REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUIONAL & JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 84 OF 2015

BETWEEN

REPUBLIC …….....……..…..…… APPLICANT

VERSUS

HANNAH NDUNG'U, CM CHIEF MAGISTRATE'S COURT, NAIROBI LAW COURTS….....1ST RESPONDENT

THE DIRECTOR

OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

EX-PARTE

NICHOLAS CHEGE MWANGI.....1ST APPLICANT

MESHACK MBURU MWANGI.....2ND APPLICANT

EDWARD NDUNG'U KAMAU.....3RD APPLICANT

AND

DAVID KAMAU IRUNGU……..…INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 24th March, 2015, the *ex parte* applicants herein, **Nicholas Chege Mwangi**, **Meshack Mburu Mwangi** and **Edward Ndung'u Kamau** seek:

1. **THAT by way of Judicial Review, an order of certiorari do issue to remove to this Honourable Court, and to be quashed, the 1st Respondent's decision made on the 19th March, 2015 ordering that the Criminal Trial in Nairobi Criminal Case No. 1765 of 2014 commence de novo.**
2. **THAT by way of Judicial Review, an order of prohibition do issue prohibiting the**

Respondents from implementing, enforcing, or otherwise howsoever effecting the 1st Respondent's decision made on 19th March, 2015 ordering that the Criminal Trial in Nairobi Criminal Case No. 1765 of 2014 commence de novo.

3. **THAT by way of Judicial Review, an order of mandamus do issue, directing the 1st Respondent to proceed with the trial in Nairobi Criminal Case No. 1765 of 2014 from the point the proceedings had stopped on March 10th 2015, and in furtherance of the directive of the Hon. The Chief Justice of Kenya as contained in the letter addressed to the 1st Respondent dated February, 2015.**
4. **THAT the costs be to the Ex Parte Applicants in any event.**

Applicants' Case

2. The facts of this case are largely not in dispute. The ex parte Applicants are the accused in Nairobi Chief Magistrate's Criminal Case No. 1765 of 2014 (hereinafter referred to as "the Criminal Case"). The said criminal case originally commenced with the 1st and 2nd applicants as the 1st and 2nd accused respectively. Subsequent to the testimony of the complainant and substantial cross-examination, the 1st Respondent was transferred to Busia from Nairobi whereupon at the instance of the said applicants, the Chief Justice directed the 1st Respondent to proceed and complete the said Criminal trial before proceedings on transfer.
3. However, on 10th March, 2015 following the successful application by the prosecution for the consolidation of the said criminal case with Criminal Case No. 450 of 2015 in which the 3rd applicant was the accused, the 3rd applicant was joined to the said criminal case as the third accused. However on 17th March, 2015 when the hearing resumed, the prosecutor alleged that he could not trace PW1 (the complainant) alleging that the complainant had been threatened and sought directions from the Court. Thereupon the 3rd applicant informed the Court that he was waiving his right under Article 50(2)(f) of the Constitution and insisted on proceedings with the trial from where the same had reached. Similar sentiments were expressed by the 1st and 2nd Applicants.
4. By a ruling delivered on 19th March, 2015, the 1st Respondent ordered the trial to start *de novo.* Apparently, it was this decision which provoked the instant proceedings.
5. According to the Applicants the 1st Respondent had no power under section 200 of the ***Criminal Procedure Code*** to direct de novo trial when no party sought for the same. It was therefore contended that the said decision was made without jurisdiction since the circumstances contemplated under section 200 aforesaid did not exist in the proceedings before the 1st Respondent more so as the applicants had not sought for the trial *de novo*.
6. It was contended that since the applicants had been denied bail, the commencement of the trail de novo was not only improper but was also irrational and prejudicial taking into account the directive by the Chief Justice for an expeditious disposal of the case.
7. According to the applicants the power to recall a witness is not synonymous with the power to direct trial de novo hence the 1st Respondent's decision was a nullity. It was contended that the 1st Respondent's decision constituted an unfair trial contrary to Article 50(2)(g) of the Constitution. It was further contended that the trial court had displayed bias towards the ex parte applicants by not adhering to the principle of presumption of innocence, denying the applicants bail and delaying the trial by deciding to commence the trial *de novo*.
8. According to the applicant's the 1st Respondent's decision was in breach of the applicant's legitimate expectation, was without jurisdiction and was undertaken by consideration of irrelevant material.
9. On behalf of the Applicants, it was submitted by **Mr Kinyanjui**, learned counsel that as section 200 aforesaid was inapplicable, the 1st Respondent's decision wastainted with illegality and that the same was irrational and prejudicial and was further tainted with procedural impropriety. Apart from that the decision violated the applicants' right to fair trial and was tainted with bias. Further the same violate dthe applicants' legitimate expectations, was in excess of jurisdiction and was arrived at in consideration of irrelevant material.

