



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
CRIMINAL REVISION NO. 6 OF 2017

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

Versus

SITOYA OLE KUMPAU.....RESPONDENT

RULING

The Office of the Director of Public Prosecutions through a letter dated 8/5/2017 filed an application before court seeking revision of the orders made by learned magistrate Hon. Chesang (RM) as appearing herein under:-

- (1) That the honourable court be pleased to revise, review, vary and or set aside the entire ruling and orders by the learned magistrate dated 27/4/2017.

Background facts:

The accused Sitoya Ole Kumpau Meipaku was indicted with the offence of obtaining registration by false pretences contrary to section 320 of the Penal Code (Cap 63 of the Laws of Kenya). The particulars of the charge being that on 23/3/2007 at Kajiado Sub-County jointly with others not before court with intent to defraud, willfully procured self registration of land title deed number Kajiado/Losilatu/813 by false pretending that he was the rightful owner a fact he knew was false.

On 22/12/2004 the accused pleaded not guilty to the charge and the matter was set down for hearing on 29/1/2015 before Hon. Mbicha (RM). The accused was represented at the trial by learned counsel Mr. Sekento.

From the record the prosecution had already summoned two witnesses PW1 and PW2 who were heard by Hon. Mbicha before his transfer in early 2017. The trial was therefore to proceed before Hon. Chesang under section 200 of the Criminal Procedure Code.

As this is the impugned order it is appropriate to reproduce it verbatim.

Coram

Before M. Chesang RM

Pros. Akoth

Accused – present

Mr. Sekento for accused

We are ready

PROS: I have no witnesses. I am not ready to proceed. The complainant is blind and unable to come to court.

Mr. Sekento: We oppose the application. This is an old matter. The complainant has always attended court without the assistance of the son.

COURT: This is an old matter. The disability on the part of the complainant is not so grave as to disable him from finding other means to attend court. The file is placed aside for 30 minutes to await complainant to attend court.

Later on at 10.31 am

Coram as before

PROS: I am waiting for the witnesses.

MR. SEKENTO: We can get an indication as we cannot wait indefinitely.

PROS: I am unable to give a time indication.

Mr Sekento: The prosecution has not indicated whether she has tried to contact the witnesses or not. She is just keeping us in suspense.

CT: The witnesses and the complainant has not attended court. I have not been shown any bond. After placing the file aside, I have not been informed whether witnesses are coming or not. As such this matter is dismissed under section 202 for non-attendance of the complainant and his witnesses to court.

Mr. Sekento: I apply for a discharge of the surety.

PROS: No objection.

CT: sureties discharged as prayed.

Signed 27/4/2017.

The learned trial magistrate was therefore under mandatory legal obligation to invoke section 200 of the Criminal Procedure Code on takeover of part heard cases.

The principal grounds raised by the prosecution consist the following:-

- (1) On 29/1/2015 wherein the case was adjourned by the defence though the prosecution was ready to proceed with (2) two witnesses.
- (2) On 2nd April 2014 wherein the case was adjourned at the instigation by the defence.
- (3) On 8/6/2015 wherein the case was adjourned by the prosecution as the court prosecutor had been indisposed by a family emergency.
- (4) On 29/8/2015 wherein the case proceeded with two witnesses being Makihanani Ole Kumpei and Stephen Mboke Kanthani.
- (5) On 14/10/2015 wherein the case was adjourned at the instance of the defence though the

prosecutor was ready to proceed with (1) witness.

(6) On 17/12/2016 wherein the case was adjourned by the prosecution for lack of the police file.

(7) On 8/2/2016 wherein the case was adjourned as the court prosecutor was on leave.

(8) On 28/4/2016 wherein the case was adjourned at the instance of the defence to consider alternative dispute resolution.

(9) On 16/12/2016 wherein the matter was adjourned by the court though the prosecution was ready to proceed with 2 witnesses.

(10) On 25/1/2017 wherein the trial magistrate Hon. Mbicha was on transfer and the case was adjourned though the prosecution was ready to proceed with 3 witnesses.

(11) Finally on 24/7/2017 the case was dismissed under section 202 of the CPC.

The prosecution stated further in the letter that the succeeding magistrate Hon. Chesang who took over the conduct of the case did not comply with section 200 of the CPC – by taking directions on the case in the presence of all the parties. The applicant therefore sought the remedies under section 362 of the CPC to have the orders set aside:

It was agreed by both counsels that submissions be filed on or before the 18/9/2015 as at the time I decided to write this ruling none of the counsels had submitted their arguments. However after perusing the letter and the record I am satisfied that there would be no prejudice in proceedings to deal with the application.

