



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL REVISION 445 OF 2016
IN THE MATTER OF MOMBASA CRIMINAL CASE NO 2140 OF 2016
BETWEEN
REPUBLIC.....PROSECUTOR
VERSUS
FATMA NABHANY.....7TH ACCUSED PERSON

RULING

This application for review has been brought by way of a Notice of Motion application dated 22nd November, 2016 under Article 165 (6) and (7) of the Constitution of Kenya and section 362 of the Criminal Procedure Code by M/s Kidenda Onyango Anami & Associate, Advocate for the 7th accused.

In this application, the applicant the 7th accused person seeks the calling of Magistrate's criminal case No 2140 of 2016, REPUBLIC VRS MOHMUD IBRAHIM HASANI & 12 OTHERS, execute it and satisfy the court as to the correctness legality and appropriateness of the decision of the Honourable magistrate in finding the 7th accused person in contempt of the court with a view of quashing the same.

The 7th accused, who is also the applicant in this case, was jointly charged with twelve (12) others with five counts in the aforementioned criminal case.

As outlined in the grounds upon which the application is based, and reading through the records of the trial court, it is observed that;

1. On 22nd November, 2016 the 7th accused, who is the applicant in this case, appeared before the Honourable trial magistrate in Criminal Case No 2140 of 2016 for mention for purposes of confirming if the parties had exchanged documents and the fate of 1st 2nd 7th and 8th accused persons so as to chart the way forward.
2. The prosecution indicated that the 1st and 3rd accused were still at large and requested that they be given 30 days to enable them complete investigations.
3. This was objected to by the defence counsel on record on the ground that the purpose of mentioning the case was for fixing a hearing date after ironing out the pretrial issues since their clients have been suspended from work and were travelling from far to attend court. In fact, counsel for the 7th accused, Mr Anami, while associating himself with the sentiments of his co-

counsel indicated that the 7th and 8th accused persons could be removed from the proceedings under section 87 (a) of the criminal Procedure code;

4. In response, Mr Wangila, learned counsel for the state, denied that they intended to delay the matter but only needed time to investigate the matter and sort out all pre-trial issues before fixing of a hearing date;

5. In considering the submissions by all counsel, the Honourable trial magistrate, declined to grant the respondents applications and made several orders which included the order that;

(a) The applicant (7th accused) take plea for the charges she was facing.

(b) The prosecution being granted 21 days to complete investigations.

6. The Honourable trial magistrate then proceeded to read the charges in court against the 7th accused person (applicant) to which she remained silent.

7. The Honourable trial magistrate made a ruling that by remaining silent the 7th accused (applicant) had without apparent reason refused to answer to the charges which he declared was contemptuous to court since there was no order to stay the proceedings against her by the High court as she had earlier sought.

8. The Honourable trial magistrate then proceeded to order the 7th accused (Applicant) remanded in custody for seven (7) days to enable her make a decision on whether or not answer to the charges.

It is decision of the Honourable trial magistrate that forms the basis of this application for revision .

The High court is granted powers of revision under Article 165 (7) of the constitution and section 362 of the Criminal Procedure Code.

Under Article 165 (6) of the Constitution,

“The High court has supervisory jurisdiction over the subordinate court and over any person, being on authority exercising a judicial or quasi- judicial function, but not over a superior court”

Article 165 (7) of the constitution the High court,

“For purposes of clause (6), may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make an order or give any direction it considers appropriate to ensure the fair administration of justice”.

Section 362 of the Criminal Procedure Code, provides as follows;.

“The High court may call and examine the record of any criminal proceedings before any subordinate court for the purposes 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 subordinate court”.

What is at test here is whether the Honourable trial magistrate, in finding the 7th accused (applicant) contemptuous in remaining silent when the charge was read to her and proceeding to commit her to jail for seven (7) days, acted correctly legally or appropriately.

In dealing with this issue, it is important to appreciate that there is a difference between civil and criminal contempt.

According to the Black's law Dictionary, 9th Edition;

Civil contempt is

“The failure to obey a court order that was issued for another parts benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanctions is to confine the contemnor until he or she complies with the court order.....imprisonment for civil contempt is indefinite and for a term that lasts until the defendant complies with the court decree”

Criminal contempt is;

“An act that obstructs justice or attacks the integrity of the court. A criminal contempt proceeding is punitive in nature. The purpose of criminal contempt proceedings is to punish repeated or aggravated failure to comply with a court order. All the protections of criminal law and procedure apply, and commitment must be for a definite period. Also known as common law contempt”

In the case of ELIUD MUTURI MWANGI (practicing in the name and style of Muturi & company, advocate) Versus LSG LUFTHANSA SERVICES EUROPA/AFRICA GMBH and LSG SKY CHEFS KENYA LIMITED HCCC NO. 154 OF 2014, COMMERCIAL AND ADMIRALITY DIVISION, JUDGE GIKONYO F; stated;

“And it should be noted that acts which constitute contempt of court are acts of interference with the administration of justice. Invariably, for purposes of committal to jail for interference with the administration of justice, the applicant must establish and prove existence of acts which are punishable in law either under the law on contempt of court or the general criminal law it is not surprising that the practice of contempt of court limits committal for

“interference with the due administration of justice” to criminal proceedings. And even though unwanted interference with administration of justice is to be prevented and nobody shall be permitted to pollute the stream of justice, the law on contempt based on interference with due administration of justice should accord to the constitutional objectives in fair adjudication of cases”

The right of an accused to fair trial falls under the Bill of rights as enshrined in chapter four (4) of our constitution, 2010. The constitution is key as it supersedes all laws; meaning that whatever the orders, they must not infringe the provisions of the constitution.

