REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 48 OF 2017

IN THE MATTER OF THE INCARCERATION OF MR. WILLIE MOMANYI

BETWEEN

OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTIONS...……..……...……...APPLICANT

AND

SIMEON SAGANA KANANI…...……..…….1ST RESPONDENT

LUCAS MATIKO CHACHA…….…….2ND RESPONDENT

PHILIP OKEYO OBURE…....……...3RD RESPONDENT

(Being an application for revision of an order in Milimani Criminal Case No. 987 of 2011(R v. Sagana Kanani & 2 others) made on 22nd March 2017.

RULING

Background.

The Applicant brought the present application by way of letters dated 22nd and 23rd March, 2017 in which he moved the court to exercise its powers of revision as set out under Sections 362 and 364 of the Criminal Procedure Code. The court was urged to satisfy itself as to the correctness or propriety of the order issued by the learned trial magistrate, Hon. T. N. Sinkiyian, Resident Magistrate in the Chief Magistrate's Court at Milimani Cr. Case No. 987 of 2011 on 22nd March, 2017. The application is supported by the affidavit of Willy Momanyi and Robert Nyoro Wambari sworn on 22nd and 23rd March, 2017 respectively both of whom are prosecuting counsel working for the Applicant.

Mr. Momanyi deponed that he was the prosecuting counsel in Criminal case No. 987 of 2011 which was part heard before Milimani criminal court number 5. That the case was set for hearing from 20th to 23rd March, 2017 but that when the matter came up for hearing on 20th March, 2017 the prosecution was not ready as witnesses were not available. That he sought an adjournment and urged the court to issue witness

summons. The court allowed the adjournment to 21st March, 2017. On this date, one witness testified and a further adjournment was sought as that was the only witness available. He deposed that on 22nd March, 2017 there were no witnesses present and he therefore sought an adjournment, an application that was vehemently opposed by the defence advocates. The court made a ruling ordering the prosecution to proceed with the case or close it, an order he opposed given that he was expecting witnesses on the 23rd March, 2017 and also because the witnesses had crucial evidence. He deponed that the trial magistrate proceeded to hold him in contempt of the court for failing to close the case as ordered. Incidentally, the defence counsel had also moved the court urging it to so hold him in contempt of the court. That despite apologizing to the court, he was nevertheless found to be in contempt of the court and was convicted accordingly. He was sentenced to one day imprisonment and in addition to pay a fine of Kshs. 25,000/- in default serve five days imprisonment.

Mr. Nyoro deponed that he was the designated prosecutor for Milimani criminal court number 5 which was presided over by Hon. T. N. Sinkiyian, RM. He deposed that he was in court on 22nd March, 2017 with Mr. Momanyi who was handling criminal case No. 987 of 2011. When the matter was called for hearing, Mr. Momanyi sought an adjournment as no witnesses were available, an application the court denied and ordered him to either proceed or close the prosecution's case. That Mr. Momanyi then refused to close the case and was held to be in contempt of the court. That the court then gave him an opportunity to mitigate before sentencing him to serve a day's imprisonment and in addition pay a fine of Kshs. 25,000/- in default serve 5 days imprisonment. That after Mr. Momanyi was taken to the cells he was called upon to proceed with the matter as directed by the presiding magistrate; either to proceed or close the case. In the absence of witnesses he had no alternative but to close the case. The matter was set for ruling on 4th April, 2017.

The Applicant urged the court to make reference to the Contempt of Court Act and the cases of **R v. Fatma Nabhany[2016] eKLR** and **Bablu Kumar & others v. State of Bihar & another(Criminal Appeal No. 914 of 2015)** which were cited in support of the application.

Submissions

This application was first presented before this court ex-parte on 22nd March, 2017 when, after considering the submissions of the Applicant, and pending inter-partes hearing the court admitted Mr. Momanyi to a personal bond of Kshs. 10,000/-. The court also ordered for his immediate release from custody. Mr Kemo & Ms. Aluda have been on record for the Applicant while Mr. Ongoya is on record for the 1st and 2nd Respondents and Mr. Agwara is for the 3rd Respondent. The application was canvassed by way of filing written submissions. Those of the Applicant were filed on 30th May, 2017while the Respondents filed theirs on 10th April, 2017. Parties orally highlighted the submissions on 19th July, 2017.

