.

Ms. Nyauncho submitted that the statement was properly admitted. This she submitted, was because it was being produced by the person who had authored it. She submitted that the witness had already pleaded guilty to all the facts of the case and was serving sentence. She submitted that the witness was not compelled to produce the exhibit in question as it was shown to him and he accepted that he made it. She submitted that the denial of the content and signature by the witness was an afterthought.

Counsel went on to submit that the issue at hand was the admissibility of evidence which could be dealt with on appeal or in submissions in the lower court. She further submitted that the application had been overtaken by events as the defence had already closed its case and the parties were to highlight their submissions on 17th March, 2017. She submitted that it could not be said that the Applicant was ambushed as he was aware that the witness had recorded a statement. She prayed that the application to be dismissed.

In reply, the applicant submitted that he did object to the production of the statement in question and that is why he filed the application in question. He submitted that it was the State Counsel who produced the statement and not the witness of his own volition. He submitted that he had called the witness in question to rebut the investigating officer's evidence that the defence witness had named him as a suspect. Finally, he submitted that the witness in question pleaded guilty to the offence as far as the facts of the charges were read to him and not to the contents of the statement.

Determination.

This court has been urged to satisfy itself as to the propriety, legality and correctness of the order made on 1st April, 2016 upholding the production of the Applicant's co-accused's statement recorded under inquiry as a prosecution exhibit. The court is moved under Section 362 of the Criminal Procedure Code which confers it with supervisory jurisdiction over the subordinate courts. This court can then exercise its powers under Section 364(1)(b) by either altering or reversing the order in question or uphold the order sought to be revised. The jurisdiction of this court extends to revising orders of the subordinate court made even after the close of the defence case as envisaged under Section 364(1)(b).

After considered the application in question and the submissions of the respective parties, this court finds that the following issues arise for determination:

1. Whether the statement in question, prima facie, was admissible.

2. Whether the statement was adduced as per the rules of evidence.

The genesis of this application is a statement under inquiry that was recorded by DW4, Abdi Majid Yassin Mohamed alias Ali Hussein alias Browny. This witness was the third accused in the said Criminal case 1427 of 2012. He pleaded guilty on 20th September, 2012 and was sentenced in all the counts. The sentences were to be served concurrently leading to a cumulative sentence of 7 years imprisonment. The defendants, DW1 (1st accused) and the Applicant decided to call him as their defence witness respectively. He testified as DW2 as part of DW1's defence case and as DW4 with regard to DW3's (applicant) defence. Whilst he testified as DW4 the prosecution in cross examination sought to produce a statement that was allegedly made by the witness after his arrest in which he incriminated the 1st accused and the applicant. The applicant was opposed to the production but the court ruled the statement as admissible. The main reason the defence was opposed to the production was the fact that the witness disputed being the maker of the statement in question and the signature appended to it.

On the question of admissibility of the statement, it is trite that statements that are made to the investigative and prosecuting authorities are admissible as part of the prosecution's evidence by their makers. However, their admissibility is contingent to various factors; including, that the statements in question being supplied to the defence prior to their production in order to ensure that the accused can adequately prepare their defence and further to ensure that a trial by ambush which contravenes the rules of natural justice does not ensue. Admissibility of the statements must also conform to the rules of admission of evidence under the Evidence Act.

In this case the applicant is adamant that the statement in question was ever supplied to the defence. This court has considered the record from the lower court and it is clear that the applicant and his co-accused were not in possession of the statement in question as it was never supplied to them. It was not part of the documents listed in the inventory of exhibits supplied to them. That being the case, it would be a gross injustice to allow the reliance on the document in question as an exhibit when the applicant had not had an opportunity to interrogate it before its introduction.

However, it should be noted that the statement in question was produced as part of the cross examination of the witness with a view to clearing any contradicting evidence which may have been inconsistent with the statement. For that purpose, the cross examination at that point would, per se, be consistent with Section 153 of the Evidence Act. The same allows a witness to be cross examined on a previously written statement if the purpose is intended to contradict the witness. However, before the document is adduced, parts of the statement that contradict his evidence should be laid out to him. In this case the prosecuting counsel did ask the witness questions pertaining to the inconsistency between the statement and his evidence adduced seeking to have the document admitted. To this extent, I hold that there was nothing wrong or illegal with the prosecution cross examining the witness on the statement.

The above notwithstanding though, it is worth to note that the prosecution sought to adduce the statement (and they did) during the hearing of the defence case. In my candid view, this was unprocedural as they had all the time during the hearing of their case to do so. At no point was the defence witness going to adduce evidence for the prosecution. To do so through a forced process, as was the case, amounted to a gross violation of an accused right to a fair trial. At the most, the outcome of the answers in the cross examination were only useful to the prosecution in their submissions.

But again, the court must interrogate the purpose for which this statement was cross examined on and produced. This is premised on the applicant's submission that the statement in question was intended to demonstrate that the applicant and his co-accused had committed the offence. In short, that the 3rd accused had confessed to his participation in the offences and had in his statement implicated the applicant and his co-accused. I need then not belabor stating that that statement amounted to a confession and ought to have been produced in accordance with the procedure set out in **The Evidence(Out of Court Confession) Rules, 2009.** The Rules do not define a confession but in **Black's Law Dictionary, 9th Edition** it is defined as:

> **"A criminal suspect's oral or written acknowledgment of guilt, often including details about the crime."**

Given the above definition, it follows that the statement was intended to be the witness' admissions to committing the offences charged, which he later pleaded guilty to. The witness (DW4) questioned its propriety. He denied some contents in it. At that point the learned trial magistrate ought to have known its credibility was questionable. Legally, a trial within a trial would be conducted to ascertain not only its credibility but the manner in which it was recorded. This was never to be because of the procedure through the court used in allowing its admissibility. Respectively, the admission of the statement for purposes of questioning the credibility of the witness was untenable as its own credibility was called into question.

There is no doubt then that the proceedings of the lower court regarding the admissibility of DW4's statement were tainted with irregularity and illegality. This court must then reverse that position failing which the applicant will not be accorded a fair trial. See **R v. Patel[2001]EWCA 2505** quoting Roch LJ in **R v. Hickey(30th July 1997):**

> **"Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distracted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened."**

It was also held in **Connelly v. DPP[1964] AC 1254,** that:

> **"The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression and prejudice."**

There is no doubt that if the trial continued with subject statement admitted as prosecution evidence the applicant and his co-accused would be heavily prejudiced. I accordingly set aside the order of the learned trial magistrate allowing the admissibility of the statement of DW4. I hold that the said statement cannot be used as evidence against the Applicant and his co-accused, DW1. The said statement is hereby expunged from the evidence on record. The trial court record be remitted back to the trial court for mention on 31st March, 2017 for purposes of taking a date for submissions. It is so ordered.

DATED AND DELIVERED THIS 28th DAY OF MARCH, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Prof. Hassan Nadwa h/b for Chacha & Mureithi for the Applicant.

2. M/s Sigei for the Respondent.