Republic v Kamau & another (Revision Case E115 of 2022)
[2023] KEHC 649 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEHC 649 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

REVISION CASE E115 OF 2022

LM NJUGUNA, J

FEBRUARY 1, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

LILIAN WANGARI KAMAU ..... 1ST RESPONDENT

ROBERT MACHARIA WAINANA ..... 2ND RESPONDENT

RULING

1. This Criminal Revision has been brought to this court by the applicant herein seeking for orders that;
   i. Spent.
   ii. Spent.
   iii. This Honourable court be pleased to exercise its discretion to call for and examine the record in Criminal Case No. 752 of 2020 (Republic v Lilian Wangari Kamau and Robert Macharia Wainaina) for purposes of satisfying itself on the correctness, legality and propriety of the findings and orders as well as the regularity of the proceedings giving rise thereto.
   iv. This Honorable Court to revise and set aside the order of September 7, 2022 and allow the state to supply the statement of the investigating officer.
   v. This Court issues any orders that it may deem fit.
2. The application is premised on the grounds on its face and its supported by the affidavit sworn by Faith Musoma.
3. The applicant's case is that the pre-trial disclosure was conducted and thereafter the matter proceeded for trial when two witnesses testified. That at this point, the applicant moved the court to supply the statement of the investigating officer which had not been supplied because the same was not within

the applicant's possession. It was the applicant's contention that the matter was still at its infancy stage and the application was made at the earliest opportunity and further, the witness whose statement was sought to be supplied had not testified and was not to testify on the material date. The applicant contended that sufficient reasons were tendered for failure to supply the same.

4. The respondents opposed the application by filing replying affidavits wherein they deponed that the trial in the lower court started way back in the year 2020 and wherein the initial trial court went on transfer after which, the matter started de novo before the current trial court. It was deposed that the trial court was kind enough and gave the parties herein another opportunity for pre-trial and thereafter the matter was set down for hearing. That the applicant served the respondents with all documents and statements of the witnesses but further admitted that it did not have the statement of the investigating officer as the same was not in the police file. It was contended that upon enquiry by the trial magistrate, the applicant noted the error and informed the court that the administration was pursuing sanctions against the said officer for the error.

5. The respondents deposed that the prosecution was aware of the error but proceeded to prosecute the case and, thus, for it to seek for the orders herein, the same is not only unfair but it also goes against the provision of the *constitution* as provided for under article 50(2). (c). That the attempt to introduce the statement by the investigating officer at this point is aimed at rectifying the loopholes that were clear in the prosecution's case and as such, the same will occasion a miscarriage of justice. In the end, this court was urged to dismiss the application herein.

6. The court gave directions on filing of submissions and all parties complied with the said directions.

7. The applicants submitted that the trial court misconstrued the continuous disclosure principle anchored in Article 50(2) (j) of the *Constitution* and erroneously rejected the applicants application to supply a witness statement. Additionally, it was submitted that the statement belonged to a crucial prosecution witness whose exclusion would seriously disadvantage the applicant. That the respondents would not, in any way, be prejudiced given that they have a recourse under Section 146 (4) of the *Evidence Act*. That though the respondents contended that the statement should have been provided by the prosecution at the pre-trial phase and the learned magistrate held the view that disclosure only applies to fresh evidence, there are numerous decisions which contrast this position and which are to the effect that disclosure of evidence is not a one off process but a continuous process throughout the trial. Reliance was placed on the cases of *Thuita Mwangi & 2 Others v Ethics & Anti-Corruption Commission and 3 Others* [2013] eKLR and *R v Ward* [1993] 2 ALL ER 537. The applicant thus prayed that this court allows the application herein.

8. Only the 2nd respondent filed his submissions. He contended that the applicant was given several chances at pre-trial to ensure that all statements had been supplied to the accused persons before the matter could proceed to trial. That it is clear that the trial had proceeded before another magistrate who went on transfer before the current trial court took over the matter and that several witnesses had testified; therefore, if the court allows the applicant to file the investigating officer's statement at this time, it will be tantamount to infringement of the 2nd respondent's rights. Reliance was placed on the cases of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] eKLR and *Republic v Charles Musyimi Maithya & 3 Others* [2022] eKLR. It was submitted therefore that, the applicant has failed to demonstrate any merit in the application for revision and the same ought to be dismissed.

9. I have considered the application before me and the replying affidavits. I have also considered the submissions by the parties herein and I form the view that the main issue for determination is whether the prayers sought by the applicant can issue.

10. The powers of the High court in revision are set out in Section 362 through to 366 of the *Criminal Procedure Code* (cap.75 of Laws of Kenya). Section 362 specifically provides that:

> " 362. 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".

