



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 83 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**RAPHAEL KEMBOI AND OTHERS.....RESPONDENT**

**RULING**

By way of a letter dated 2<sup>nd</sup> April, 2015, the office of the Director of Public Prosecution sought revision of a ruling delivered on 5<sup>th</sup> December, 2014, in chief Magistrate's Criminal case No. 7774 of 2014, whereby the trial magistrate, Honourable M. N. Gicheru, chief magistrate ordered the consolidation of Chief Magistrates Criminal cases Number 1767,1778,17779,1780,1781,1782 all of 2014

According to the prosecution;

1. the cases were from different police stations involving different complaints and different transactions having been conducted by different investigating officers;
2. if the case proceeded as it is, there is a likelihood of the accused persons being embarrassed in their defence, and not guaranteed a fair trial.
3. that they will be faced with challenges of harmonizing these evidence in all the cases.

Mr Magolo, learned counsel for the defence opposed the application on the grounds that;

1. overturning the magistrate's order for consolidation will cause more serious injustice to both the accused and court;
2. the consolidation order was acted upon and the Director of Public Prosecution did not benefit from any stay order;
3. since only one file exists, it will be difficult to implement the order overturning the consolidation;
4. the offences were committed in a series, and allegedly in Mombasa by the same persons;
5. the prosecution has not shown that what the magistrate did was illegal or incorrect or inappropriate.

Mr Magolo has stated that the prosecution will not be prejudiced by denial of this application as they will have control of their case/trial.

The DPP through Mr Muteti learned counsel for the state cited an authority by the court of appeal where it was held that for a court to order joint trial suo-moto, they should be able to find that the accused persons are not likely to be embarrassed. He submitted that to allow the proceedings in the cases under review to continue as they stand, will lead to embarrassment of the accused persons, which is against the law.

Powers of revision are donated to the High court under section 362 of the Criminal Procedure code 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 and propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”***

The issue that is basically for consideration in this application for revision is;

“Whether the order for consolidation of Chief Magistrate’s Criminal cases Nos. 1767,1774,1778,1779,1780,1781 and 1782, all of 2014 was proper, correct or legal.

I have perused the record or of proceedings in all the aforementioned cases and confirm that indeed they arise from incidents committed on different dates against different victims (complainants).

In Chief Magistrate’s Criminal case No 1778 of 2014, the offence is alleged to have been committed on the 24<sup>th</sup> day of April, 2014 near National Security Fund Building along Nkurumah road in Mombasa city against MICHAEL MURAMBA.

In Chief Magistrate’s criminal case No 1782 of 2014, the offence is said to have occurred on 27<sup>th</sup> day of June, 2014 in Mombasa city against OMAR BORA MWAIWE.

In Chief Magistrate’s criminal case No 1779 of 2014, the offence is alleged to have been committed on 20<sup>th</sup> day of September, 2014 along Mathenge street next to Triton Petrol station within Mombasa county and against NAFTALI PRIVA KITATU.

In Chief Magistrate’s criminal case No 1780 of 2014, the offence occurred on 16<sup>th</sup> day of September, 2014 in Mombasa city against ADEN HASSAN IDOW.

In Chief Magistrate’s criminal case No. 1781 of 2014, the offence is said to have occurred on 19<sup>th</sup> day of September at Mombasa city against GEORGE IRUNGU MBUGUA.

In Chief Magistrate’s criminal case No. 1767 of 2014, the offence allegedly happened on 24<sup>th</sup> day of April, 2014 near National Security Fund Building along Nkrumah road within Mombasa County against MICHAEL MURAMBA NGUNDO.

Also a perusal of the charge sheet in each case reveals that chief magistrate’s criminal case No 1776 of 2017 was filed at the Divisional CID Mombasa, Chief Magistrate’s criminal case No 1774 of 2014 was filed at Makupa police station while the rest were registered at the Central police station in Mombasa. This clearly shows that the cases were reported to different police stations hence involved different investigating officers.

Section 135 of the Criminal Procedure code provides for joinder of charges thus;

***“Any offences, whether felonies or mis-demeanours, may be charged together in the same***

***charge or information of the officers charged are founded on the same facts or form or are part of a series of offences of the same or similar character”.***

I find that the offences in the instant case, although committed by the same accused persons, and are of similar character they cannot be said to have been committed in a series since the span of time taken between one offence and another is considerable. Also, the circumstances under which they were committed, are different.

By consolidating this cases, the trial court clearly created a case of misjoinder of counts, which I find inappropriate (see court of appeal Criminal case No. 37 of 2013, HAMISI MUNGALE BUREHE VRS REPUBLIC).

To proceed with the consolidated charge sheet, as it is would prejudice the accused persons or cause them embarrassment in their defence during trial and it will be inconvenient for the parties during trial.

I therefore, wish to reiterate the holding by the court of appeal Judges in HAMISI MUNGALE BUREHE VR REPUBLIC (2015) e KLR, that;

“We nonetheless reiterate that, despite the fact that the exceptions permit the joinder of several offences in the same charge sheet, the court may in its absolute discretion order separate charge sheets and trial for the offences. The court may do this where the interest of justice so demands; such as where the accused may be prejudiced or embarrassed in his defence by a trial of all the alleged offences in one charge sheet. In conclusion with regard to this ground of appeal, we must say that rules of drafting charges are extremely important in criminal trials and must be adhered to strictly since they engender clarity and accuracy in the accused and his counsel’s understanding of the of the charge brought by the state or prosecuting authority. It would also help the accused and his counsel to focus sufficiently on his defence. These rules, if strictly followed, enforced and jealously guarded, would not only ensure that justice is done, but will be seen to be manifestly done.....”

I hence find that application on revision meritable and direct that the trial magistrate invokes the provisions of section 135 (3) of the Criminal Procedure code and order separation of the trials.

**Ruling delivered, signed and dated this 17<sup>th</sup> day of November, 2016.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr Ayodo for the state

Mr Mokaya holding brief for Mr Magolo

C/clerk- Kiarie