Mr. Kemo opened his submission by urging the court to quash the sentence meted out against Mr. Momanyi and also urged for the transfer of the case to a different trial magistrate. Whilst setting out the background of the proceedings in court he urged the court to determine whether the conduct of Mr. Momanyi in refusing to close the prosecution case as directed by the trial court amounted to contempt of court. He submitted that contempt involved the interruption of the administration of justice but that Mr. Momanyi's behavior did not meet this threshold. That was to say that the mere fact that he informed the court that he had no evidence to adduce did not, of itself, amount to contempt of the court. Instead, it was in line with his prosecutorial responsibility as provided under the Office of the Director of Public Prosecutions Act (hereafter ODPP Act). He submitted that Section 15 of the ODPP Act protects a prosecutor from being held personally liable if he carries out his duties in good faith.

Mr. Kemo also urged the court to address itself as to whether it had the power to hold the prosecutor in contempt. He concurred that the Contempt of Court Act, (hereafter the Contempt Act), conferred powers to a subordinate court to hold a person in contempt of court if the contempt is committed in the face of the court. He submitted that Mr. Momanyi acted in a professional manner and that the court should have set a date for a ruling on whether his behavior amounted to contempt of court instead of the summary

finding it made.

It was Mr. Kemo's submission that the proper procedure was not followed before the trial magistrate found Mr. Momanyi in contempt. He referred to Section 7 of the Contempt of Court Act which he submitted did not provide for a summary procedure. Instead, the court ought to have made a record of all the proceedings leading to the contempt. Enunciating the procedure that ought to have been followed, counsel submitted that a charge ought to have been drafted, followed by the taking of plea in the ordinary manner before a guilty verdict was arrived at. Further, the accused (contemnor) must be accorded an opportunity to mitigate. The court was referred to the case of **Joseph Odhengo s/o Ogongo** v. **R [1954] 21 E.A.C.A 302** to buttress this submission. Counsel further submitted that the process used to condemn Mr. Momanyi went against the rules of natural justice as he was never accorded an opportunity to defend himself. He submitted that if the matter went on appeal there would be no record to guide the appellate court.

Ms. Aluda submitted that the sentence meted out was wrongful in light of the fact that Mr. Momanyi was exercising his professional duties. She submitted that this court had jurisdiction under Articles 162 – 165 of the Constitution and Section 362 of the Criminal Procedure Code to review the order of the court convicting the prosecutor and closing the case. She submitted that the closure of the case was unprocedural and that this court had the powers to reopen it. She thus urged the court to allow the application.

Mr. Ongoya, for the 1st and 2nd Respondents opposed to the application. He was opposed to the request by the Applicant for the recusal of the trial magistrate from the trial itself as it was based on no merit. Besides, it was only raised in the submission thus amounted to a red herring. He relied on the case of **Prof. Peter Anyang Nyongo v. Attorney General (Appeal No. 1 of 2009) EACJ** to buttress the submission that the trial court must first be moved on an application seeking an order that it recuses itself.

He submitted that the scope of **Section 362 of the Criminal Procedure Code** was clear, which is limited to the court satisfying itself as to the legality, propriety and correctness of the order or sentence passed or as to the regularity of the sentence. In that regard, what was before the court was merely a consideration of whether the order to close the case was correct, legal or proper based on the facts of the case. The court had to also satisfy itself that the order of contempt was correct or proper. He laid out a background of the matter and submitted that in the circumstances the trial magistrate's decision finding Mr. Momanyi in contempt of the court was legal, proper and correct.

Mr. Ongoya noted that the case was closed by Mr. Nyoro, a prosecution counsel in the Office of the Director of Public Prosecutions who was competent to do so. He submitted that reopening the case would be prejudicial and perpetuate an injustice. He faulted the impression created by the Applicant that jailing Mr. Momanyi was wrongful when he had rightfully been found guilty. But on humanitarian grounds he was amenable to the release of Mr. Momanyi. He submitted that prosecutors were not inherently immune to contempt proceedings. Thus, Mr. Momanyi should have followed the order of the court and if he disagreed with it he should have asked for leave to appeal against it. He relied on **Hadkinson v. Hadkinson[1952] 2 All ER, 67** to buttress this submission. He submitted that the trial magistrate properly invoked Section 10(2)(c) of the Magistrates' Courts Act in holding that Mr. Momanyi was contemptuous of a court order.

Mr. Agwara for the 3rd Respondent in oral submission was represented by Mr. Kamande who aligned himself with the submission of Mr. Ongoya. He zeroed in his submission on the right to a fair hearing; that is to say that the Respondents had a right to have their case begin and concluded without unreasonable delay. That therefore, reopening the prosecution case would be injurious to the Respondents. He urged the court to note that the trial began in the year 2011 and as at the time the prosecution case was closed, the delay in the trial was largely occasioned by the prosecution. This, according to the counsel, amounted to an abuse of the legal process. Counsel submitted that the application lacked merit and ought to be dismissed.

