REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

MISC. CRIMINAL REVISION NO. 604 OF 2005

DAVID NJOGU GACHANJA

…….…….....……..……APPLICANT

VERSUS

REPUBLIC……..….....……..……..RESPONDENT

ORDER IN REVISION

By a Notice of Motion dated 5th December, 2005, ***DAVID NJOGU GACHANJA*** hereinafter referred to as the Applicant sought the following orders:-

1. **THAT** this Honourable Court be pleased to certify the Application as urgent and to admit the same for hearing ex-parte in the first instance.

2. **THAT** an order be made calling the entire file in Nairobi Chief Magistrate's Court Criminal Case Number 469 of 2005 for examination as to the correctness, legality and propriety of the orders made by Mrs. M. W. Muigai, P. M. on 21st October, 2005 in so far as the Application by the 12th accused dated 23rd May, 2005 is concerned.

3. **THAT** this Honourable Court be pleased to reverse and or alter the orders made by Mrs. M. W. Muigai, P. M. on 21st October, 2005.

4. **THAT** the costs of the Application be provided for**.**

The Application was brought on the premise that:-

(a). The orders made by Mrs. M. W. Muigai P. M. on 21st October, 2005 dismissing the 12th Accused (the Applicant herein) Application dated 23rd may, 2005 were made in total disregard of the fact that the was no Complainant lodged against the 12th accused as defined under the Criminal Procedure Code.

(b). The orders made by Mrs. M. W. Muigai P. M. on 21st October, 2005 fail to recognize the fact that the company whose funds are alleged to have been stolen had not lodged any formal Complaint against the 12th accused and the alleged complainant was a person not authorized in law to bind the said company.

(c). The orders made by Mrs. M. W. Muigai, P. M. on 21st October, 2005 in dismissing the accused's Application dated 23rd may, 2005 amount to a direct infringement of the 12th accused's fundamental right to a fair trial.

The Application was supported by the Affidavit of the Applicant in which he reiterates and expounds on the foregoing grounds upon which the Application was brought. Suffice to state that the Applicant is the 12th accused person in Nairobi Chief Magistrate's Court ***CRIMINAL CASE NUMBER,469 OF 2005, REPUBLIC VS THUO MATHENGE & OTHERS.*** That by an Application dated 23rd May, 2005 which was in the nature of a preliminary objection, the Applicant sought the striking out of the charges against him and a discharge from the aforementioned criminal proceedings. The Application was heard by Mrs. M. W. Muigai, P. M., the presiding Magistrate who in a well written and reasoned ruling delivered on 21st October, 2005 dismissed the Application. It is that dismissal that has spurred this Application.

In making this Application, the Applicant is invoking the supervisory jurisdiction of this Court over the subordinate Courts as provided for under Section 65 (2) of the Constitution of Kenya as well as Sections 362 and 364 (1) of the Criminal Procedure Code. In my considered view however, the Applicant is essentially and basically invoking the Revisionary jurisdiction of this Court.

Revision is a power bestowed upon a Court to revise the records of an inferior Court. Section 362 of the Criminal Procedure empower the High Court to call for and examine the record of any Criminal proceedings before any subordinate Court. This it does to satisfy itself as regards the correctness, legality or propriety of any finding, sentence or order recorded or passed, and also as to the regularity of any proceedings of any such subordinate Court.

When the Application came up for hearing before me, Mr. Makura. Learned State Counsel raised a preliminary objection. It was two fold. First he submitted that revision cannot be entertained on an interlocutory order. For this submission, Counsel relied on the case of ***UGANDA VS DALAL (1970) EA 355.***

Secondly Counsel submitted that the Application itself was unprocedural. That to invoke Revisional jurisdiction of the High a formal Application is not necessary. A mere letter will do. It was therefore the contention of the Counsel that he Application was materially defective and ought therefore to be struck out.

In response, Mr. Kariuki Learned Counsel for the Applicant submitted that the objections were unwarranted. That first and foremost there was no prescribed procedure in the Criminal Procedure Code as to how a party can invoke the Revisionary Jurisdiction of this Court. Unless there is a procedure which has been flouted then it is wrong for a party to say that because in the past letters have been used to invoke the jurisdiction, any other procedure was wrong. Counsel further submitted that the form adopted in invoking the jurisdiction did not prejudice the Respondent. For this submission he relied on the case of ***UGANDA VS MUKHALWE (1968) EA 372.***

With regard to the 1st preliminary objection, Counsel submitted that the order sought before the presiding Magistrate was final. That they were seeking to terminate the proceedings. The nature of the Application was not therefore interlocutory. Counsel further pointed out that the provisions of the Constitution as well as Criminal Procedure Code, talk about an order and not a final order. That if Parliament intended that revision could only be entertained where a final order has been made, parliament would have gladly said so. Counsel then referred this Court to the case of ***ABIERO VS REPUBLIC (1962) EA 650*** in a bid to show that the dismissal of the Application by the presiding Magistrate was an order that could be altered in revision.

