



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC. CRIMINAL APPLICATION NO. 62 OF 2014**

**(CONSOLIDATED WITH MISC. NO. 61 OF 2014)**

**CHARLES CHIRA WACHIRA.....APPLICANT**

**DANIEL NJOROGE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. This ruling concerns the applications dated 2<sup>nd</sup> July 2014, brought under Article 50(2) (q) of the Constitution and Section 362 of the Criminal Procedure Code, by which the applicants seek the following orders:
  - a. **That the court be pleased to call for and examine the record of Nakuru Criminal Case No. 1774 of 1994 whereby the Applicants were convicted and fined Kshs. 30,000/= and in default 15 months imprisonment for the purpose of satisfying itself as to the correctness, legality or propriety of the finding of guilt, sentence and order recorded or passed and as to the regularity of the proceedings of the subordinate court;**
  - b. **That the court be pleased to review and set aside the conviction of the Applicant herein upon being satisfied of the incorrectness and illegality of the conviction and sentence imposed upon by the trial court; and**
  - c. **The costs of this application be provided for.**
2. Charles Chira Wachira (the 1<sup>st</sup> Applicant) and Daniel Njoroje (the 2<sup>nd</sup> Applicant) were charged as the 3<sup>rd</sup> and 7<sup>th</sup> accused persons in Nakuru Criminal Case No. 1774 of 1999 and 2<sup>nd</sup> and 6<sup>th</sup> accused persons in Nakuru Criminal Case No. 1763 of 1999. In both cases, they had been accused of causing grievous harm and assault causing actual bodily harm contrary to **Sections 234 and 251** respectively of the **Penal Code**.
3. The two files were later consolidated and Criminal Case No. 1774 of 1994 became the main file. Following the consolidation, the accused persons pleaded again to the charges. In a judgment delivered on 22<sup>nd</sup> March 2000, the trial court acquitted the applicants' co-accused. The court however convicted the applicants, who it referred to as the 2<sup>nd</sup> and 6<sup>th</sup> accused persons, of both counts and sentenced them to a fine of Kshs. 20,000/= or in default 15 months imprisonment on

- the first count and a fine of Kshs. 10,000/= or in default 9 months imprisonment on the second count.
4. The applicants' contend that they were wrongly convicted due to an error on the record. It is their case that after the two files were consolidated, there was a confusion as to whether they were the 2<sup>nd</sup> and 6<sup>th</sup> accused persons or the 3<sup>rd</sup> and 7<sup>th</sup> accused persons. According to the new charge sheet dated 13<sup>th</sup> October 1999, the two applicants became the 3<sup>rd</sup> and 7<sup>th</sup> accused persons. However, in its judgment, the trial court referred to the two as the 2<sup>nd</sup> and 6<sup>th</sup> accused persons.
  5. This confusion is also apparent from the record of the witnesses' testimony. The Prosecution witness, **PW1** referred to James Waithanji Mwaura as the 6<sup>th</sup> accused person and **PW2** identified Warui Kagonia as the 2<sup>nd</sup> accused and Bishop Waiganjo as the 6<sup>th</sup> accused. He referred to the 2<sup>nd</sup> applicant as the 7<sup>th</sup> accused person. It is noteworthy that their evidence incriminated these persons and not the applicants.
  6. It is on this basis that the applicants have sought revision of the judgment of the lower court. They believe that a miscarriage of justice resulted from this confusion and that they should not have been convicted. They concede that their appeals No. 119 and 120 of 2000 against their conviction and sentences were dismissed for want of prosecution but contend that this dismissal does not bar them from seeking the orders of revision.
  7. The Respondent filed Grounds of Objection dated 10<sup>th</sup> March 2015. The prosecution counsel argued that the court's revisionary powers under **Section 364** of the **Criminal Procedure Code** can only be exercised in instances when the aggrieved party could not appeal. In this case, the applicants do have a right to appeal against their conviction and did in fact file appeals which they did not prosecute. Accordingly, they are barred from invoking the revisionary powers of the court.
  8. It was Counsel's submission that there was no error in the record as alleged. The applicants were the 2<sup>nd</sup> and 6<sup>th</sup> accused persons and this sequence of appearance was maintained at all times even when they were giving their defence. They have suffered no prejudice because ultimately, the court was aware of the parties it convicted.

