REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISIION NO 3 OF 2013

MUEMA SYENGO KITI……..APPLICANT

VERSUS

REPUBLIC……..…RESPONDENT

RULING ON REVISION

Muema Syengo Kiti (the applicant) was charged in Criminal Case No 516 of 2012 at Mwingi Principal Magistrate's Court. This case was consolidated with Criminal Case No 612 of 2012 in which one John Mwinzi Masila was the accused. Both accuses persons took the plea on the consolidated charges on 28th November 2012 with the applicant appearing as the 1st accused person. The consolidated charges were shop breaking and committing a felony contrary to section 306 (a) of the Penal Code where both of the accused persons were said to have broken and entered into the shop of one Elijah Wambua and store motor vehicle tyres worth Kshs 123,000. The applicant faced an alternative count of handling one motor vehicle tyre. After the plea was taken the case was fixed for hearing on 20th February 2013 on which date the applicant told the court that he was in pain and could not proceed with the hearing. He was referred to hospital and the court called for a medical report.

On 13th February 2013 the report was furnished to the court showing that the applicant was fit to proceed with the hearing of his case. Hearing of the case was fixed for 20th March 2013. It seems that the case went for mention on 14th March 2013 before another magistrate when an order was made to the effect that the applicant be taken to hospital for medical report on whether his alleged injured arm could prevent him from proceeding with the hearing of the case. The case was not heard on 20th March 2013 for reasons that it could not be reached. It was adjourned to 10th April 2013 on which date the applicant told the court that he was unwell and could not proceed with the hearing. The court did not adjourn the case. It was noted that the applicant was in perfect health as per the medical reports. The court (I.W. Gichobi RM) while noting that the applicant was defiant of the orders of the court when he was in perfect health ordered the case to proceed without the applicant.

What followed is rather dramatic. It appears that after the second witness Musili Mwanzia (PW2) testified, the applicant was brought to court for identification by the witness. The applicant was in court again on 29th May 2013 when he refused to proceed with the hearing due to alleged sickness and the court dispensed with his presence. However, the record indicates that he was present since it shows he did not cross examine Syengo Matano (PW3) and No. 56883 Symon Lumbuya (PW4). The record also shows these witnesses identified him as having been involved in the offence. Likewise, the applicant was brought to court to be identified by No. 73692 PC Stephen Irungu (PW5). Again the applicant did not cross examine this witness.

After the prosecution concluded its case, the court made a ruling touching on both the applicant and the co-accused person putting both on their defence. The applicant refused to proceed with the case and the trial court ruled that his case would be heard on 6th August 2013 before another magistrate. The defence for the second accused was taken and a judgement delivered on 26th June 2013. The court entered an acquittal against the second accused.

This matter came to this court's attention during the visit to Mwingi G.K Prison in July 2013. This court called for the record from the lower court under the provisions of section 362 of the Criminal Procedure

Code for purposes of satisfying itself of the manner the proceedings were carried out. It is a strange case and my view is that it was mishandled by the trial magistrate. The applicant too made it very difficult for the court to proceed given that there were two accused persons and the actions of the applicant were affecting a speedy trial for his co-accused.

The powers of the High Court on Revision are given under section364 of the Criminal Procedure Code and include alteration or reversal of an order made by the lower court. However, where the order of the lower court is an acquittal, the High Court cannot alter, reverse or convert it into a conviction (see Section 364 (1) (b) and (4) of the Criminal Procedure Code). I am stating this for emphasis because the easiest way out of this problem in my view would have been to order a retrial for both the accused persons. However, this would affect the rights of John Mwanzia Masila who has been tried and acquitted.

I have had the opportunity to read the entire lower court record. I have no reason to doubt that all the information of what transpired before the trial magistrate is recorded. The criminal justice system dictates that any adult of sound mind must take responsibility for the crimes he/she commits whether crimes of omission or commission. The applicant is not exempted from that responsibility. He was arrested as a suspect and the law requires that he must face the criminal proceedings to find out if he is guilty or not. The law guarantees him certain rights. Some of those rights are that he is not condemned unheard and that he be subjected to the due process of the law; that he be present during his trial and that he is accorded all rights of an accused person as stipulated under Article 50 of the Constitution of Kenya. However, the applicant is required under the law to behave in a certain manner to enable the prosecution of his case and the court to determine the issues before it.

My reading of the lower court record discloses someone who failed to cooperate with the court. The court tried its best to accord him his request to be treated but he just refused to participate in the trial claiming he is sick and cannot proceed with the case. There is nothing on record to give more details as what the problem really was. I want to remind him that he cannot escape the justice system and he is responsible to any crime he is alleged to have committed. Having stated the above, I now wish to turn to the proceedings in the lower court.

The trial magistrate was wrong in the manner she conducted the proceedings. The applicant and his co-accused were jointly charged with the main charge and each faced an alternative charge. In my view the trial magistrate ought to have exercised a bit of patience and find out why the applicant insisted on being sick even when the medical report showed he was fit to proceed with the trial. Judicial officers are human beings and this “humanness” ought to reflect in our daily duties. We deal with all manner of personalities and sometimes our call of duty goes beyond the official duty. In the normal course of my official duties, I have come to realize that trying to understand parties before me and the actions they take helps a lot. I call it discharging judicial duties with a human face.

The mistakes of the trial magistrate are in the manner she ruled to exclude the applicant from the proceedings and yet proceed to have him produced in court for identification by the witnesses. She also went ahead to include him in the ruling for a case to answer. I think judicial officers have immense powers exercised in our inherent jurisdiction to make ends of justice to be met. If it was completely impossible to proceed with the hearing, there was nothing to stop the trial court, in my view, from having the charges separated in order to try each accused person separately. Secondly the continued production of the applicant in court for purposes of identification by witnesses when the court has ordered that the trial proceed without him compromised on his rights. The record also shows that after each witness finished testifying the applicant would be called upon to cross examine and he would decline. This seems as though the applicant was on trial when this is not the case.

The record further shows that evidence adverse to the applicant was admitted which again is illegal. Making a ruling that the applicant had a case to answer when the trial court had ordered trial without the applicant’s participation is also prejudicial to the applicant. Since the court had ordered that the applicant would not be tried, the best way would have been for the trial magistrate to call evidence in respect to the other accused person only and decline to take any evidence that touched on the applicant.

This court will and does hereby invoke the provisions of Article 50 and 159 of the Constitution and also the inherent jurisdiction of this court for ends of justice to be met and order that the applicant be tried by another magistrate. Without laying emphasis on technicalities, I order that the State is at liberty to proceed with the charge sheet as drawn or to amend it to reflect the applicant as the only accused person provided that if such amendments are undertaken, the charge shall be read over and explained to the accused afresh in a new plea to be taken by a different magistrate than the one who tried the applicant's co-accused. In my considered view, this will not prejudice the applicant in any way and it is meant for ends of justice to be met. In the same vein, I hereby reverse the order that the applicant had a case to answer. He did not participate in the trial and it is unfair, prejudicial and a miscarriage of justice to put him on his defence before he has been heard by the court. This goes against the grain of fair trial and according the applicant due process of the law. I make orders accordingly.

S. N MUTUKU

JUDGE

Dated, signed and delivered in open court, this 29th day of August 2013.