Muraya & another v Republic (Revision Case E358 of 2023)
[2024] KEHC 8381 (KLR) (9 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8381 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

REVISION CASE E358 OF 2023

HM NYAGA, J

JULY 9, 2024

BETWEEN

MARGARET WAIRIMU MURAYA ..... 1ST APPLICANT

SIMON CHEGE MURAYA ..... 2ND APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicants have moved this court through a Notice of Motion dated 27th November, 2023 brought under Articles 3,10,20,25(1),(a),(c) and 50(1)& (ii), (j), (k),50(4) and 2 of *the Constitution*, Sections 362 and 364 of the Criminal Procedure Code seeking for Orders:-

    i. Spent

    ii. Spent

    iii. Spent

    iv. That this Honourable Court be pleased to review, vary and/or set aside the orders given on 24th November,2023 by Hon Ruth Kefa (P.M)

    v. That this Honourable Court upon grant of (d) above be pleased to substitute the same with an appropriate order.

    vi. That the costs of this Application be provided for.

2. The Application is premised on grounds on its face and supported by an Affidavit of the 1st Applicant sworn on her on behalf and on behalf of the 2nd Applicant.

3. In a nutshell, it is the Applicants' case that this matter was part heard before Hon. Munyi and upon her transfer Hon. P Kefa took over and that whereas the latter magistrate swore to do justice impartially and without fear or favour, bias, affection, ill will, prejudice, political, religion or other influence, she is unlikely to do justice on account of her open bias against her and her co-accused/applicant together with their Counsel.

4. They contend that in the course of proceedings, the learned magistrate for reasons unknown to them, retained the file in her chambers contrary to the laid down legal procedures and this issue was brought to her attention but she failed to plausibly respond, and consequently their advocate did a formal complaint on 8th November, 2023 to the Chief Magistrate and copied the trial court as well as other relevant stakeholders of justice.

5. That on 13th October, 2023 after the close of the Defence case, the Prosecution made a strange application for remission of exhibits that mysteriously disappeared from the court file in the course of the retention of the file by the magistrate, and their counsel sought for formal filing of the same and for service to be done for purposes of verification and approval.

6. It is the Applicants' case that on 26th October, 2023 the ODPP sought for more time to file their lists of exhibits while their advocate told the court that she had tried accessing the file for perusal in vain since the file was permanently in chambers, and the matter was fixed for mention on 9th November, 2023.

7. The applicants further aver that on 16th November, 2023 the court directed the ODPP to serve a list of their exhibits with a copy of the defence for perusal and comment and fixed the matter for further mention on 23rd November, 2023 but the ODPP failed to comply with these directions and instead informally placed their exhibits in the court file and the trial court deemed the same as properly filed without following the formal laid down rules on admission of the said exhibits.

8. They assert that the purported exhibits informally placed on record are at variance with the order of the predecessor court given on 2nd March, 2020 and the documents filed on compliance thereof.

9. It is their further averment that on 23rd November 2021, the ODPP had still not served the list of exhibits as ordered and on this date the firm of Karanja Mbugua & Company advocates came on record purportedly for the "victims".

10. It is the Applicants' assertion that when the matter came up for directions on 23rd November, 2023, their counsel raised a legal objection as to the appearance of counsel for the "victims" and the trial court upon hearing rival submissions reserved the matter for ruling at 2.30p.m.

11. They state at 2.30pm the ruling was not ready and the matter was deferred to 24th November, 2023. That on this date upon their advocate's request for the matter to be heard in open court to enable her address the issue of the missing exhibits the court directed the matter to be mentioned in open court at 11.00a.m since their counsel was attending to another matter before High Court No.3 at 11.30a.m.

12. They contend that at 11.00 a.m. the trial magistrate did not appear in court as agreed but she appeared at 11.30am and addressed children's matters first, and considering their advocate had another matter before High Court No.3 at that time, she sought for further directions and the trial court directed her to appear before her as soon as she was done with the High Court 3 matter.

13. That later at 3.30 p.m. the trial court made a negative inference against their counsel to the effect that she had not appeared before her at that time despite the High Court No.3 finishing its session at 1 pm and proceeded to deliver her ruling allowing the Prosecution to re-admit the alleged missing exhibits without according them or their counsel an opportunity to be heard.

