Republic v Ngugi & 4 others (Miscellaneous Criminal Revision E173 of 2023) [2024] KEHC 6037 (KLR) (21 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6037 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

MISCELLANEOUS CRIMINAL REVISION E173 OF 2023

RM MWONGO, J

MAY 21, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

JOSEPH KAMAU NGUGI ..... 1ST RESPONDENT

EDWIN WACHIRA MURIUKI 'ALIAS' EDU ..... 2ND RESPONDENT

FRANCIS MUTHII WARUI 'ALIAS' KABONGE ..... 3RD RESPONDENT

PAUL MAINA MUGO ..... 4TH RESPONDENT

MURIUKI NGIGE 'ALIAS' WANGIGE ..... 5TH RESPONDENT

(In respect of a Ruling by Hon. G. W. Kirugumi delivered on 8th day of August 2023 in the CM's Court Criminal Case No. E246 of 2023)

RULING

1. The applicant's motion of 17th August 2023 seeks orders that:

    1) Spent.

    2) That the Honourable Court stays the proceedings in Kerugoya Criminal Case No. E247 of 2023 between Republic v Joseph Kamau Ngugi, Edwin Wachira Muriuki 'Alias' Edu, Francis Muthii Warui 'Alias' Kabonge, Paul Maina Mugo, Muriuki Ngige 'Alias' Wangige before the Principal Magistrate Court Hon. Grace Kirugumi pending the hearing and determination of this application for revision and call for the trial court file for consideration.

    3) That the Honourable Court exercises its supervisory jurisdiction to revise the ruling delivered on 8.8.2023 in Kerugoya Criminal Case No. E247 of 2023 between Republic v Joseph Kamau

Ngugi, Edwin Wachira Muriuki 'Alias' Edu, Francis Muthii Warui 'Alias' Kabonge, Paul Maina Mugo, Muriuki Ngige 'Alias' Wangige to ascertain as to tis correctness and legality.

4) That the Honourable Court orders each party to bears its own costs.

2. The grounds of the application are that the trial magistrate ruled on 8.8.2023 dismissing the applicant's application to disclose new evidence to the defence before close of the prosecution case. Further, that the trial magistrate disregarded the trite law that criminal investigation is a continuous process until close of the prosecution case; that the prosecution's duty to disclose new and additional evidence to the defence does not end until close of the prosecution case; that the new evidence could not prejudice the defence whatsoever; and that the trial magistrate's ruling of 8.8.2023 offends fairness, legality and correctness.

3. In the trial court, the respondents are charged with stealing between 1st January 2023 and 15th March 2023, 8,977 Kgs of parchment coffee (Mbuni) valued at Kshs. 1,168,921/= from Kagumo Coffee Factory. They all deny the charges. The complainant indicated in the charge sheet is Joyce Wakio Kuthii on behalf of Mutira Farmer's Co-operative Society.

4. In a nutshell, PW1 was stood down when the defence cross-examined her based on a bulky document (DMFI) which the prosecution was not privy to. At the prosecution request, the court ordered the defence to serve the prosecution with DMFI. The defence did not comply.

5. However, the prosecution obtained DMFI with other material through their continuous investigations. It thus applied to the court to produce and rely on the new evidence. The court, in its aforesaid ruling declined, prompting this revision application.

6. The Respondents oppose the application. They assert that the parties had attended the pre-trial conference and indicated that they were ready with 15 witnesses, and the documents had been already supplied to the defence. They argue that the application to introduce new evidence is an attempt on the part of the prosecution to fill in gaps in their weak case, disclosed by the cross-examination of PW1.

7. The proceedings of the lower court show that what the prosecution sought to introduce were: Minutes dated 21.3.2013 and bundle of letters; Minutes dated 7.6.2022 and bundle of documents; certificate of registration of Mutira Farmers, Appointment letters and pay slips; Farmers collection counter book Kagumo 282223; By- Laws of Mutira Farmer's Co-operative Society; physical count of cost on stolen coffee; and introduction of management committee letter dated 16.6.2023.

8. In the trial court, the applicant argued that having found a document or new material relevant to the administration of justice they were obliged to disclose it; that Article 50 on fair hearing required that they disclose the information; that the prosecution is entitled in law to continuously investigate and prosecute and thus avail any evidence it may come across.

9. Article 50 (2) (c) (j) of the *Constitution* grants the accused a right to fair trial which includes the right:

"

"(c) ...to have adequate time and facilities to prepare a defence"

.....

