Muia v Republic (Criminal Revision E064 of 2022)
[2023] KEHC 856 (KLR) (Crim) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 856 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL REVISION E064 OF 2022

GL NZIOKA, J

FEBRUARY 9, 2023

BETWEEN

ROY MUNYAO MUIA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The ruling herein relates to a notice of motion application dated February 22, 2022, brought under the provisions of sections 362 and 364 of the C*riminal Procedure Code*. The applicant is seeking for orders that: -

    a. The Honourable court be pleased to call for and examine the record of Honourable Magistrate in Milimani MCTR E2575/2021 Republic Vs Roy Munyao Muia for purposes of satisfying itself as to the correctness, legality, propriety of the proceedings therein and the orders of the court issued on March 15, 2022 that the applicant had a case to answer.

    b. The costs of this application be provided for.

2. The application is supported by the grounds on the face of it the affidavit sworn on March 22, 2022 by the applicant wherein he avers that he was arraigned in the Chief Magistrate's Court on April 26, 2021, vide Milimani MCTR E2575 of 2021, charged with the offence of careless driving contrary to section 49(1) of the *Traffic Act* (cap 403), of the Laws of Kenya.

3. That he pleaded not guilty and the case proceeded for hearing. At the end of the prosecution case on February 14, 2022, the trial court gave its ruling on a case to answer on March 15, 2022, and held that he had a case to answer and placed him on his defence.

4. However, he avers that by the Traffic (Amendment) (No. 2) Act, the offence of careless driving was deleted and substituted it with the offence of; driving without due care and attention. Thus, the charge sheet is defective, in that the offence he is charged with does not exist in law.

5. The applicant further states that, in the given circumstance his right to fair hearing has been grossly infracted and is prejudiced. He reiterates that, any proceedings and/or orders couched on a defective charge sheet are also defective and ought to be quashed and or set aside ex-debito justiae.

6. The Respondent did not file any formal response to the application. However, the application was disposed of by filing of submissions. The applicant argued that, he is not questioning the merits of the ruling by the trial court but rather the regularity of the proceedings that led to the said ruling and the correctness, legality or propriety thereof. Hence he has properly invoked the court's revisionary jurisdiction pursuant to section 362 and 364 of the *Criminal Procedure Code*.

7. That the applicant relied on the case of *Joseph Lendrix Waswa v Republic* [2020] eKLR where the Supreme Court of Kenya, explained the exceptional circumstances where an appeal on an interlocutory decision may be sparingly allowed.

8. That an individual should not be charged and/or convicted for an offence not known in law and relied on the case of *B N D vs Republic* [2017] eKLR where the court stated that the test for a defective charge sheet is whether the accused was charged with an offence known in law. Further, reliance was placed on the case of *Peter Nguu v Republic* [2021] eKLR where the court faced with similar facts in overturning the conviction, cited the Court of Appeal decision in *Henry O. Edwin v Republic* [2005] eKLR where it was held that where the appellant was charged under a non-existent provision the charge sheet was defective.

9. However, the respondent in it submissions dated; June 30, 2022 acceded that the charge of careless driving was amended by the Traffic (Amendment) (No. 2) Act and substituted it with the offence of driving without due care and attention.

10. However, the substantial elements of the offence were not amended as the amendment was occasioned by the fact that careless driving cannot be equated to driving without due care and attention. Further, the amendment was necessary because section 47 of the Act had an offence with similar elements as elements of careless driving.

11. The Respondent further conceded that the charge of careless driving is not supported by the particulars of the offence, which states that the applicant was driving without due care and attention.

12. That the timing of the application is premature as there is no provision in *the Constitution* and the *Criminal Procedure Code* for interlocutory criminal appeals and that article 50 (q) provide for a right of appeal or review to a higher court, while section 347 and 379 (1) of the *Criminal Procedure Code* allows appeals where a person has been convicted. Reliance was placed on the case of *Joseph Lendrix Waswa v Republic* (supra) where the Supreme Court stated that the right of appeal against interlocutory decision to a party in criminal trial should be deferred and await the final determination save for where exceptional circumstances may exist.

13. The respondent argued that the application before the court was interlocutory in nature and prayed that the court to dismiss it and advice the applicant to await conclusion and final orders of the trial court.

14. Having considered the application and note that, the same is anchored on sections 362 of the *Criminal Procedure Code* which states: -

> " 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."

15. However, the section should be read together with section 364 of the *Criminal Procedure Code* which 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 its 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 sections 354, 357 and 358, and may enhance the 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: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
>
> (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
>
> (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
>
> (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

16. Pursuant to the aforesaid, the court will only exercise its revisionary powers where, the impugned sentence is either incorrect, illegal or improper. The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

17. Therefore, in exercise of revision powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in; *Major S.S Khanna vs Brig* F.J Dillon 1964 AIR 497, 1964 SCR (4) 409).