14. In view of the foregoing, the Applicants believe that there is a possibility of bias and reasonable doubt about the fairness of the administration of justice in this matter by the said Magistrate Hon. Kefa.

15. In opposition to the Application, Joseph Gaturo Muraya one of the victims, swore a Replying Affidavit on 4th December,2023 wherein he deposed that the Applicant's application is to ensure that the trial magistrate does not timeously deliver a judgement in this matter.

16. He averred that the matter is pending judgement hence the reason the court file was retained by the trial magistrate for purposes of writing a judgement.

17. He asserted that the trial magistrate was not only magnanimous but overly patient as she waited for the advocate for the accused persons to handle her High Court matters in the morning hours and when she did not show up at 3. 30p.m she had no choice but to proceed with the matter and she cannot be faulted for that.

18. He contended that the application raises no revisionary materials because the accused persons had cross examined all the witnesses on the said exhibits and their Counsel had already filed her submissions in readiness for a judgement.

19. He prayed that the Application be dismissed with the directions that the trial magistrate proceeds to deliver her judgement.

20. The 1st Applicant swore a supplementary affidavit in response to the aforestated Replying Affidavit wherein she deponed that the Replying affidavit is bad in law, incompetent, full of half-truths, mala fide and only fit for dismissal ex debito Justitiae.

21. She averred that whereas there is need for courts to expeditiously dispose of matters the same cannot be done at the expense of fair trial and substantive justice.

22. She deponed that the issue of disappearance of exhibits was brought at the tail end of the proceedings and that their misgiving was on the process and procedure purported to be applied by the trial court in admission of the said exhibits.

23. She averred that her advocate upon perusal of the trial's court's ruling she did a letter dated 27th November, 2023 requesting the learned judge to confirm the authenticity of the proceedings in MAT CAUSE No. 3 of 2017 and specifically when the court concluded its proceedings, and the learned Justice Muhochi responded to the same vide a letter dated 28th November, 2023 confirming that indeed his session ended at 4. 00p.m and that their advocate was in court attending to the said matter.

24. She averred that from the foregoing, it is crystal clear there is sufficient material placed before this court to warrant revision by this court.

25. The response by the Respondent is not on record.

26. The Application was canvassed through written submissions.

Applicants' Submissions

27. On whether they are entitled to revision orders sought, the Applicants submitted revisionary powers of this court is donated by Articles 165(6) and (7) of *the Constitution* and Section 362 of the Criminal Procedure Code.

28. The Applicants made reference to a book titled "Essentials of Criminal Procedure in Kenya" by Kiage J where he wrote that;-

> " In exercising its revision Jurisdiction, the High Court calls for and examines 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 such proceedings where there exists sufficient circumstances entitling it to vary the order of the court below"

29. The Applicant also cited the case of Joseph Nduvi Mbuvi vs Republic [2019] eKLR and Article 50 of *the Constitution*, and submitted that there is no doubt that the circumstances surrounding the issuance of the directions complained of herein reveals an infringement of the right to fair trial specifically on the right to legal representation and right to challenge evidence.

30. The Applicants submitted that the impugned proceedings failed the test of correctness, legality, propriety and or regularity and that this court pursuant to Section 364(1)(b) of the Criminal Procedure Code can bring the said proceedings back on track so that the subject trial meets the constitutional muster in Article 50 of *the Constitution*.

31. The Applicants submitted that the Application has merit. To bolster their submissions, the Applicants relied on *Director of Public Prosecutions vs Swazuri & 24 others (Criminal Revision E003 of 2023*) [2023] KEHC 22153 (KLR); REPUBLIC vs SURBODINATE COURT OF THE 1ST CLASS MAGISTRATE AT CITY HALL, NAIROBI & another Ex-parte YOUGINDAR PALL SENNIK & another [2006] eKLR; Barnaba Kipsongok Tenai vs Republic (2014) eKLR

Victim's Submissions

32. The Victim submitted that the orders sought to be reviewed, varied or set aside has not been extracted and attached to any affidavits.

33. He posited that the application is misconceived and there are no grounds to warrant a revision. The Victim further posited that the Applicants ought to have applied to set aside the proceedings of 24th November, 2023 but they opted not to do so.