### **ISSUES FOR DETERMINATION**

- i. Whether there has been unreasonable delay in the filing of the application;
- ii. Whether an order for revision of the judgment of the lower court is merited;

### **ANALYSIS**

9. The first issue relates to whether the application was filed without unreasonable delay.
10. The Applicants were convicted and sentenced on the 22<sup>nd</sup> March, 2000 in Nakuru CMCR. Case No. 1774 of 1999. This instant application was filed on the 4<sup>th</sup> August, 2014 which translates to a time lapse of fourteen (14) years, thereafter.
11. The applicants have offered an explanation for the delay; that during this period they had filed an appeal against the judgment; that their former advocate, J.K. Ayusa, was not available as he had travelled abroad for further studies; therefore on the date fixed for hearing no appearance was made on behalf of the applicants and their appeals were dismissed for want of prosecution. Upon finding out that the appeals had been dismissed the applicants filed an application for the reinstatement of the appeal which they later withdrew and subsequently filed this instant application.
12. After perusal of the court record this court is satisfied that the explanation offered by Applicants for the delay in filing this application is reasonable and is satisfactory.
13. The next issue relates to the issue of revision. The applicant seeks to rely on the provisions of **Article 50(2)(q)** which reads as follows;

**“Fair hearing.**

**(2) Every person has a right to a fair trial, which includes the right –**

**(q) if convicted, to appeal, or apply for review by, a higher court as prescribed**

by law.”

14. The applicant confirms that after being convicted and sentenced, they proceeded to file appeals which were dismissed for want of prosecution. They then proceeded to file applications for reinstatement of the appeals which they later withdrew.
15. Nowhere in the court record does the applicant allude to or articulate any illegality or any action that constitutes a breach of this fundamental right so as to enable this court to intervene and enforce this right.
16. It is this court's considered view that the applicants can only seek this court's intervention under the said Article if they demonstrate how this right has been infringed upon.
17. The applicant has also invoked the provisions of **Section 362** of the **Criminal Procedure Code** as read with **Section 364** which is also the prescribed procedure for revision articulated in **Article 50(2)(q)**.
18. **Section 362** provides as set out hereunder;

**“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.”**

19. The prosecution counsel argued that the court's powers of revision under this section can only be invoked where the right of appeal has not been conferred by statute. In the instant case, the Appellants did have a right conferred by **Section 347** to appeal on matters of law or fact against their convictions and sentences. Therefore, they could not apply to this court to revise the judgment of the lower court in light of **Section 364 (5)** of the **Code** which provides:

**“364 (5) When 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.”**

20. The East Africa Court of Appeal held in **Republic V. Ajit Singh s/o Vir Singh**, [1957] E.A. 822 that the above sub section is not intended to preclude a court from considering the wide powers conferred, for purposes of the High Court by **Section 362**. The learned judges were of the view that the court in its discretion, act on its own motion even where the matter has been brought to its notice by an aggrieved party. Accordingly when an accused person had a right of appeal, but had not exercised it, is not a reason to bar the court from revising a decision of the lower court.
21. This decision only refers to a person who has a right of appeal but has not exercised it. It follows therefore that if an appeal has been filed, and determined, then the court has no powers to revise the decision appealed against.
22. This finding is also supported by the provisions of **Section 364 (1) (a)** which outlines the powers of the court and provides in the case of a conviction that the court's powers of revision are the same as those conferred on it at a **Court of Appeal** by **Section 354, 357 and 358** and it may **“enhance the sentence or in the case of any other order other than an order of acquittal, alter or reverse the order”**.
23. In **Criminal Appeal No. 61 of 2004 Muya v Republic** cited with approval in **Republic V. Baktash Akasha Abdalla alias Baktash Akasha & 3 Others**, [2015] eKLR. It held that:

**“An order made by the High Court in the exercise of its revisionary jurisdiction is deemed to be a decision of the High Court in its Appellate jurisdiction and accordingly the decision in this case was appealable to the Court of Appeal on a matter law.”**

24. Therefore, a decision which has been appealed against to the High Court which as the first appellate court can determine both matters of fact and law, is not open for revision. The court exercising its revisionary powers would in those circumstances be called to examine the decision

- of a court of concurrent jurisdiction which powers it does not have.
25. The Applicants herein exercised their rights to appeal against the judgment of the lower court and lodged two appeals in this court. They were however unsuccessful and were both dismissed for want of prosecution after the appeals remained unprosecuted for 14 years. I note that they were not determined on merit and the substantial issues raised by the Applicants have not been heard.
26. Notwithstanding, the dismissal order, it is a final determination of the court of that appeal. It settles the appeal, leaving the judgment of the lower court intact as there was no reason put forward to alter it. Therefore, the Applicants did exercise their rights of appeal but they were unsuccessful. The subsequent applications for revision amount to an abuse of the court's process. In the circumstances, this court has no jurisdiction to revise the judgment of the lower court.

### **FINDING AND DETERMINATION**

27. I find that as the Appellant filed appeals in this court against their conviction and sentence in Nakuru Criminal Case No. 1774 of 1994, and the appeals were dismissed for want of prosecution, this court lacks jurisdiction to exercise its revisionary powers under **Section 362** of the **Criminal Procedure Code, Cap 75**.
28. For the above reason, the Applications dated 2<sup>nd</sup> July 2014, are dismissed.

**Dated, Signed and Delivered at Nakuru this 26th day of August, 2015.**

**A. MSHILA**

**JUDGE**