REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. 88 OF 2011

LIVINGSTONE MAINA NGARE .....APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING ON REVISION

The respondent, **LIVINGSTONE MAINA NGARE**, is on trial before the Chief Magistrate's Court in ACC No. 5 of 2002. He is charged with 2 counts of obtaining advantage without lawful consideration **contrary to section 65 (1) of the Prevention of Corruption Act.**

Eleven witnesses have already testified. The prosecution then indicated to the trial court that there were two more prosecution witnesses. However, the prosecution was having major difficulties in getting the said 2 witnesses to come to Kenya, to give evidence.

Those 2 witnesses were named as GAUTAMA SENGUPTA and GLENN WERE. Both of them are domiciled in the United States of America.

The 2 witnesses had expressed fears for their safety and security, if they were compelled to come to Kenya, to give evidence in the criminal case. They informed the prosecution that they had received explicit threats, relative to the criminal case. That prompted the prosecution to request the trial court to re-locate to the United Sates of America, for the purposes of receiving the evidence of the two witnesses.

The Hon. the Chief Justice of the Republic of Kenya caused the publication of a Gazette Notice designating the Embassy of the Republic of Kenya in Washington D.C, a court, for the purposes of receiving the evidence of the 2 witnesses.

However, as the respondent herein raised a strong objection to that development, the trial court did not relocate to Washington D.C.

Meanwhile, the prosecution continues to view the 2 witnesses as being very crucial to the case against the accused. The prosecution therefore made an application to the trial court, to have the evidence of the 2 witnesses received by way of Video-Link or Video-conferencing.

Having given due consideration to the application, the learned trial magistrate rejected it. In arriving at that conclusion, the court said that evidence could only be received in the proposed manner if there was legislation that provided for it.

It is that decision which has prompted the Hon. Attorney General to move this court, seeking a revision of the decision made by the trial court.

The applicant asserts that the High Court has jurisdiction to revise the decision of the trial court, and that that jurisdiction derives from **section 362 of the Criminal Procedure Code** as read with **Section 364 (2)** of the said Code.

On the other hand, the respondent submitted that this court lacks jurisdiction to do that which the applicant has asked of it. The respondent points out that that which the applicant has sought is to argue an appeal, as there was nothing which was so manifestly illegal, in what the trial court had done, as to require this court to correct it.

It is the respondent's further submission that the learned trial magistrate had not made any finding, sentence or order which could invite the High Court's intervention through revision. It is said that the trial court had only made an interlocutory ruling in an ongoing trial. Therefore, the respondent believes that an attempt, by this court, to revise the said ruling would be tantamount to micro-managing the trial.

I was told that the High Court has no jurisdiction to micro-manage a trial. If anything, the policy of the law should be to permit a trial to proceed without interruption or interference from any quarter.

But even assuming that the court had jurisdiction, the respondent believes that the application is not meritorious. His reasons for that are that;

(a) It is against the provisions of the law of Kenya for a court to sit outside the territorial jurisdiction of the court;

(b) It is unlawful for a trial court to abdicate its lawful duty to control its process and to give the supervision of a witness to another person;

(c) The Applicant has demonstrated that this is not a proper case for revision as he is calling upon the court to innovate, to think outside the box and to grant orders in respect of a new form of procedure which has no lawful application in Kenya;

(d) A court cannot provide an accused with a fair trial if it has no control over the witnesses and immediate ability to punish for perjury.

However in my considered view, if the application was granted, the trial court would not sit outside its jurisdiction. It would be sitting within the territorial jurisdiction of Kenya.

But before I venture into issues concerning the substance of the application, I must first consider whether or not the application is properly before me, through the process of revision.

Pursuant to the provisions of **section 362 of the Criminal Procedure Code,** the High Court is mandated to call for and examine the record of any criminal proceedings before any subordinate court. The purpose for which the High Court is so mandated is to satisfy itself as to the following;

"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."

The powers of the High Court on revision are spelt out in **section 364 of the Criminal Procedure Code**. Of relevance to the matter before me is **section 364 (1) (b)** which clothes the High Court with power;

"In the case of any other order other than an order of an acquittal, (to) alter or reverse the order."

The learned trial magistrate found no merits in the prosecution's application to have 2 witnesses testify via video link. She therefore dismissed the application.

Clearly, that was an order of the court. Therefore, it falls within the ambit of **section 364 (1) of the Criminal Procedure Code**. And this court can inquire into its correctness, legality or propriety. In other words, this court has the requisite jurisdiction to inquire into the findings and the orders made by the learned trial magistrate, with a view to revising it, if the court should find it necessary to do so.

In arriving at this decision, I do reject the respondent's contention that the High Court can only exercise its revisionary jurisdiction when there was something that was manifestly illegal, which required correction. Such a contention is not borne out from the clear wording of **section 362 of the Criminal Procedure Code.**

The High Court can and should exercise its jurisdiction if it was satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required standards of correctness, legality or propriety.

I now need to ask myself whether or not the findings and order made by the learned trial magistrate, on the matters in issue, fell foul of the required standards of correctness, legality or propriety.