Mr. Kemo, in reply, submitted that the Respondents had failed to address the court on whether what

transpired in court amounted to contempt of court. He reiterated that the submission by Mr. Momanyi before the trial court that he had no evidence to offer did not, of itself, amount to contempt of court. He added that the independence of the Office of the Director of Public Prosecutions was anchored under **Article 157(10) of the Constitution and Section 6(b) of the ODPP Act**. He submitted that the application was meritorious and urged the court to grant the orders sought.

Determination

The application before this court seeks revision of orders passed by the trial court in Milimani criminal case No. 987 of 2011, namely; an order closing the case and an order finding that the prosecution counsel was in Contempt of court. I will first address myself to the issue of the learned trial magistrate finding the learned prosecution counsel, Mr. Momanyi in contempt of the court. Suffice it to state, the magistrate's court convicted Mr. Momanyi pursuant to **Section 10(2) of the the Magistrates Court Act.** The entire application is brought pursuant to Sections 362 and 364 of the Criminal Procedure Code which confer on this court supervisory jurisdiction over the subordinate courts. Under Section 362 the powers are limited to the calling of the trial court record so that this court can satisfy itself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed, or as to the regularity of any proceedings of any subordinate court. In the instant case, the court is urged to revise the respective order by overturning it and thus hold that Mr. Momanyi was not in contempt of the court. The trial summarily convicted the said Mr. Momanyi and therefore the order available for this court to revise is that on conviction. Flowing from this observation, the inevitable question is, whether under its revisionary powers the court can overturn an order of conviction.

Under 364(5) **'' where an appeal lies from a finding, sentence or order, and no appeal is brought no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.''** It is then gainsaid that the Applicant failed to take the noble opportunity granted by the statute to seek redress by way of an appeal. For avoidance of doubt, a revision against an order of conviction would only lie pursuant to Section 364(a) where the court would only disturb the nature of the sentence only. That is not the scenario in the instant case as the court has been asked to entirely set aside the conviction of the learned State Counsel.

Even with this observation, I do not think I will do justice to this ruling if I penned off this limb before I comment on learned counsel, Mr. Kemo's submission that the order convicting Mr. Momanyi ought to be revised on account that the right procedure was not followed before a guilty verdict was reached. To Mr. Kemo, a charge ought to have been framed followed by plea taking, a conviction, mitigation and finally the sentencing. Counsel cited the case of **Joseph Odhengo s/o Ogongo[1954] 21 EACA 302** to buttress the submission. The then East African Court of Appeal in the case held that:

> **"…, it is essential that the Court sho*uld frame and record the substance of a charge, call upon the person accused to show cause why he should not be convicted on that charge, and give him a fair opportunity to reply. We have no doubt that in the instance case the learned Judge did in fact follow the principle of natural justice. But we think it desirable that in every such case the record should show that this procedure had in fact been followed and should contain an adequate note of the accused person's reply, if any, as well as the Court's decision. If these particulars do not appear on the record an appellate court will naturally be hampered in the event of an appeal being lodged from the summary conviction."***

In the case, although the court did not explicitly hold that the failure to record the entire procedure of recording a charge, taking plea and the subsequent conviction and mitigation was a fatal defect to a conviction on a charge of contempt of court, it did not overturn the conviction on the basis of the failure to follow this procedure. The appeal was dismissed for want of merit. The court only emphasized that for good order and organized recording of proceedings, it was prudent that the formal procedure was followed. The scenario presented in this case is that the conviction was what may be referred to as contempt in the face of the court as provided under Section 10(2)(c) of the Magistrates' Courts Act No. 26 of 2015. This was restricted to disobedience of a court order or direction of the court in the course of the hearing of a proceeding.

Contempt in the face of a court was defined by Lord Denning, M.R, in **Balog**h v. **St Alb**an**s Crown Court [1975] 1QB** 7**3, as**:

> ***"Its meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempts for which a judge of his own motion could punish a man on the spot. So "contempt in the face of the court" is the same thing as "contempt which the court can punish of its own motion". It really means "contempt in the cognisance of the court."***

Where such contempt is occasioned a court is empowered under common law to summarily punish the contemnor. Stephenson LJ in **Balogh(supra)** deliberated on summary convictions for contempt thus:

> ***"It must never be invoked unless the ends of justice really require such drastic means; it appears to be rough justice; it is contrary to natural justice; and can only be justified if nothing else will do:"***

The findings of Lawton LJ in the same case are also illuminating. He held that:

> ***"In my judgment the summary and draconian jurisdiction should only be used for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment."***

I would, nevertheless, not wish to delve into whether or not the circumstances leading to the conviction of Mr. Momanyi amounted to contempt on the face of the court as doing so would pre-empt an impeding appeal. The appellate court will wisely deal with this aspect.