Article 20(1) of the constitution states that:

“The Bill of rights applies to all law and binds all state organs and all persons”

This Article makes it mandatory for the Bill of rights to apply to any law.

Under Article 22 of the Constitution,

“Every person has the right to institute court proceedings claiming that a right or fundamental fringed in the bill of rights has been denied, violated, or infringed, or is threatened”.

And Article 23 of the constitution spells out the authority of courts and the remedies a court has been called upon to enforce the Bill of rights. It provides that;

(i) “High court has jurisdiction in accordance with Article 165, to hear and determine applications for redness of a denial, violation, or in infringement of, or threat to, a right or fundamental freedom in the Bill of right”

Article 23 (3) of the constitution goes onto state that;

***“In any proceedings brought under Article 22, a court may grant appropriate relief, including
(f) an order of judicial review.***

This is what I have resorted to in dealing with the decision of the lower court in this case to punish for contempt, if it is unfair and unjust to a party.

The right to fair trial is one of the rights that is jealously protected by Article 25 of the constitution, 2010, which states that;

“Despite any other provision in this constitution, the following right and fundamental freedoms shall not be limited-

(a) Freedom from torture and cruel, inhuman, degrading of treatment or punishment;

(b) Freedom from slavery or servitude

(c) The right to fair trial, and

(d) The right to an order of habeas corpus.

Article 50 of the constitution deals with fair hearing and among the rights spelt out, are the rights to answer to the charges and to remain silent.

Article 50 (2) (h) states;

“Every accused person has the right to a fair trial, which includes the right

(c) to be informed of the charge, with sufficient detail to about it.”

Under Article 50 (2) (i);

“Every accused person has the right to a fair trial, which includes the right

(i) to remain silent, and not to testify during the proceedings”

The issue of plea taking is governed by the Criminal Procedure Code (Chapter 75 of the laws of Kenya).

Section 207 (1) of the Criminal Procedure Code states as follows;

“The substance of the charge shall be stated to the accused person by the court and he shall be asked whether he pleads not guilty or guilty subject to a plea agreement.”

Section 207 (4) goes on to state;

“If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him”

And so, by the 7th accused person in the instant case choosing to remain silent, she was exercising one of her rights as protected under the Bill of right in our constitution the provisions of statute.

Further, in punishing for contempt, a magistrate is expected to apply the provisions in section 121 which falls under chapter X1 of the penal code and is pleased “OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE. This section provides that;

“Any person who;-

(a) Within the premises in which any fair trial proceedings is being had or taken, or within the precincts of the same, shows disrespect, in speech or manner to or with reference to such proceedings or any person before whom such proceedings is being heard or taken; or

(b) Having been called upon to give evidence in a judicial proceeding, fail to attend, or having attended, refuses to be sworn or to make an affirmation, or having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being had or taken, after the witnesses have been ordered to leave such room; or

(c) Causes an obstruction or disturbance in the course of a judicial proceedings; or

(d) While a judicial proceeding is pending, makes use of any such speech or writing misrepresenting such proceedings or capable of prejudicing any person in favour of or against any party to such proceeding, or calculated to lower the authority of a person before whom such proceeding is being had or taken, or

(e) Publishes a report of the evidence taken in any judicial proceeding which has been directed to be filed in private; or

(f) Attempts wrongfully to interfere with or influence a witness in a judicial proceeding either before or after he has given evidence in connection with such evidence or

(g) Dismisses a servant because he has given evidence on behalf of a certain party to a judicial proceeding; or

(h) Wrongfully retakes possession of land from any person who has recently obtained possession by a court of law, or

(i) Commits any other act of intentional disrespect to any judicial proceeding or to any person before whom such proceedings is being had or taken, is guilty of an offence and is liable to imprisonment for three years.

(2) when any offence under any of the paragraphs (a) (b) (c) (d) and (i) of subsection (1) is committed in view of the court, the court may cause the offender to be detained in custody and at any time before the rising of the court on the same day may take cognizance of the offence and sentence the offender to a fine not exceeding one thousand four hundred shillings or in default of payment to imprison for a term not exceeding one month.

(3) The provisions of this section shall be deemed to be in addition to, and not in derogation from the power of the High court to punish for contempt of court”

This section creates numerous offences running from paragraphs (a) to (i) with each paragraph constituting an offence complete in itself. The section also provides for manner in which the court is to deal with some, and not all, of the effects created if the offence is committed on the face of the court.

In finding the 7th accused’s conduct of remaining silent and refusing to answer to the charges contemptuous the trial magistrate, did not specify which of the offences tabulated in paragraphs (a) to (i) of sections 121 (i) of the Penal Code, the applicant was guilty of. He merely stated:

“The charges in count 1, are read to the 7th accused. She has remained silent and refused to answer to the charge. No apparent reason given why she is not responding to these charges. This is contemptuous to this court. The 7th accused remains a accused person”

No offence under section 121 (i) of the penal code has been disclosed here. No wonder the learned state counsel, Mr Wangila did not oppose the application for revision.

I find that the learned trial magistrate erred in concluding that the applicant (7th accused) was contemptuous of his court

The decision is therefore incorrect and illegal. And by the powers accorded to me by Article 165 (6) and section 23 (3) of the Constitution and section 36A2 of the Criminal Procedure Code, I set aside the said decisions.

Ruling read, signed and dated this 13th day of December, 2016.

D. O. CHEPKWONY

JUDGE

13.12.2016

Before Hon. D. O. Chepkwony-Judge

C/clear Kiarie

Ms/ Mutua for the state

Mr Anami for Applicant