"(j) to be informed in advance of the evidence that the prosecution intends to rely on and to have reasonable access to that information."

10. These are the rights which must be at the fore of the court's consideration when exercising its mind on the question of whether or not to allow new evidence to be introduced.

Revisionary or Supervisory Jurisdiction?

11. The application brought before this court for revision invoked Articles 159(2)(d) and 165(6), of the *Constitution*; Sections 362 and 364 *CPC*; Section 10 of the *Judicature Act* and Rule 3 (1) and (2) of the *High Court Practice and Procedure Rules*. In other words, it is a full pledged, open-ended application seeking to invoke both the revisionary criminal jurisdiction and the constitutional supervisory jurisdiction of the Court. The distinction is well described in the case of *DPP v Perry Mansukhlal Kasangara & 8 Ors* [2020] eKLR.

12. In calling up a Lower Court's file in normal revision under Section 362 and 364 *CPC*, the court's object is to satisfy itself at to the correctness, legality or propriety of any finding or order of the court or the regularity of the proceedings. In making an order under revision, no prejudice should be occasioned to the accused, who must have an opportunity of being heard.

13. Contrariwise, in exercising supervisory jurisdiction under Article 165 (6) and (7) of the *Constitution* the court's object under Article 165 (7) is to:

> "Make any order or give any directions it considers appropriate to ensure the fair administration of justice."

As stated in *DPP v Perry Mansukhlal Kasangara*, the exercise of supervisory jurisdiction arises:

> "150
>
> a) Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;
>
> b) Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;
>
> c) Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.
>
> d) In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring "the fair administration of justice";

14. I do not think the present case discloses any of the above characteristics to justify this court's intervention on the basis of its constitutional supervisory power. What we see in the present application is merely a situation where the prosecution has conducted its investigations in a narrow manner and, either inadvertently or carelessly, failed to obtain information that was readily available had it exercised reasonable effort to obtain it.

15. The majority of items sought to be introduced by the prosecution are basic readily obtainable items such as Minutes of Meetings of Mutira Farmer's Co-operative Society, the complainant; its Certificate of Registration, Appointment letters and pay slips; By- Laws of Mutira Co-operative Society, and the like. Without going into the issue of their relevance and admissibility, it appears to me that these are

items that were most likely available to the prosecution all along before trial but which it opted not to take into account, until PW1 was under cross-examination.

16. It was pointed out in the Perry Mansukhlal Kasangara case that the exercise of constitutional supervisory jurisdiction ought to be exercised under the following safeguards:

> " 151. where it is intended to exercise Supervisory Jurisdiction under the *Constitution* the following safeguards should be observed:
>
> i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro-manage the trial court's independence in the conduct and management of its proceedings;
>
> ii. Ideally, constitutional Supervisory Jurisdiction should be exercised after the parties are heard on the subject matter in question;
>
> iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;
>
> iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate.
>
> v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest confidence in the administration of justice".

17. In light of the foregoing, I do not consider the present application to be a proper application for the exercise of constitutional supervisory jurisdiction within the meaning of Article 165 (6) and (7) of the *Constitution*.

Revision

18. I now consider the application in light of Sections 362 and 364 of the *CPC* in respect of ordinary statutory criminal revision. The object of such revision under the *CPC* as earlier stated is for the court:

> " 362 .....to satisfy itself as to the correctness legality, or propriety of any finding, sentence or order recorded or passed, and as to the regularity or any proceedings of any such subordinate court....."

In this case, the remedy sought in terms of Section 364 is alteration or reversal of the subordinate court's order declining to allow the new additional evidence.

19. The state relies on the duty of the police (and prosecution) to continuously investigate and present evidence as mandated by Section 24 (e) and 35(b) of the *National Police Service Act*, 2014, which provisions are derivative of Article 245 (4) (a), of the *Constitution*.

20. Article 245 (4) merely empowers the cabinet secretary responsible for police services to give direction to the Inspector General except with respect to the investigation of offences. This allows for independence of police investigating power. Section 24 (d) *National Police Service Act* merely indicates the functions of the Police Service to include investigation of crimes; whilst Section 35(b) provides for the functions of the Directorate of Criminal Investigations including to undertake investigations. Those provisions

demand independent investigation and not impute power to produce investigative material after charging.