The trial court was persuaded that;

"the common thread that runs through the use of the said technology in courts in the aforesaid countries is that the use of that technology is supported by legislation."

In the same vein, the learned trial magistrate made the following point, about what could happen in situations where enabling legislation was not yet in place;

"This court fully appreciates the prosecution's submission that even in the absence of legislation providing use of video link technology (i.e. as the law is silent) the court can still allow the application, as it is, by law, obligated to administer substantive justice and should not tie its hands with technicalities."

That means that the trial court appreciated that it was possible, in principle, to allow an application for evidence to be taken via video link, even in the absence of legislation. The reason given by the learned trial magistrate in arriving at that conclusion is that the hands of the court were not to be tied up with technicalities, if the court was to discharge its mandate, to administer substantive justice.

Nonetheless, the court went on to reject what it perceived as an invitation to "develop the law in a vacuum". In doing so, the trial court said that it was not ready to have the 2 witnesses who were in the U.S.A. give their evidence;

"using a mode that is not recognized by the Kenyan law as currently established."

In **REPUBLIC Vs KIPSIGEI COSMAS SIGEI & ANOTHER, (KAKAMEGA) HIGH COURT CRIMINAL CASE NO. 19 of 2004,** G.B.M. Kariuki J. expressly stated as follows;

"The absence of specific legislation on video evidence does not, as I have said, outlaw or render inadmissible video evidence. This court has a duty to adopt a commonsense approach in the face of these challenges when faced with questions of admissibility of video evidence notwithstanding that there is absence of regulations to direct the manner in which such evidence should be adduced or admitted. This court has inherent power to do justice in accordance with the law. This is core."

The views of G.B.M. Kariuki J. were readily accepted by Maraga J. in **REPUBLIC VS. UWE MEIXNER & ANOTHER (MOMBASA) HIGH COURT CRIMINAL CASE NO. 24 of 2004**; wherein the learned Judge expressed himself thus;

"Though it is not clear to me what fact the video evidence was adduced to prove in that case, I, nonetheless entirely agree with my brother, the Hon. Justice G.B. M. Kariuki, that the Evidence Act, though it does not expressly provide for the reception of video evidence, does not outlaw it."

Of course, as the respondent has pointed out, those two cases dealt with scenarios in which video recorders captured photographic records, in the nature of cinematographic films.

However, that distinction cannot undo the fact that the Evidence Act did not, at the time it was enacted, or even by the time the said cases were determined; make provision for the reception of evidence recorded on video.

It thus follows that when the two learned judges ruled on the issue of the admissibility of video evidence, they did not shut out such evidence on the grounds that statute had not provided for the same. G.B.M. Kariuki J. urged as follows, regarding the powers of the courts;

"It has inherent jurisdiction to admit as evidence, material, including video pictures, which is relevant and calculated to place all the facts before it and thus give the correct picture of the case. And Judges, in this regard, must be bold spirits, ready to develop the law. They must be valiant in preserving the powers vested in them by the Constitution and the general law, so as to dispense justice which must always be the polar star by which the court must be guided in all litigation. The Judge-made law is as much part of our law as the statute law. The former develops out of necessity. It is shaped by changing or novel circumstances. It must respond to and keep pace with advancement in science and technology and societal changes. It cannot be static."

I must say that I fully share those sentiments of my learned brother. In doing so, I am fortified by the fact that it is not just in Kenya that we hold that view.

In New Zealand, the Court of Appeal was faced with the issues about whether or not a computer programme in electronic form was a "document"; and also whether or not a computer disk (which was in the form of a hard disk), on which a computer programme was recorded, was also such a document. Those issues fell for determination in **R. Vs Misic [2002] 2 LRC 1**

The court held as follows, at page 9;

"***it is unarguable that a piece of papyrus containing information, a page of parchment with the same information, a copper plate or a tablet of clay, are all documents. Nor would they be otherwise if the method of notation were English, Morse code or binary symbols. In every case, there is a document because there is a material record of information. <u>This feature, rather than the medium, is definitive."</u>***

- The emphasis is mine.

Elsewhere, in the United Kingdom, in the case of **TAYLOR Vs CHIEF CONSTABLE OF CHESIRE [1988] LRC 193,** at Page 197, the court quoted with approval, from the following words from the judgment of the Court of Appeal in **R V Maqsud Ali [1966] 1 QB 688,** at page 701;

"Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted, and now there are devices for picking up, transmitting, and recording conversations. We can see no difference, in principle, between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording

can be proved and the voices recorded, properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence."

So far, all the cases I have looked at touch on the admissibility of video recording.

In **R V DAVIS (2008) UKHL 36**, the House of Lords gave consideration to the question whether it was permissible for an accused person to be convicted where a conviction was based solely, or to a decisive extent, upon the testimony of one or more anonymous witnesses.

The court appreciated that the cross-examination of the anonymous witness would be hampered; and that therefore if the said witness was the sole or the decisive witness, upon whose testimony the court would have to determine the guilt or otherwise of the accused, the court should be reluctant to convict.

But then, in the case before me the 2 proposed witnesses are not anonymous. Their identities have been disclosed. And they do not propose to camouflage either their faces or their voices when testifying.

