Nduta v Republic (Criminal Revision 2 of 2023) [2024] KEHC 5392 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5392 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL REVISION 2 OF 2023

FN MUCHEMI, J

MAY 16, 2024

BETWEEN

MARTIN KIHONGE NDUTA .... APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. This application dated 20th November 2023 is brought under Sections 114, 115, 123(3) & 362 of the *Criminal Procedure Code* and Articles 49(1)(h) & 50(2)(e) of the *Constitution* seeking review of the verdict issued in Criminal Case No. E1882 of 2021 at Ruiru Law Courts for the purpose of satisfying itself as to the correctness, legality or propriety of the case to answer verdict against the applicant and move the file from the lower court to the High Court or be pleased to transfer the file to Gatundu Law Courts.

The Applicant's Case

2. The applicant states that he is the accused in Criminal Case No. MCCR/E/1882/21 where he made an application for review of the ruling on the case to answer which was declined by the learned magistrate. The applicant states that the learned magistrate did not give any tangible reasons for the refusal to review the case to answer and thus presumed that he is guilty of the offences he is charged with thus going against the irrefutable presumption of innocence. The applicant argues that the letter and spirit of the *Constitution* contemplates that all suspects are presumed innocent until proven guilty and are entitled to review unless there are exceptionally compelling reasons to warrant the court to exercise discretion in favour of the denial.

3. The applicant contends that the learned magistrate erred in overlooking the evidence on record before determining that he had a case to answer. Thus, by the learned magistrate refusing to review the verdict

on case to answer, the applicant contends that his right to a fair trial as contemplated by Article 50(2) (a), (c) & (p) have been infringed.

4. The applicant states that he continues to suffer because his clients continue to ask for their phones but the same were confiscated by the police without any reason or colour of right. Further, the police neither had a court order nor a search warrant to search his shop and seize his client's items.

5. The applicant thus urges the court to examine the lower court record and review the ruling on the case to answer verdict so that his rights as the accused person cannot be shifted and curtailed any further.

The Respondent's Case

6. The respondent states that the revision is premature and hence intended to further delay the case as the applicant will not suffer any prejudice by being put on his defence. Further, the respondent states that the applicant has not demonstrated how he is going to be prejudiced if he tenders his evidence in his defence and there is no proof that he is being asked to fill in the gaps in the prosecution case during his defence. Moreover, the respondent contends that the applicant being put to his defence does not mean that he has been found guilty. Furthermore, a ruling under Section 210 of the Criminal Procedure Code is not a final order but an indication that there is possibility on the face of it an offence may have been committed.

7. The respondent states that a criminal trial is an elaborate process which is designed to protect both parties in a suit and therefore the applicant ought not to fear as he has an opportunity to challenge the prosecution case.

8. The respondent argues that the applicant's prayer to have the subject matter transferred to Gatundu Law Courts is not merited as he has not offered any reasonable grounds so as to be granted such an order and thus only amounts to forum shopping. Furthermore, the respondent contends that having the matter which is still active at the trial court, to the High Court is unheard of and untenable.

9. The respondent states that a perusal of the proceedings reveals that after the ruling on a case to answer, the applicant failed to attend the trial court and on 13/12/2023 a warrant of arrest was issued against him. Further on 23/1/2024, the applicant failed to attend court and the warrant of arrest was extended.

10. The respondent states that there is no order of stay of proceedings at the subject lower court but the applicant has blatantly refused to attend court hence further delaying the trial without any good cause. Furthermore, the respondent states that the application has not been brought in good faith but is meant to delay the trial of the subject case and thus ought to be dismissed and the warrant of arrest against the applicant in force to be effected to enable the hearing proceed to its logical conclusion.

The Applicant's Submissions

11. The applicant submits that he was charged with stealing contrary to Section 268 as read with Section 275 of the *Penal Code* and an alternative charge of having suspected stolen goods contrary to Section 323 of the *Penal Code*. The applicant contends that his two co-accused persons are former employees of Red Land Roses Limited, the complainant whereas he is self-employed and repairs mobile phones at Ruiru town. The applicant contends that the evidence of the prosecution does not link him to the theft of the phone. PW1 testified that the applicant is not an employee of the complainant, that he met the applicant at Ruiru police station for the first time and that he was arrested for flashing/clearing the memory of the phone. PW1 further testified that he did not know where the phone was recovered from and thus the applicant argues that from the evidence of PW1, he was never arrested with the

phone. The applicant further submits that at the time of his arrest, no statement had been recorded in the occurrence book and it was a phone call that led to his arrest.

12. The applicant further submits that PW2 testified that he was told that the phone was taken to the applicant for flashing. The applicant contends that PW2's testimony confirms that he did not see him in the CCTV. The applicant submits that PW2 testified that he was not found with the phone and that PW2 is uncertain of the items taken from the shop of the applicant.

