Chepkiyeng v Republic (Criminal Revision Application E001 of 2023) [2023] KEHC 878 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 878 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION APPLICATION E001 OF 2023

RN NYAKUNDI, J

FEBRUARY 10, 2023

BETWEEN

SUSAN CHEPKIYENG ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant filed this application dated January 12, 2023 seeking the following orders:
    1. That there be a stay of further proceedings in Iten CMCRI no. E 708 of 21 pending the hearing and final determination of this Revision application
    2. That this Honorable court be pleased to call for the file being Iten CMCRI no E 708 of 2021 with a view of revise the order Issued Therein on 04.10.22 and to substitute it with an order acquitting the accused/applicant
2. In this grounds in support of the application the applicant contents that:
    1. The applicant is the 1st accused in Iten CMCRI no E 708 of 2021 and was charged with the offence of Robbery with violence contrary to section 296 (2) of the *Penal code*.
        (a) Malicious damages to property contrary to section 339 (1) as read with section 3339 (3) (B) of the *penal code*
        (b) Interference with Boundary feature contrary to section 24 (1) of the *Registered Land Act* cap 300 Laws of Kenya
    2. The applicant was charged alongside four other namely:-
        a) Husein Zei.....2Nd Accused (A2)

b) Titus Kimutai.....3Rd Accused(A3)

c) Callen Nato .....4Th Accused (A4)

d) Victor Wanyama.....5Th Accused (A5)

3. This Honourbale Court issued an Order on 04/10/22 which effectively put the accused on her defence as well as her co -accused

4. The Criminal case pending for defence hearing before the trial court is one in which the charges preferred against the accused are fatally defective and the accused/applicant is at a loss as to how she will defend herself

5. The applicant filed comprehensive submissions on whether or not there was a case to answer but from the court's ruling, it appears that the submissions were never even considered

6. Issues of law had been raised which appeared to have been totally ignored

7. The applicant is now at a quandary as to how she will tender her defense in the light of totally defective charges

8. Though this application is filed by the 1st Accused the other accused persons since they were charged jointly are in the same predicament

9. The applicant case is coming up for defense hearing on 16/1/2023

10. The applicant prays that this Honourable Court kindly revise the order of the Learned trail Magistrate delivered on 04/10/22 and substitute therewith an order acquitting the accused applicant.

11. Count 1 referred to destruction that is alleged to have occurred in a railway station but the particulars of the offence and the evidence tendered are not in line with the statement of offence

12. Count 2 is with regard to a repealed statute that was no longer in operation as at the time of the alleged offence

13. It is in the interests of justice that the revision application be allowed and the accused/applicant be acquitted.

3. The facts of the case were that the Applicant was facing trial on the indictment base on the information as preferred by the office of the Director of Public Prosecution under article 157 (6) (A) (B) and (C) of the constitution. As the Applicant pleaded not guilty to all the counts in the charge sheet it was the duty of the prosecution to prof the elements of the offences beyond reasonable doubt. That is the spirit of the *constitution* in article 2(A) which provides as follows:

4. That the accused person has a right be presumed innocent until the contrary is proved. It is that duty which the prescription set out to discharge adducing evidence from the 6th witnesses as provided for under section 1071 of the *Evidence Act*. It is however clear from the record that at the close of the prosecution case the accused person was placed on his defence on October 4, 2022. This is the order upon which the grievance on revision is being pursued by the applicant.

Determination

5. It is necessary perhaps to start with the very article 165 (6) and (7) of the *constitution* which donates the power to this court on such matters as follows:

(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 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.

6. This controversy is also underpinned in section 362, 364, and 382 of the *Criminal Procedure Code*. The object of revisional jurisdiction under section 362 of the code is to set right the patent, mistake, error omission, of jurisdiction or law committed by the lower court or tribunal. It is also a jurisdiction which is usually involved where the decision under scrutiny is grossly erroneous, wrong or issued ultra-vires , or the findings was against the evidence, standard or probative material presented by the prosecution was ignored all together by the learned trial magistrate. In the persuasive case of *Amit Kapoor v Ramesh Chander* [2012] 9 SCC 460 (para 18) " the Hon'ble Supreme Court, in the case noted below, has ruled thus : "Normally, revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases. The revisional jurisdiction can be exercised to prevent abuse of process of court or to secure the ends of justice. Further the court in *Girish Kumar Suneja v CBI*, AIR 2017 SC 3620 to state as follows:

> "A revision against an interlocutory order should be dismissed in limine at threshold: A revisional court is under no obligation to entertain a revision petition against an interlocutory order. Such a revision petition can be rejected at threshold. If the revisional court is inclined to accept revision petition, it can do so only against a final order or an intermediate order, namely, an order which if set aside, would result in culmination of proceedings.
>
> Criminal law is a very special form of societal regulation for it seeks to express our society's collective disapprobation of certain Acts and omissions. From this comment it suggests that the court's role is not to second guess government policy to punish crime for those found culpable. The sanctity of revisional jurisdiction is to keep tribunals and subordinate courts within the boundaries of the constitution and statute law See the case of "Joseph Nduvi Mbuvi v Republic [2019] eKLR and Nyakundi J in Prosecutor v Stephen Lesinko [2018]eKLR"

7. I have perused the notice of motion and the only evidence adduced by the applicant together with the trial court record. Apart from stating that the charge sheet in which the applicant was placed on her defence to answer was defective, on the basis of the law this court has not been told how that order prejudices fair trial rights under article 50 of the *Constitution*. Be it as it may this court has no jurisdiction at this stage to delve int the defects in the particulars of the offence as charged. That fundamental criticism on the wording creating the offence in question however vague it may be is not within the boundary of the court to stop its application against the applicant. In terms of the governing provisions on revisionary jurisdiction the canons of illegality, irregularity, incorrectness, and unjustness, or impropriety must be given their purposive meaning so as not to occasion an injustice to the due process clauses guaranteed under article 50 of the *Constitution*.

8. In this case it can be said that there is no significant breach of intra-vires or ultra-vires jurisdiction by the learned trial magistrate in exercising his judicial function under article 50 (1) of the Constitution.

This court revisionary jurisdiction had not ripened as submitted by learned counsel for the applicant. The principal goal of the magistrate's court is to receive evidence against an accused person who is in contravention of the law against the state or society so that genuine issues and material facts can be distilled to disaproof his or her innocence or show existence of essential elements of the offence to secure conviction. (See section 107 (1) and 108 of the *Evidence Act*.)

9. The main concern as whether the trial magistrate exercised his discretion wrongly or rightly in placing the accused on her defence as of now is moot. Faced as I am here with an order from a court of competent jurisdiction, what constitutes an infringement of fundamental rights to a fair trial under Article 50 of the constitution remains in the unknown horizon. Given the courts power to make an order that is just and equitable in terms of article 50 of the *Constitution* and the provisions of the Criminal Procedure Code on trials before magistrate's court the revision so presented stands on sinking sand. In my view this court must adopt a perspective where it is in the interest of justice to do so by declining an invitation to interfere with the discretion of the trial court so expressly provided for in the Criminal Procedure Code. For reasons that I have stated the motion in terms of section 362 and 364 of the Code is lost. As indicated above the trial court to proceed in earnest to adjudicate the criminal proceedings on a priority basis.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRYARY 2023

.....

R. NYAKUNDI

JUDGE