



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**(CORAM: OJWANG, J.)**

**CRIMINAL REVISION NO. 147 OF 2007**

**BRYAN YONGO.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

Learned counsel, **Mr. Ondieki** asked the Court to call for the file in Chief Magistrate's Court Criminal Case No. 2598/03, **Bryan Yongo v. Republic**, for the purpose of revision by virtue of powers provided for by ss.362 and 364 of the Criminal Procedure Code (Cap.75).

The case for revision was stated in advocates' letter to the Registrar of the High Court, dated 9<sup>th</sup> February, 2007 and filed on 14<sup>th</sup> March, 2007.

The complaint is that the pending criminal case against the applicant is a matter civil in nature, and so the case is "illegal, irregular and oppressive thus not affording him a fair trial as envisaged under the Constitution."

It is also alleged that whereas the burden of proof, in criminal cases, lies on the prosecution "it appears the Court is trying to shift the burden of proof [on] to the accused persons."

It is contended that the Court has "failed to listen to pleas that the complainant [PW1] in this matter...has committed an offence of perjury [in] the face of the Court...."

The applicant alleges that the trial Magistrate "abused her powers when she fined the accused person Kshs.1000/= and simultaneously locked him up in the prison cells from 11.00 p.m. to 5.30 p.m. and this she did not record in the proceedings...."

The applicant presents as grounds for revision the following:

- (i) that the trial Magistrate acted improperly by punishing the accused under s.131 of the Penal Code which does not contemplate a fine and in any event, she became the prosecutor, investigator and judge at the same time and did not consider the accused person's plea;
- (ii) that the trial Magistrate having punished him by imposing a fine of Kshs.1000/= or 10 days'

imprisonment in default, locked the accused in the basement cells from 12.00 noon to 5.30 p.m. without a hearing and without recording it;

(iii) that the trial Magistrate erred in disallowing the accused person's application for a document-examiner to examine certain exhibits.

(iv) that the criminal proceedings brought against the applicant were "based on lies and fabrications for the predominant purpose of exerting pressure on the accused person's company..."

(v) that the criminal prosecution is "not for the legitimate purpose of upholding the criminal law, or achieving the objects of criminal justice."

Learned counsel **Mr. Ondieki** submitted that the learned Magistrate's orders showed a lack of impartiality – and so the trial by her was in contravention of the applicant's trial rights under s.77(1) of the Constitution. Counsel cited case law, in particular High Court revision case, **Patrick Simiyu v. Republic**, Criminal Revision No. 18 of 2007, in support of the revision case. In that case **Makhandia, J** had remarked:

"It would appear in the circumstances of this case that the Court acted as prosecutor, investigator, as well as judge, in its own cause. This was wrong and contrary to law."

Learned counsel **Mr. Makura** urged that, on the basis of ss.362 and 365 of the Criminal Procedure Code (Cap.75), no party had a right to be heard in the exercise of the Court's criminal revision powers; and so it was not necessary for the State to address the Court on this occasion.

The record shows that a criminal charge was brought against the applicant, in Criminal Case No. 2598 of 2003. It is not apparent why the applicant claims that this is a civil matter being passed off as a criminal one, as the charge-sheet clearly shows the pertinent section of statute as the Penal Code (Cap.63), s.313, and the particulars of the charge are properly stated.

I have already set out the several elements of the applicant's gravamen; he claims that the trial is not being conducted properly; he asks for the trial process to be shifted to a different Court. These two claims in particular cannot be sustained and, in any case, do not fall within the *revision* jurisdiction of the High Court. It clearly is the obligation of the trial Court, as properly constituted, to conduct the trial and to determine the specific claims in the charge. If, at that stage, the applicant is dissatisfied with the verdict pronounced by the trial Court, then there is an open legal avenue to the High Court on *appeal*.

Was it proper for the trial Court to impose a fine upon the applicant, by virtue of s.131 of the Penal Code (Cap.63)? That section gives power to the Court to make certain orders, in situations of disobedience to lawful orders; it specifically provides:

***"Any person who disobeys any order, warrant or command duly made, issued or given by any Court, officer or person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of the disobedience, to imprisonment for two years."***

As this provision, it is evident, makes no mention of **fine**, it ought to be considered that Parliament's intent is that the relevant misdemeanour if committed, can only be punished by imprisonment for up to a maximum term of two years. It was, therefore, wrong in law for the trial Court to impose a fine by virtue of that provision.

I do not, however, consider it a genuine ground for the exercise of this Court's revision jurisdiction, the fact that the trial Court may have disallowed the accused person's application for a document-examiner to examine certain exhibits. If such happened, it is a matter that resolves into the final judgement of the trial Court, and can only be taken up on appeal after that Court has delivered its judgement. Continuity of the trial process may not be unnecessarily interrupted by applications to the High Court alleging defective

procedure, in respect of directions which will, in any event, culminate in the merits of the judgement itself.

On the whole, I consider most of the elements in this application for revision to have failed to contain themselves within the legal measure. The claim, for example, that the proceedings brought against the applicant were “based on lies and fabrications”, cannot be entertained within this Court’s *revision* jurisdiction; for, once again, it is an allegation which must ultimately resolve into the *final judgement* and, therefore, a point which is redressible by the normal appeal process, at the right time.

Similarly, the claim that the criminal prosecution against the applicant is “not for the legitimate purpose of upholding the criminal law” is a question the true nature of which can only be judged on the correctness and propriety of the judgement itself; and therefore, any grievance by the applicant herein, must be formulated as an *appeal* after judgement has been delivered.

Subject to the finding herein, as regards the trial Court’s non-compliance with the terms of s.131 of the Penal Code (Cap.63), I would dismiss the application for revision. If, however, any monies at all were paid as fine by the applicant, by virtue of orders made under s.131 of the Penal Code, then the same shall be refunded to him.

***Orders accordingly.***

**DATED and DELIVERED at Nairobi this 24th day of September, 2007.**

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Tabitha Wanjiku**

**For the Applicant: Mr. Ondieki**

**For the Respondent: Mr. Makura**