13. The applicant states that PW3, a police officer by the name of Justus Mbuvi confirms that the lost Oppo phone was recovered from Ongwangwa from his house.

14. The applicant submits that PW1 and PW2 gave no iota of evidence or insinuation that he was arrested for the suspicion of having stolen goods. PW3 testified that he moved to the applicant's shop and arrested him for not producing owners of the phones in his custody. Further, the applicant submits that PW3 confirmed that nobody went to claim ownership of the phones and laptops taken from his shop. Similarly, no one had reported their phones and laptop having been snatched from them by the applicant. Thus the applicant argues that the alternative charge cannot be made to stand by the hearsay evidence of PW3.

15. The applicant relies on Section 118 of the *Civil Procedure Code*, Articles 24 and 31 of the *Constitution* and submits that there was no reason to enter his shop and confiscate his property and those of his clients without a valid search warrant. By doing so, the applicant contends that the police officers infringed on his right to privacy and further pursuant to Section 60 of the *National Police Service Act* number 11A of 2011, the police did not demonstrate any apprehension that he would dispose of the items before they obtained the search warrant. Relying on the cases of *Standard Newspaper Limited & Another vs the Attorney General and Others* (2013) eKLR; *Samra Engineering Limited & Others vs Kenya Revenue Authority*, (2012) eKLR and *Samson Mumo Mutinda vs Inspector General National Police Service* (no citation given), the applicant submits that the police were out to harass and intimidate him thus breaching his right to privacy. Thus, the applicant contends that the charges against him are unfounded and he should not have been charged with the said offences at all.

The Law

16. The High Court's power of revision is set out in Article 165 (6) and (7) which provides:-

    (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but over a superior court.

    (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

17. Section 362 of the *Criminal Procedure Code* provides:-

> The High Court may call and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the 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.

18. Section 364(1) of the *Criminal Procedure Code* provides:-

> In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may"-
>
> a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
>
> b. In the case of any other order other than an order of acquittal alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

19. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi vs Republic* [2019] eKLR:-

> "In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

20. Similarly Nyakundi J in *Prosecutor vs Stephen Lesinko* [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows:-

    a. Where the decision is grossly erroneous;

    b. Where there is no compliance with the provisions of the law;

    c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;

    d. Where the material evidence on the parties is not considered; and

    e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

21. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.

22. Section 362 of the *Criminal Procedure Code* addresses cases for revision where the magistrate has made a mistake, irregularity or illegality. The High Court has power to correct such misdoings by giving the appropriate orders in an application for revision.

23. In an application of this nature, the applicant bears the burden of proof to the effect that the trial magistrate made a mistake, an illegality, impropriety or irregularity in its finding or order.

24. In this matter, the magistrate at the close of the prosecution's case communicated her finding that the applicant had a case to answer and placed him on his defence. The act of the magistrate placing the applicant on his defence gives him a chance to ventilate his case which is paramount to his right to a fair trial under Article 50 of the *Constitution*. I have further perused the proceedings and noted that the applicant was represented by an advocate during the trial. Following the ruling of the court on 9/8/2023, the advocate told the court that the accused had elected to give sworn evidence and call three (3) witnesses. The matter came up for hearing on 21/9/2023 but it was adjourned on the instance of the applicant as he had instructed a new counsel who was not ready to proceed with the case. The trial court allowed the adjournment and scheduled a further hearing on 31/10/2023. On the said date, counsel for the applicant was not ready to proceed and sought a review of the decision to place the accused on his defence. The prosecutor made an application to the tune that he was confused with the nature of the application and counsel for the applicant abandoned his earlier prayers and requested for more time to prepare for the hearing.

25. The trial court once more allowed the application for an adjournment and scheduled the hearing for 13/12/2023. The applicant on 13/12/2023 and 23/1/2024 failed to attend court and a warrant of arrest was issued. It appears the applicant developed cold feet after being put on his defence. The trial in criminal case is a process that ought to be concluded as required by the law. The appellant cannot jump off the bus before it reaches its destination. He is obligated to participate to the very end.

26. In the trial, the learned magistrate followed the law and delivered justice to the applicant by giving him a chance to ventilate his case despite the applicant causing adjournment of the case on numerous occasions. Furthermore, the trial magistrate did not give any reasons on the application for review of the verdict on a case to answer as the advocate for the applicant abandoned that application. In my view, such an application for review has no place in criminal law.

27. The learned magistrate is not required to give reasons in a ruling of a case to answer as that will pre-empt the defense of the applicant. The applicant has no legal right to demand that such reasons be given by the court. His obligation was to prepare his defence and present it to the court so that the trial would be concluded expeditiously.

28. Accordingly, I find that the applicant has failed to demonstrate that the trial court committed any illegality, mistake or irregularity to warrant any interference by this court in the course of its supervisory jurisdiction. I find no merit in this application and it is hereby dismissed.

29. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED THIS 16TH DAY OF MAY 2024 AT THIKA.

F. MUCHEMI

JUDGE