11. What the High Court can do under its revisionary jurisdiction is stated under Section 364 of the *Criminal Procedure Code* Cap 75, which provides:

> " 364.
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> 1. 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 -
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> (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;
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> (b) in the case of any other order 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 had had an opportunity of being heard either personally or through 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.
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> 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 arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

12. It is thus clear from the above provisions that the High Court has wide powers in its exercise of revisionary jurisdiction.

13. This court has been called upon to invoke its discretion on whether or not to allow the prosecution to supply the statement of the investigating officer. The respondent in opposition has submitted that the applicant seeks to reopen the pre-trial by supplying the said statement while the applicant contends that the principle of disclosure of all material whether fresh or not is a continuous process throughout the trial.

14. Of importance to note is the fact that the keystone principle in determining whether the prosecution should be allowed to reopen its case or provide a witness statment is whether the accused will suffer any prejudice. In other words, will the same affect his or her defence in any way. A trial judge's exercise of discretion to permit the prosecution's case to be reopened and/or to provide the statement of a witness must be exercised judiciously and should be geared towards ensuring that the interest of justice is served.

15. Article 50(2) (j) of the *Constitution* guarantees the accused person the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. In *Dennis Edmond Apaa & Others v Ethics & Anti-Corruption Commission* [2012] eKLR the court held that: -

> " The words of Article 50(2) (j) that guarantee the right to be informed in advance cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused person 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 other rights to fair trial. Article 50(2) (c) guarantees the accused the right to have adequate facilities to prepare a defence. This means the duty is cast on the prosecution to disclose all evidence, trial materials 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/her defence. The obligation to disclose was a continuing one and was to be updated when additional information was received."
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> [Also see *Republic v Emilio Njoka Mwaniki* [2021] eKLR].

16. Further, considering the rights of the accused, the victim, and the society as a whole in a criminal trial is not only fair, pragmatic but also constitutionally viable and the same has been acknowledged in various jurisdictions. In *Attorney-General's Reference (No. 3 of 1999)* [2001] 2 AC 91 [118], the House of Lords dealing with a question of law involving the proper construction of Section 64(3B) of the Police and Criminal Evidence Act 1984. One of the issues that came up for consideration was fairness of a trial. Lord Steyn observed:

> " The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."
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> [Also see House of Lords decision in *R v H* [2004] 2 AC].

17. From the above decision, it is trite that a judge/court must protect the rights of all parties involved in criminal proceedings. There is a public interest in ensuring that trials are fair. This interest can be served by safeguarding the rights of the accused, the objectivity of the prosecution and, by acknowledging the victim's interest. The rights of the accused should be secured and fulfilled and so too, the public

interest. The rights of victims, properly understood, do not undermine those of the accused or the public interest and in fact, the true interrelationship of the three is complementary.

18. It is thus my considered view that as long as the defence is not forced to immediately proceed with the hearing of a case upon being served with a witness statement or a document and the court allows an adjournment so as to give the accused opportunity to prepare their defence, no prejudice is occasioned to the accused. In this case, the prosecution submitted that the matter was still at its infancy stage and the application was made at the earliest opportunity and further, the witness whose statement was sought to be supplied had not testified and was not to testify on the material date. Upon perusal of the record herein, the court notes that indeed the prosecution had intended to call ten witnesses and by the time the trial magistrate made the impugned ruling, seven witnesses had testified.

19. I note that the accused persons are facing the offence of conspiracy to defraud contrary to section 37 of the *Penal Code*. That the respondents herein allegedly defrauded members of the public by falsely pretending that they could help them secure employment at the Judicial Service of Kenya at Embu Law Courts. It is trite that this court has a higher duty to ensure that justice is delivered to both the accused and the members of the public who were allegedly defrauded their money and for that to happen, the court has a duty to ensure that all the relevant evidence is tendered in court so that the prosecution can prove its case to the required standards and equally ensure that the defence is allowed time to counter the said evidence.

20. Having in mind the reasons given by the prosecution, can the same lead this court into allowing the prayers sought herein?

21. It is my considered view that the prosecution's application to supply the witness statement is not meant to give the prosecution unfair advantage having in mind that the prosecution has not yet closed its case and it had previously registered with the court the challenges that it had faced in acquiring the said statement.

22. Further, I hold the view that no prejudice will be caused to the accused as the defence will also be granted an opportunity to cross examine the witness.

23. In this regard, the court is satisfied that in order to reach a fair determination, it is only fair and just that the prosecution is granted their application.

24. In the end, I find that the application has merits and the same is allowed as prayed.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF FEBRUARY, 2023.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the State