The powers and jurisdiction by the high court to call for the subordinate or tribunal records:

The power of revisionary of this court falls within the provisions of section 362 (1) of the Criminal Procedure Code which 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.”

The procedure is clearly stated under section 364 (1) of the CPC:

“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

(a).....

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

The discretion of this court to deal with the application without hearing the parties is set out under section 365 of the code.

“No party has a right to be heard either personally or by an advocate before the high court when exercising its powers of revision.”

I would observe that although the high court has jurisdiction to exercise powers of revision the consideration is that the threshold is that of a failure of justice. This is to ensure that parties aggrieved of an irregularity, error or mistake in the course of the proceedings do not rush to court with frivolous claims in relation to the orders issued by a competent court. That is the reason under section 380 and 382 of the

CPC should be read together with section 362 when exercising the powers of revision.

The operative word when concerned with the issues on revisionary jurisdiction is that the error, omission or irregularity has occasioned a failure of justice. The Republic constitution Article 165 (6) confers supervisory jurisdiction over all subordinate courts and tribunals except the court martial to call for the record of any proceedings before them and exercise both administrative as well as judicial function for the sole purpose of ensuring a fair administration of justice. Article 165 (6) and 7 of the constitution as read together with section 362 and 364 (1) of our code is devoid of any procedural and technicalities or restrictions with regard to Article 165 (6) and 7. It should be made abundantly clear that the supervisory jurisdiction is wide and can be used to meet the ends of justice.. This is in contrast with the provisions of section 362 of the code which is mostly concerned with correction of errors, omissions, irregularities, illegalities in the order or proceedings of the subordinate court and tribunal.

Having considered the application and the provisions of the law which govern the power of revision its now pertinent to turn to the facts in question. In the present record there are two issues which arose from the order by the learned magistrate dated 27/4/2017:

(1) The first one is when the learned trial magistrate took over the proceedings from the previous magistrate without complying with section 200 (3) of the CPC. The provisions are couched in this language:

“Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his or her predecessor, the accused person may demand that any witnesses be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

The essence of the provisions under section 200 (3) of the CPC lies in the fundamental right to a fair hearing as enshrined in Article 50 of our constitution. The Court of Appeal in a recent case ***John Belt Kinengeni v R [2015] eKLR*** dealing with the provisions under section 200 (3) and (4) of the CPC stated as follows:

“In Richard Charo Mote NRB Criminal Case No. 135 of 2004 this court approved the principles set in Ndegwa v Republic [1985] KLR 534 and stressed that the duty is reposed on the court and there is requirement that an application be made by the accused person for such compliance, and that failure to comply with that requirement would in an appropriate case render the trial a nullity as section 2003 (3) requires in a mandatory tone that the succeeding magistrate (read judge) shall inform the accused person of the right to demand a recall of any of the witnesses to be reheard by the succeeding magistrate.”

In ***Cyrus Mureithi Kamau & Ano. v R Nyeri Cr. Appeal No. 87 and 88 of 2006***, the court added that the use of the words shall inform the accused person of that right in section 200 (3) supra was clearly meant ***“to protect the rights of an accused person and the duty to see that the right is protected is placed on the trial magistrate and the burden to inform an accused person of the right to have the previous witnesses re-summoned and reheard is placed on the magistrate in mandatory terms.”***

In ***Bob Ayub alias Edward Gabriel Mbwana alias Robert Mandiga***, the court ruled that the mere mention in the judgement that section 200 (3) was complied with in accordance with the law. This court stressed in ***Ndegwa v Republic [1985] KLR 534*** thus:

“No rule of natural justice, no rule of statutory protection , no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject as he is the most sacrosanct individual in the system or our legal administration.”

In the case at hand by perusing the record the previous magistrate had already taken evidence of two witnesses. The succeeding trial magistrate appears to have proceeded without complying with section 200 (3) of the CPC. The substance of the provisions is to explain the rights to the accused person and the legal

requirement to call the witnesses in the event he prefers to take that route. From the record there is no evidence or findings that the trial magistrate appreciated the duty to indicate the application of that right to the accused.