I now determine whether the reopening of the prosecution case is merited. Record of proceedings does show that as soon as Mr. Momanyi was convicted, the prosecution counsel who was in charge of prosecution in that court, Mr. Nyoro rose up and apologized to the court in his professional and personal capacity for what had transpired between Mr. Momanyi and the presiding magistrate. He then addressed the court as follows;

> ***"I close the prosecution case in the circumstances."***

The court then set a ruling date on a case to answer.

I cannot belabor to conclude that although Mr. Nyoro did what seemingly was the right thing, the atmosphere in the court at the time was hostile and he was, in the circumstances, compelled to do what pleased the court. This is simply explained by the fact that Mr. Momanyi had just been led to the cells after his conviction. The conviction was informed on his refusal to close the prosecution case as directed by the court. Fearing for a similar fate, the human thing that Mr. Nyoro would have done was to obey the court's direction; and so he moved to close the case. But the irregularity lay with the court allowing Mr. Nyoro to take over the conduct of the matter when in fact he was not the prosecutor charged with the matter on that day. He was not therefore versed with the facts of the case, and more so the circumstances leading to the non- attendance of the witnesses on the fateful day. He could not, as such, competently take control of the matter. In my candid view, notwithstanding that the court was displeased with Mr. Momanyi's conduct, it should have adjourned the proceedings of the day until when, either Mr. Momanyi served the sentence or the DPP appointed another prosecutor to take over the conduct of the proceedings. In that regard, I would not hesitate to order the reopening of the prosecution case.

One other issue is that the case had been fixed for hearing for three days, from 20th to 22nd March, 2017. It is not clear why the court insisted that the prosecution should close their case when the three days had not been exhausted. And indeed, on this ground alone, Mr. Momanyi was hesitant to close his case. In as much as the trial court felt that the prosecution was not doing enough to avail their witnesses at the earliest available opportunity, it was irregularly to force them to close their case before the period allocated for the hearing was spent. The action of the learned magistrate was thus, unmerited and could

easily be construed was instigated by ulterior motives especially because it was followed by the conviction of Mr. Momanyi, the merits or demerits of the same notwithstanding. On this ground again, this court would correctly reopen the prosecution case.

Finally, is the question of whether the trial should be conducted by another magistrate other than Hon. T. N. Sinkiyian. This is a prayer that was sought by the Applicant; that the circumstances leading to the instant application called for the recusal of the learned magistrate. Of course this prayer was vehemently opposed by the Respondents citing that firstly, there was no good reason to warrant the grant of the order and secondly, that the prayer should have been brought up before the trial magistrate. In view of the latter submission, the court was urged to find that it had no locus standi to determine the issue. The case of **Prof. Peter Anyang Nyongo(supra)** was cited to buttress the view that the issue not having been raised in the application itself could not be submitted on and so the court could not determine it.

In my view, it would be improper not to consider this issue merely on ground that it was not broached before the trial magistrate or pleaded in the application. Having found that the prosecution case shall reopen, it is obvious that the hostility between the learned magistrate and the learned State Counsel, Mr. Momanyi who is charged to prosecute the matter cannot be wished away. And therefore, to insist that the matter goes back to the same court would be an injustice to the court itself, the litigants and the prosecutor. In so finding i add that proceedings in a trial must and should be conducted in a conducive environment, a fair platform for all parties involved so that justice can be seen to be done. Accordingly, I find that this request is not made in vain and is also not vexatious.

In the result, the application herein partially succeeds. The prayer for revision of the order on conviction of Mr. Momanyi fails for the aforestated reasons. I do however admit him to a personal bond of Ksh. 10,000/ pending any intended appeal. I however set aside the order of the learned trial magistrate ordering the closure of the prosecution case. The case shall forthwith re-open. The trial shall be conducted by another magistrate other than Hon. Sinyikian. The trial court file shall be placed before the Chief Magistrate, Milimani on 4th October, 2017 for mention for purposes of re-allocating it before another magistrate with competent jurisdiction. The trial court file be forthwith remitted back to the trial court. It is so ordered.

Dated and Delivered at Nairobi This 26th Day of September, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. M/s Sigei h/b of Kemo for the Applicant.

2. Mr. Agina for the 1st and 2nd Respondents.

3. Mr. Agina h/b for Agwara for the 3rd Respondent.