18. The question is: Has the applicant properly invoked the revisionary power of the court taking into account the fact that, the impugned order relates to a decision that goes to the merit of the matter and at an interlocutory stage.

19. In that regard, it is noteworthy that, section 347 of the *Criminal Procedure Code* states that:-

> "(1) Save as is in this Part provided—
>
> (a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and
>
> (b) Repealed by Act No. 5 of 2003, s. 93.
>
> (2) An appeal to the High Court may be on a matter of fact as well as on a matter of law."

20. However, the only circumstance under which an appeal may lie in a criminal matter on a final decision at an interlocutory stage is where the accused is acquitted on a case to answer.

21. It also suffices to note that, an appeal differs from a revision in that, through an appeal the case is heard again by a different and superior court and may lead to a new decision, whereas in a revision, the High Court checks whether legal actions were followed and whether the court exercised regular jurisdiction. Therefore, an appeal is continuation of proceedings and involves examination of law and facts, while a revision checks jurisdiction and procedure followed to arrive at the impugned decision.

22. In the case of; *Joshua Njiri v Republic* [2017] eKLR the court had the following to say about revisionary powers of the High Court:

> "I see these two tier pronged approach aimed at only one strategic objective that of correcting miscarriage or failure of justice from such a tribunal or subordinate court. The revisionary powers and supervisory jurisdiction vested in the high court not only deals with jurisdictional issues but it also covers all situations where it appears there has been an error, mistake, illegality, impropriety, incorrectness or material in the merit of the case involving injustice. The only rider the applicant's complaint ought to be within the parameters of article 165 (6) and (7) of *the Constitution* and section 362 and 364 of the *Criminal Procedure Code*.
>
> In the present situation I am satisfied that though the applicant did not exercise his right of appeal the same did not affect the competency of the application under section 362 of the CPC.
>
> The high court has therefore the jurisdiction to supervise subordinate courts and tribunals to ensure quality control by reviewing and correcting errors, mistakes, illegalities for the fair administration of justice. However, in order to safeguard the integrity of the court process this power under Article 165 (6), (7) and section 362 of the CPC should be exercised only in rare cases to attain the interest of justice."

23. Be that as it were, the issue herein is not on the impugned ruling per se but the charge upon which it is based. Both parties have conceded that an applicant is charged with the offence of "careless driving" that does not exist under the law. So what is the legality of the ruling founded thereon?

24. It is settled law that an accused person can only be charged with an offence known in law as was held in the case of *Henry O. Edwin vs Republic* [2005] eKLR where the Court of Appeal stated that:

> " It is trite law that an accused person must be charged with an offence that is known to law. Particularizing the charge enables the accused person know the offence with which he is charged and the likely sentence that he would get should he be convicted. This is information that enables the accused person to adequately prepare his defense. We adopt with approval the sentiments of the High Court in Sigilani –vs Republic [2004] 2 KLR 480 where it was held that:_"The Principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead specific charge that he can understand. It will also enable the accused to prepare his defense."

We have looked at the Act. Section 5, the section under which the appellant was charged provides for "penalty for other acts connected to narcotic drugs etc." There is no section 5(b). The appellant was therefore charged under a non-existent provision of law. This renders the charge sheet fatally defective."

25. It is also a fact that where a charge is defective and/or the particulars of the charge are at variance with the charge, the entire proceedings are defective and therefore null and void. That is exactly the position herein. Therefore, the ruling rendered by the trial court on a case to answer is also null and void. I exercise the inherent power given to the court under section 362 and 364 of the *Criminal Procedure Code* and quash the entire proceedings in the subject matter in the trial court for being null and void.

26. However, it cannot go unnoticed that, the applicant is guilty of acquiescence in the nullity, the applicant took a plea on the defective charge and fully participated in the prosecution case and only came up with the application herein when put on his defence. This is quite unfortunate taking into account that, he is represented in the matter.

27. But even more despite the applicant raising the issue of defective charge in submissions on a case to answer the court did not address it before rendering its ruling. Similarly, the prosecution remained silent only to come and concede in this matter. What has happened is a waste of otherwise scarce resource in form of time, which is quite unfortunate. I say no more.

28. The upshot is that the proceeding in the lower or trial court are quashed as being null and void. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 9TH DAY OF FEBRUARY, 2023

GRACE L NZIOKA

JUDGE

In the presence of;

Mr. Ayieko for the Applicant

Mr. Kiragu for the Respondent

Ms Ogutu: Court Assistant