Being kept in ignorance of the rights under section 200 (3) of the CPC the accused obviously was disadvantaged and ran a risk of being prejudiced in the ongoing proceedings. In my view the learned trial magistrate has clearly contravened the imperative provisions contained in section 200 (3) of the CPC by proceeding to take over the trial which was previously part heard before her colleague Hon. Mbicha (RM). It can be easily be said that the error or omission had occasioned failure of justice in the circumstances of the case.

The second issue which emerged in this revision is whether an order of dismissal of the criminal case made by the trial magistrate on her own motion on the first scheduled hearing before her was justified. The history of this case was well projected by the prosecution in their letter dated 8/5/2017 to this court. It appears to me that since the arraignment of the accused the trial has suffered a misfortune from either side both the defence and the prosecution. This is exemplified by the various adjournments since the last prosecution witness took the stand on 19/8/2015. The case was set for hearing for the first time before the succeeding magistrate but it suffered a blow for being dismissed for lack of witnesses on the part of the prosecution.

In examination of the record it does not show the learned trial magistrate interrogated from the prosecutor the probable cause for non-attendance of witnesses. During the proceedings on 27/4/2017 the key witness of the case was present. According to the prosecution he is an old man with a disability of being blind. The prosecution further stated in their letter that he has diligently and religiously been attending the trial when and at the time scheduled by the court. The dismissal of the case with the consequent release of the accused was not based on any sufficient cause by the learned trial magistrate. The Director of Public Prosecutions under Article 157 (a) (b) (c) (7) (10) and (11) of the Constitution is vested with authority to consider all matters under the administration of criminal justice as provided for under the above Article.

The state being represented by the Director of Public Prosecutions in all criminal cases is a key player in any functional criminal justice system. The state is actually the key cog in the wheels of justice because it institutes, undertakes, continue, or discontinues any of the criminal proceedings is a function and power exclusively conferred by the constitution to the Office of Director of Public Prosecutions. Indeed for justice to prevail in the devolved units the Director of Public Prosecutions has appointed and delegated his functions for the interest of the administration of justice. The state like the accused is also entitled to due process in criminal cases. The trial magistrate in exercising discretion to dismiss the charge was bound to be guided by the provisions of Article 10 (2) of the Constitution on natural values and principles of governance. The law on this Article is very clear as it sets out the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non discrimination, integrity, transparency and accountability as the haul-mark of decision making process by any state officer.

Fairness under Article 50 of the Constitution is not one way street focusing exclusively on the rights of the accused but ignoring the rights of the victims represented by the state. It also does not imply that the rights of the accused should be subordinated to the public interest under the guise of crime prevention or punishment.

In a persuasive authority from a Common Law jurisdiction by the Supreme Court of Philippines in the case of *Dimatulac v Villon 297 SCRA [1998]* the court held:

***“The judge, on the other hand, should always be imbued with a high sense of duty and responsibility in the discharge of his obligations to promptly and properly administer justice. He must view himself as the priest, for the administration of justice is a kin into a religious crusade. Thus exerting the same devotion as a priest in the performance of the most sacred ceremonies of religious liturgy, the judge must render service with impartiality commensurate with the public trust and confidence reposed in him.*”**

Although the determination of a criminal case before a judge lies within his exclusive jurisdiction and competence, his discretion is not unfettered, but rather must be exercised within reasonable confines. The judge's action must not impair the substantial rights of the accused, nor the right of the state and offended party to due process of law."

It must be stressed that trial courts should sparingly exercise discretion in the form of summary proceedings when it comes to criminal cases. The speedy conclusion of cases should be anchored and clothed with the right to a fair hearing and due process of the law. The dismissal order in default of appearance of witnesses was made *ultra vires* and the same deprived the state from being heard in the interest of justice.

As far as the contention by the prosecution in this matter is concerned I am satisfied that a meritorious case has been advanced in their favour to warrant a reversal, review and setting aside the order of 27/4/2017 in its entirety.

In conclusion therefore the Criminal Case No. 2002 of 2014 shall be initiated and prosecuted before another magistrate besides the Hon. Chesang (RM). That the chief magistrate expeditiously allocates the case to the relevant magistrate to hear and determine it as high priority matter. That the succeeding magistrate do comply with section 200 (3) of the CPC.

It is so ordered.

Dated, delivered and signed in open court at Kajiado on 18/9/2017.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Akula for the Director of Public Prosecutions

Mr. Sekento for the respondent

Mateli Court Assistant