34. The Victim submitted that both cases had been closed and when the trial magistrate retired to write a judgement she learned that documentary evidence were missing from the court file and she involved all parties to have the prosecution resubmit the copies of the missing exhibits and accused persons' counsel were notified of the same. In view of this, the victim submitted that there is no contention that the copies of the lost exhibits are different from the originally produced one.

35. He urged this court to disallow the Application. In buttressing his submissions, the Victim relied on the cases of Ruto vs Republic (Criminal Revision E12 of 2021) [2022] KEHC 10156 (KLR); Republic vs John Wambua Munyao & 3 others [2018] eKLR; Republic vs Judith Achola Mulala [2019] eKLR; & Director of Public Prosecutions vs Perry Mansukh Kansagara & 8 Others [2020] eKLR.

Analysis & Determination

36. The only issue for determination is whether the applicants' request for an order of revision is merited.

37. Article 165(6) and (7) of *the Constitution* confers upon this Court supervisory jurisdiction over subordinate courts and empowers this Court to make any order to give any direction it considers

appropriate to ensure fair administration of justice. The said provisions are couched in the following terms:

> "(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 not over a superior court.
>
> (7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of 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."

38. As regards the Criminal Procedure Code, the correct legal provision ought to have been section 362 of the Criminal Procedure Code provides as follows:

> " The High Court may call for 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."

39. Section 367 of the Criminal Procedure Code, on the other hand, provides as hereunder:

> " When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith."

40. In view of the above, it is patent that the powers of revision under section 362 of the Criminal Procedure Code are invoked to enable this Court satisfy 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 subordinate court.

41. Therefore, if the Subordinate Court's decision is wanting in its correctness, legality or propriety or the proceedings are irregular, this Court will no doubt step in and correct the same.

42. Joseph Nduvi Mbuvi vs Republic [2019] eKLR G.V. Odunga J (as he then was) while interpreting the provisions of Section 363 of the Criminal Procedure Code opined as follows:-

> " A strict reading of section 362 of the Criminal Procedure Code, however, does not expressly limit the High Court's revisionary jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings. Suppose a subordinate court would be minded to make an absurd decision of commencing a criminal trial by directing the accused to give evidence before the prosecution, I do not see why the High Court cannot call the proceedings in question to satisfy itself as to the correctness, regularity or legality of such order. 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 on-going, 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."

43. Having set out the legal provisions applicable, I will begin by dealing with a preliminary issues raised by the counsel for the victim. It I contended that the orders sought to be reviewed, varied or set aside has not been extracted and attached to any affidavits & that the Applicants ought to have applied to set aside the proceedings of 24th November, 2023

44. In regards to this issue, Article 159 (2) (d) of *the Constitution* enjoins any court to administer justice without undue regard to procedural technicalities. The is no law that expressly demand that the order be attached, although it is at times necessary that the same be extracted and annexed for purposes of enabling the court have clarity as to the orders complained about. However, it is my opinion that failure to annex the impugned order is not fatal to the application since such order would be on the court file anyway. Having called for the lower court record, as required by the law, this court will easily peruse the record and refer to it. This court will thus place substantive justice over the procedural consideration.

45. With respect to the second issue, it is clear that by virtue of Section 362 and 367 of the Criminal Procedure Code that this court that can issue the orders sought herein. it is appreciated that the applicants could have also moved to have the court review the orders in question that does not oust the jurisdiction of this court to determine the matter, for the fair administration of justice. The Applicants are therefore properly before this court.

46. Having considered the Application it is patent that the Applicants' main issue is on admission of the prosecutions' exhibits by the trial court without their input.

47. It is not in dispute that after the close of the defence case, the prosecution applied to produce certified copies of missing documents that it had earlier produced. The Applicants prayed that they be supplied with the same for verification purposes before adoption by the trial court. On 16th November, 2023, the trial court expressly directed the prosecution to serve the defence with the missing documents. The documents were duly supplied to the Applicants' counsel and on 23rd November, 2023, the said counsel made an application to address the court on the said documents. It is further evident that the trial court allocated the matter for hearing at 11.00 am. The record shows that the hearing did not proceed at 11.00 am. At 11.30 am the counsel for the Applicants requested the matter to be placed aside as she had another matter before High Court No.3. There is no indication that the trial magistrate directed her to appear before her as soon as she was done with the High Court No.3 matter as alleged. The trial court also did not indicate the time the matter was to take off for hearing. At 3.30 pm the trial court noted that the defence counsel was not in court despite High Court No.3 finishing its cause list at 1pm and proceeded to fix a date for judgement on 28th November, 2023. The trial magistrate did not categorically state whether or not she admitted the documents in issue. However, she noted the need for the defence counsel to submit on whether there are any discrepancies between the documents that were produced during hearing and the photocopies that had been submitted by the prosecutor on 16th November, 2023.