21. The applicant cited the Supreme Court case of *Hussein Khalid & 16 Ors v AG and 2 Ors* [2019] eKLR where the court very pertinently stated;

> " 91. Further, our jurisprudence is replete with authorities to the effect that presentation of evidence is a continuous process during the trial process provided that the accused has not been put to his defence. We draw an answer to the Appellant's complaints under Article 50(2)(j) of the *Constitution* from the case of Dennis Edmond Apaa and Ors v Ethics and Anti-corruption commission, Nairobi, Petition No. 317 of 2012, [2012] eKLR which dealt with the issue of disclosure of documents by the prosecution as follows:
>
> > ''26. The words of Article 50(2)(i) that guarantee the right "to be informed in advance" cannot be read restrictively to mean advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to fair trial. Article 50(2)(c) guarantees the accused the right, "to have adequate facilities to prepare a defence".
> >
> > "27. This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence.....The obligation to disclose was a continuing one and was to be updated when additional information was received."
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> "92. Note also that the 2nd and 3rd Respondents are not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial. The duty of the prosecutor is to bring the new information and evidence to the attention of the accused and for the court to give the accused the opportunity to interrogate the new evidence and adequate time to prepare his defence (See George Taitumu v Chief Magistrates Court Kibera & 2 Ors [2014] eKLR. (Emphasis added)

24. In reaching that position, Mulwa J relied on a statement in *Thomas Patrick Gilbert Cholmondeley v R* (2008) eKLR where the court had held:

> " We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, copies of documentary exhibits to be produced at the trial such like items....."

25. The respondent's main contention in opposition to the application is that; Firstly, pre-trial had been concluded; Secondly that the documents sought to be introduced are merely to fill the gaps left by the prosecution as identified in cross-examination; Thirdly that new evidence should not be used to

ambush the accused. Fourthly, that the notice of material in the hands of prosecution must be availed with sufficient notice for the defence to prepare adequately; and, fifthly that the material sought to be introduced could not have been reasonably availed for foreseeable before commencement or pre-trial.

26. In *R v Ward* (1993) 2 ALL ER 557 in the English Court of Appeal unanimously held:

> " Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure....."

27. The Ward case and the case of Thomas Cholmondeley case were relied upon heavily in Dennis Edmond Apaa's case which underpinned the Supreme Court's position in Hussein Khalid's case where the Supreme Court stated that: "Presentation of evidence is a continuous procedure during pre-trial process provided that the accused has not been put to his defence". In fact, in Dennis Edmond Apaa's case, PW10 was stepped down in order that his witness statement could be produced, given that his evidence as a witness had been previously indicated in the list of witnesses.

28. Unlike the position in Edmond Apaa's case, here what is sought to be produced is evidence that came to light to the prosecution during cross-examination of PW1. It is not asserted by the prosecution that the material was otherwise not reasonably readily available.

29. Looking at the lower court proceedings, what emerges is that when PW1 was on the stand in cross-examination, and he produced what the prosecution referred to us as a "bulky document", and that he needed to look at it as it would "inform re-examination". The trial court then stood down PW1 to give the prosecution time to peruse the document.

30. At the next hearing date, the prosecution applied to introduce new evidence which included the By-Laws and other material held in the office of the complainant which the prosecution had not previously thought of obtaining to utilize as evidence.

Disposition

31. In my view, this is not a case where the prosecution has been engaged in conducting investigations and has obtained new evidence. This is a case where the prosecution, struck at its lack of foresight and anticipation of the defence, was forced to go and obtain further material that had been highlighted in cross-examination to fill the gaps in the evidence they had presented, in order to strengthen such evidence.

32. It is acknowledged that the prosecution has a duty to continuously investigate and bring to the attention of the court any evidence, inculpatory or exculpatory, which comes to its attention at any stage of the proceedings before the defence case commences. I would go so far as to say that if such new evidence is exculpatory, it may be introduced at any time before judgment.

33. In the present case, whilst it is true that PW1 had not been re-examined and that, the case had another 14 witnesses after PW1, I do not think that the decision made by the trial court is fundamentally "incorrect, illegal or lacking in propriety" in terms of Section 362 of the CPC, to require this court to interfere with the trial court's decision.

34. Accordingly, I do not consider that this is a proper case in which to interfere by way of revision. The prosecution application is therefore declined and is hereby dismissed.

35. The stay against continuance of the lower court proceedings is hereby vacated, and the Lower Court file shall be returned to the Lower Court.

36. Orders accordingly.

DATED AT KERUGOYA THIS 21ST DAY OF MAY, 2024

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Accused 1 - 5 - All present in Court

2. Makazi for Respondent

3. Mr. Murage, Court Assistant