10. In support of the submissions, learned counsel relied on **Republic vs. Welington Lusiri [2014] eKLR**, **Ephraim Wanjoh Irungu & 7 Others vs. Republic NRB HCCR REV. 6 OF 2013**, **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170,** **Republic vs. Chief Magistrate's Court at Mombasa Ex Parte Ganijee & Another [2002] 2 KLR 703**, **Meixner & Another vs. Attorney General [2005] 2 KLR 189, George Joshua Okungu & Another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR,** and **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**.

Respondents' Case

11. On behalf of the Respondents, it was contended that when the trial commenced and PW1 testified the 3rd applicant had not been arrested and was as such not present and as such PW1 had not identified the 3rd applicant.
12. In their view the decision to start the trial de novo was not based on section 200 of the ***Criminal Procedure Code*** but on the fact that the 3rd applicant had not been identified by the complainant. It was their view that the applicants are not concerned about the process of the decision making but rather by the decision of the 1st respondent, a matter which goes to the merit rather than the process. In their view the 1st respondent did not act *ultra vires* and that all the parties were accorded a fair trial and if aggrieved the applicants ought to have appealed against the decision.
13. On behalf of the 2nd Respondent, it was submitted by Miss Nyamweya, that the 1st Respondent's decision was not premised on section 200 of the said Act but were based on the 1st Respondent's discretion as the complainant had not performed dock identification. In her view the applicants ought to have appealed the decision rather applying for judicial review. She therefore was of the view that the 1s Respondent did not act ultra vires her powers as contended.

Determination

14. I have considered the respective cases of the applicants and the respondents. Article 50(2)(e) and (g) of the Constitution provides:

(2) Every accused person has the right to a fair trial, which includes the right—

(e) to have the trial begin and conclude without unreasonable delay;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

15. On the other hand section 200 of the ***Criminal Procedure Code*** provides:

> ***200. (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may -***
>
> > ***(a) deliver a judgment that has been written and signed but not delivered by his predecessor; or***
> >
> > ***(b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resummon the witnesses and recommence the trial.***
>
> ***(2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.***

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.

16. It is therefore clear that the procedure contemplated under section 200 aforesaid is only applicable where there are successive magistrates involved in a trial. **Miss Nyamweya**, learned counsel for the 2nd respondent conceded that the impugned decision was not made under section 200 of the ***Criminal Procedure Code***. She however was unable to pinpoint at any provision under which the impugned decision was arrived at but rather contended that the decision was arrived at in the exercise of discretion. However even where the court has unfettered discretion, the exercise of that discretion must be based on evidence and law. Its exercise must be based on reason and not caprice. In other words, it must be exercised judicially rather than whim, caprice or sympathy.
17. As this Court has held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Similarly, in **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held that it has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.
18. Commencement of a trial *de novo*, there is no dispute is, in all probability, likely to lead to a delay in the expeditious disposal of the trial, all things being equal. To that extent, such a move is likely to infringe upon the applicants' right to fair trial and in particular the right to have the trial begin and conclude without unreasonable delay. In order to justify such a course, it has to be shown that the provisions of Article 24 of the Constitution have been satisfied. That provision requires *inter alia* that the existence of less restrictive means to achieve the purpose be considered and that in the case of a provision enacted or amended on or after the effective date, the legislation specifically expresses the intention to limit that right or fundamental freedom**,** and the nature and extent of the limitation.
19. Apart from section 200 of the ***Criminal Procedure Code***, no other provision was cited before the Court to justify the course adopted by the 1st Respondent. Though the aforesaid section was enacted before the effective date, section 7(1) of the Sixth Schedule to the Constitution provides that *"all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."*
20. Therefore section 200 of the ***Criminal Procedure Code*** must of necessity be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with Article 24 of the Constitution. In my view a less restrictive means of achieving the purpose for which the 1st Respondent set out to achieve would have been to invoke the provisions of section 146(4) of the ***Evidence Act***, Cap 80 Laws of Kenya which provides:

The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

21. In the absence of any legislation which conforms to Article 24 of the Constitution, the 1st Respondent's decision cannot be justified.
22. In the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others**

[2008] 2 EA 300, the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality...Procedural Impropriety...may...involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

23. It follows that the 1st Respondent's decision was tainted with illegality and procedural impropriety and cannot stand.

Order

24. Consequently the orders which commend themselves to me and which I hereby grant are as follows:

1. **An order of certiorari removing to this Court, for the purposes of being quashed, the 1st Respondent's decision made on the 19th March, 2015 ordering that the Criminal Trial in Nairobi Criminal Case No. 1765 of 2014 commence de novo which decision is hereby quashed.**
2. **An order of prohibition prohibiting the Respondents from implementing, enforcing, or otherwise howsoever effecting the 1st Respondent's decision made on 19th March, 2015 ordering that the Criminal Trial in Nairobi Criminal Case No. 1765 of 2014 commence de novo.**
3. **As the 1st respondent has the option in the exercise of her discretion to recall the witnesses, I decline to grant an order of mandamus compelling her to exercise her discretion in a particular way.**
4. **As the complainant was not joined to these proceedings there will be no order as to costs.**

Dated at Nairobi this day 17th day of April 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for the applicants

Cc Richard