I have carefully considered the preliminary objection, the submissions made in support and in opposition thereof. I have also read the authorities cited by Learned Counsels. On the issue of procedure, I would agree with Learned Counsel for the Applicant that in the absence of any prescribed procedure in the Criminal Procedure Code or other statutes as to how an aggrieved party can invoke the Revisional

jurisdiction of this Court, a party may choose to come to Court by whatever means and or procedure provided that it does not occasion prejudice to the Respondent. A word of caution though, in my considered view it is desirable to alert the Court and invoke its Revisional jurisdiction by a mere letter rather than a formal Application lest the provisions of Section 365 of the Criminal Procedure Code be rendered otiose.

On the more substantive objection I hold the view that contrary to the submission by Learned Counsel for the Applicant, the ruling of the trial Magistrate was in the nature of an interlocutory ruling. The case had barely started when the Applicant raised the preliminary objection to the charges preferred against him. The case to date is still pending. It matters not that in the Applicant's view the orders sought in the Application would have determined finally the case against the Applicant. That is not the test for what amounts to interlocutory proceedings. In my view interlocutory proceedings are those proceedings conducted in the main case whilst it is still pending for hearing and determination. In my view therefore the Application by the Applicant was in the nature of interlocutory proceedings. In the case of ***MISC. CRIMINAL APPLICATION NUMBER 1181 OF 2005, SAMUEL CHEPKONGA VS REPUBLIC,*** I have heard occasion to hold thus:-

"…..***In my view Section 362 of the Criminal Procedure Code can only be invoked where the subordinate Court has made a finding, sentence or order….***"

This presupposes a decision with some finality. Revision jurisdiction cannot be invoked with regard to interlocutory rulings when the case is still ongoing as in the instant case. Revisional jurisdiction of this Court should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their day today proceedings. If every ruling of the Lower Court and which went against a party were to be subjected to the Revisional Jurisdiction of this Court, we would have opened flood gates and this Court will be inundated with such Applications and the sub-ordinate may find it practically impossible to proceed with any case to its logical conclusion.

Section 362 of the Criminal Procedure Code talks of:-

"…….***Any finding, sentence of order…..***"

Employing the ejusdem genesis rule of interpretation, I have no doubt at all that those words connotes something with some finality. I do not agree with the Learned Counsel for the Applicant that the word "***order"*** means any order and not a final order. If that were there case then it would result into ridiculous consequences. For would an order standing over the matter to another date be such an order capable of being subjected to revision. Similarly the supervision entailed in Section 65 (2) of the Constitution does not envisage the intervention by this Court every stage of the trial by a subordinate Court.

In the case of ***REPUBLIC VS KUBWA MOHAMED SEIF & 2 OTHERS, CRIMINAL REVISION NO. 36 OF 2004,*** Justice Lesiit commenting on the ambit of Section 362 of the Criminal Procedure Code delivered herself thus:-

"…..***Section 362 of the Criminal Procedure Code applies only where a subordinate Court has made a finding, order or sentence. It cannot be applied to interlocutory rulings made before the final decision of the subordinate Court, especially where, like in this case, it is shown that the trial is still going on before the Court. It is impractical and improper for interlocutory orders made in the proceedings that are still pending before the Lower Court to be the subject of revision……..***"

I totally agree and endorse the reasoning of the Learned Judge. It is my finding therefore that the ruling by the Learned Magistrate is not a final order, finding or sentence that can be subjected to revision. I note that all the authorities cited by Learned Counsel in support of their various positions are High Court decisions which are not binding on me but are merely of persuasive value.

The Criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the evidence Act. There are also Constitutional safe guards stipulated in Section 77 of the Constitution to be

observed in respect of both Criminal Prosecution and during trials. It is the trial Court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge, whether there is a Complainant and or whether the charge against the Applicant is well founded. This is not the jurisdiction of this Court on Revision.

In view of what I have already stated above uphold the preliminary objection by Mr. Makura that revision is not available on a ruling made on an interlocutory Application with the consequence that the Application is dismissed.

Dated at Nairobi this 6th day of February, 2006.

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MAKHANDIA

JUDGE