



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL REVISION NO. 14 OF 2011

SIMON MUNGA GITONGA.....

.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

REVISION

The Applicant and his wife of four children are estranged. The Applicant left his wife, sold all or most of his property and moved to Mombasa where he is said to operate a matatu business. The old child - 20 years, is on his own. His wife stayed behind with the couples father, but the grandfather has no time for his daughter-in-law and children aged 14, 8 and 11 months so that the wife lives with a neighbor - and they are uncomfortable living in the neighbour's house and ask for support from the Applicant, the husband and father of the neglected children.

Once the area Children Officer noticed the plight of the children, they sought out the Applicant and took him to court under Nyahururu PMC P & C. Nos. 41 of 2011 **REPUBLIC VS. NAOMI WANGUI & 2 OTHERS**, and Nyahururu PMCCR. Case No. 598 of 2011, **REPUBLIC VS. SIMON MUNGA GITONGA**.

The Applicant states that P & C. No. 41 of 2011 which involves the Applicant and HILDA NYAMBURA's three children has been irregularly conducted in an inquisitorial manner by the Hon. Principal Magistrate. The applicant contends that the case has no charge sheet in it or even a formal application by the mother of the children to which the Applicant can make a formal reply, and hence there is no or little evidence properly called except reports by Children Officers, which have been relied upon to the detriment of the Applicant.

On the basis of these reports the applicant has been hauled into court and remanded for over 4 days without charge.

In addition, the applicant has been charged in Nyahururu P.M.C.Cr. Case No. 598 of 2011 due for hearing on 24th June, 2011.

The Applicant prays that if both of these cases proceed, he will not know which case to answer, and he will thus be put into double jeopardy. He asks the court to make -

(a) a declaration of invalidity of the simultaneous cases, orders, trial and proceedings in P & C 41 of 2011 and PMCCr.C. No. 598 of 2011 which violate, infringe and threaten the Applicant's human dignity, fundamental rights and freedoms enshrined in the Bill of Rights under Article 28, 29 and 50(O) & (P) of the Constitution.

(b) a declaration of rights to equal parental responsibility between the Applicant and the mother of the subjects vide Article 53 of the Constitution, and

(c) any or further relief which the court may deem just and fit to grant.

The application for review is premised *inter alia* upon Article 165 (6) & (7) of the Constitution 2010, and Sections 362 and 364 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*).

Article 165(5) & (7) of the Constitution donates to this court supervisory powers over not only subordinate courts but also over any person, body or authority exercising a judicial or quasi-judicial function, other than a Superior Court, and for this purpose the court may call for the record of any proceedings before any subordinate court or person, body or authority, and may make any orders or give any direction it considers appropriate to ensure the fair administration of justice.

For purposes of criminal proceedings, Section 362 of the Criminal Procedure Code empowers this court to call for and examine 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 regularity of any proceedings of any such subordinate court. And Section 364 sets out the powers of this court on revision.

This application is rather unique. The Applicant here has not been prosecuted, and therefore has neither been convicted or acquitted. So none of the powers of this court to alter, or reverse the conviction or acquittal under Section 364 of the aforesaid can be exercised. The Appellant's case is that he is facing two cases, arising from the same set of facts, alleged neglect of his wife and children under SS. 63, 64, 119, 120, 125 and 191 of the Children Act, 2001. He says he will put into double jeopardy if he is prosecuted under P & C No. 42 of 2011 as well as Nyahururu PMC Cr. 598 of 2011. He asks that the prosecution authority do elect to charge him with one case with the alleged offences, but not subject him to double jeopardy.

The rule against double jeopardy postulates that two cautions cannot be brought in respect of the same cause. So that where an act or omission constitutes an offence under two or more provisions or enactments, an alleged offender unless a contrary intention appears, is liable to be prosecuted and punished under either or any of those provisions, but once for the same offence..

I agree with counsel for the Applicant. The prosecution must clearly choose to prosecute the Applicant under Nyahururu P.M.C. P & C No. 41 of 2011 or Nyahururu PMCCr. Case No. 598 of 2011. To do otherwise would clearly put the applicant into double jeopardy, and he would be shuttling between two courts, maintaining the same defence. It would be grossly unfair on him, and cause further estrangement between the Applicant, his wife and the affected children.

I therefore declare as invalid the simultaneous trial of the applicant in P & C 41 of 2011, and PMCCr. No. 598 of 2011, as this would indeed violate and infringe upon the Applicant's dignity, fundamental rights and freedoms enshrined in the Bill of Rights under Articles 28 & 29 of the Constitution.

Whichever course the prosecution elects, I direct the trial court to observe the provisions of Section 90 of the Children Act 2001, regarding parental responsibility.

Dated, signed and delivered at Nakuru this 10th day of June 2011

M. J. ANYARA EMUKULE
JUDGE