48. It goes without saying that before rendering its judgement, the trial court will have to consider all the documents produced. The issue that the trial magistrate pointed out above is indeed a fundamental one and must be addressed before delivery of the judgement.

49. I have gone through the entire record and I have not seen anything that suggests the trial magistrate was biased against the Applicants or her counsel. The trial magistrate gave Applicants' counsel ample time to make her application. The counsel has indeed demonstrated that the matter she was handling before the High Court ended at 4 pm. She has annexed a letter written by the Judge, High Court No. 3 confirming this position. However, at that material time the trial court was not made aware of this position. It was the duty of the counsel for the applicants to have ensured that the trial court was kept abreast of her unavailability. The counsel ought to have assessed the situation and promptly instruct another counsel to either attend to her lower court matter or apply for an adjournment. She did not deem it fit to do so and the trial court cannot be faulted for proceeding with the matter in her absence.

50. The applicants have suggested that the trial magistrate irregularly kept the file in her chambers after the proceedings of the day. I do not understand what that means. Having set a date for judgment, the magistrate cannot be faulted for having kept the file in her chambers. Now, a judges or judicial officers' chambers are not the personal property of such officer. They are part and parcel of the court premises and as such, the retention of a file there is not an indication of any bias. Every judge or judicial officer has a way of conducting their matters. Some are known to commence the writing of a judgment or ruling from the first date the matter is heard before them. That would require that the said judge or judicial officer goes through the file at his/her own time. He/she cannot be faulted for doing so.

51. In the instant case, there was no action on the part of the applicants that was impeded by such retention of the court file. All that the applicants' advocate was required to do, if she wanted to peruse the file, or take any action, was to formally apply to do so. I have perused the lower court record and I did not see any formal request to peruse the file. All I saw was a letter dated 8th November 2023, addressed to the Chief Magistrate, Nakuru Law Courts, complaining about the unavailability of the file for perusal.

52. I am of the view that the applicants are making unwarranted allegations of bias against the judicial officer. In her ruling delivered on 5th March 2024, she has adequately explained why the file was in her chambers. I see nothing to cast doubt in the manner she conducted the trial.

53. It has to be remembered that every decision of a court will invariably favour one party. The other party cannot use this as a basis to impeach the character of a judge or judicial officer.

54. This is a matter that appears to be raising emotions of the parties. The trial court record does not show anything that may suggest that it has descended into the arena of conflict, so as to affect it's capacity to deliver an impartial verdict.

55. This court's jurisdiction should not be used to micromanage a trial before any court. The court will only intervene if there is a possibility of injustice or prejudice being occasioned upon a party, in this regard the applicants.

56. From the trial court record, it is noted that the documents in question formed a crucial part of the case against the applicants. It was incumbent upon the trial court to have examined each document before admitting the replacement copies into the court record. The possibility of relying on different documents other than those actually produced was high, so there was need to scrutinise each of them carefully. The loss of the documents from the court record cannot be attributed to the judicial officer since the file passes through many hands. Any suggestion as to the culpability of the trial magistrate is pure speculation with no foundation.

57. I believe the interest of justice demands that the Applicants be given an opportunity to submit on the replacement documents produced by the prosecution before the trial court proceeds to render its judgement.

58. In view of the foregoing, the order issued on 24th November, 2023 by Hon. Ruth Kefa, Principal Magistrate, is hereby called to this court by an order of revision under section 362 of the Criminal Procedure Code and the same is set aside. It is substituted by an order directing the trial court to fix the matter for compliance with the orders it issued on 16th November 2016, followed by hearing of the Applicants' counsel's submissions on the documents prior delivery of the Judgment. Needless to add, the Prosecution will have a right to also submit.

59. The trial court file is to be returned to it for compliance with the said orders.

60. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jeniffer

State counsel Nancy

Mr. K. Mbugua for victims

Mrs Mukira for applicants