In any event, in **R Vs Davis (supra),** the House of Lords made following significant point;

"Thus, though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers.

That the face-to-face confrontation is not absolute does not, of course, mean that it may easily be dispensed with. As we suggested in Coy, our precedents confirm that a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."

In effect, the authority cited by the respondent acknowledges that even where the constitution provides for the right of Confrontation of accusatory witnesses, the said right is not absolute.

Indeed, the House of Lords made it clear that a one-way closed circuit television procedure may be acceptable. This is how they made the point;

"We are therefore confident that use of one-way closed-circuit television procedure, where necessary to further an important state interest, does not impinge upon the truth-seeking or symbolic purposes of

the Confrontation Clause."

In this case, we are dealing with video conferencing. The respondent has provided me with an article published in AIR Journals, on the topic of **"Recording Evidence Though Video Conferencing in India"**. In the said article, video conferencing is defined as follows;

"A video conference is a televised telephone call whereby two or more parties can speak in real time and also see each other in real time."

The Supreme Court of India has had occasion to consider the use of video conferencing when a witness is testifying in a criminal case. They did so in the case of **THE STATE OF MAHARASHTRA Vs DR. PRAFUL [2003] INSC 207.**

In that case, **Dr. Ernest Greenberg of Sloan Kettering Memorial Hospital, New York, U.S.A,** had indicated that he was willing to give evidence, but he was not ready to travel to India for that purpose.

Before the matter went to the Supreme Court, the High Court had held that it was mandatory for a witness to be in the actual physical presence in court, where the accused was being tried.

The Supreme Court reversed that decision, holding as follows;

"Thus it is clear that so long as the Accused and/or his pleader are present when evidence is recorded by video conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of *Section 273, Criminal Procedure Code.* ***Recording of such evidence would be as per 'procedure established by law' ".***

In arriving at that decision the court distinguished between virtual reality and video conferencing. They explained that whilst virtual reality is the state in which one is made to feel, hear or imagine what does not really exist, video conferencing is "actual reality".

The court expressed itself in the following words;

"This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other."

The Supreme Court of India went further to address the practical aspects of fixing up the video conferencing, as well as how to deal with the other concerns raised by the respondent herein.

The instruments for video conferencing in this case would be set up within the trial court in Nairobi, and at the Embassy of Kenya in Washington D.C. A judicial officer would be commissioned to be present in Washington D.C. to ensure that the witnesses are present, and that none of the said witnesses was either coached, harassed or otherwise interfered with. The judicial officer would administer the oath to the witness before he commenced his testimony.

Meanwhile, the trial court would set up itself, in the presence of the accused person, his advocate and the prosecutor.

The accused would have every opportunity to cross-examine the witnesses or to raise any objections or to communicate with them as if they were practically in his presence. He would not be prejudiced at all.

Before concluding this ruling, I must address one other issue. In **BRYAN YONGO Vs REPUBLIC, CRIMINAL REVISION NO. 147 of 2007,** Ojwang J. (as he then was) emphasized the importance of continuity of the trial process in any ongoing case. He said;

"Continuity of the trial process may not be unnecessarily interrupted by applications to the High Court alleging defective procedure, in respect to directions which will, in any event, culminate in the merits of the judgment itself."

For that reason, the learned judge held that assertions such as **"the proceedings were based on lies and fabrications";**

cannot be entertained within the High Court's revisionary jurisdiction: That is because such assertions would ultimately resolve into the final judgment. He therefore emphasized that such points would be

reversible by the normal appeal process, at the right time.

In contrast, the issue of admissibility, as determined by the trial court, goes to the question of whether or not the witnesses can give evidence through video conferencing.

If, as the applicant believes, the evidence of the 2 witnesses was crucial to the prosecution, it would mean that the prosecution would fail to prove the case against the accused, if the evidence of the 2 witnesses was excluded.

If the prosecution was forced to close its case, without calling the 2 witnesses, that would seriously prejudice the public interest in having all evidence laid before the court, so as to enable the court arrive at the just decision.

On the other hand, if the 2 witnesses are allowed to give their evidence, the respondent would not be prejudiced at all, because he would still retain his right to cross-examine the said witnesses.

The receipt of evidence through video conferencing would not, of itself, necessarily result in the conviction of the applicant. The trial court may still end up acquitting him.

In the result, I find that the decision to exclude video conferencing as the medium for receiving the testimony of the 2 witnesses was improper. And unless it is corrected at this stage, it cannot be corrected at the stage of an appeal, if the accused were acquitted by the trial court. But if the accused person was convicted, and if such conviction was based solely or largely on the evidence received through the video conferencing, the respondent would be able to challenge the decision through an appeal, if he felt that the procedure used was wrong.

For all those reasons, I do now reverse the order dismissing the prosecutor's application to have the 2 witnesses testify through video-link. I order that the Gautama Sengupta and Glenn Were should give their respective testimonies through video link.

The prosecution shall meet the expense of setting up the necessary equipment and shall also obtain any necessary authorizations for the video-link.

Dated, Signed and Delivered at Nairobi, this 28th day of July, 2011

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FRED A. OCHIENG

JUDGE