Republic v Kipkemoi (Criminal Revision E011 of 2024)
[2024] KEHC 12109 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12109 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDAMA RAVINE

CRIMINAL REVISION E011 OF 2024

RB NGETICH, J

OCTOBER 9, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

VINCENT BIRIR KIPKEMOI ..... RESPONDENT

RULING

1. The Applicant has moved this court vide an application dated 14th March,2024 brought under the provisions of Articles 50(2)(h) and 159(2)(a), 165 (6) and (7) of *the Constitution* of Kenya 2010, Sections 362 and 364 of the Criminal Procedure Code, Cap 75 Laws of Kenya seeking to revise ruling delivered on 5th March 2024 in Eldama Ravine Spm's Cr. No. E1390 of 2019 and E698 Republic vs Vincent Birir Kipkemoi disallowing the prosecution's application to have the accused undergo a mental assessment.

2. The application is premised on the following grounds:-

    a. That the accused person has all through his ongoing criminal trial in E1390 of 2019 and E698 of 2021 appeared mentally unstable in the eyes of a reasonable man.

    b. That the prosecution's application(s) to the Court for orders for the accused person to be subjected to Mental assessment have been twice denied by the trial Court.

    c. That the orders by the learned trial Magistrate were improper and incorrect and in violation of *the Constitution* of Kenya 2010, Article 50 on fair hearing and therefore it is fit for this court to exercise its revisionary powers.

    d. That no prejudice will be occasioned to the respondent whose rights the applicant is keen to uphold.

    e. That the application is made in good faith with no mischief whatsoever.

f. That it is in the interest of justice that the application is allowed in light of the nature of the case.

3. The Application is further supported by the Affidavit of Odero Vena, Prosecution Counsel. She further avers that she is in conduct of the matters in question being Criminal case No. E1390 OF 2021 and E698 of 2021 pending hearing and determination before Eldama Ravine Law Courts and in the above stated matters the respondent herein, Vincent Birir Kipkemoi has been charged with the offence of Malicious Damage to Property contrary to section 339(1) of the Penal Code.

4. That in both matters, the complainant is one Wilson Chepkonga and both matters have been proceeding for trial but during the trial, it has been obvious to the eyes of a reasonable man that the accused person appears mentally unfit and incapable of defending himself as he has continuously expressed himself during court proceeding by making statements that cannot be comprehended by a reasonable person.

5. That for this reason, the prosecution twice made an oral application for the accused person to be referred for mental assessment since it would be prejudicial to proceed with the hearing if indeed the accused is mentally unfit that the applications were made in good faith so as to assist in dispensing justice to both the victim and the accused and would occasion no delays and/or prejudice to both the complainant and accused person but the Court declined to allow the applications by the prosecution and ordered the trial to proceed and has subsequently placed the accused on his defence in E1390 of 2019.

6. That it is on the basis of the ruling made on 5th March 2024 that the prosecution is seeking a revision of rulings which were in their view incorrect, irregular and improper; and further submit that *the constitution* of Kenya 2010, Article 50 provides for the right of the accused to a fair hearing and sub article (2) thereof provides for the right of the accused to representation should the court determine the need.

7. Further that it is obvious in light of how the matters in question have proceeded that the accused does not understand the gravity and possible outcomes of the charges against him based on the content of his line of questioning and conduct displayed during his court addresses.

8. That as a gazetted prosecution counsel with delegated prosecution powers, she is required to perform her duties under set guidelines and / or policies including upholding the tenets of the Kenyan Constitution on the rights to a fair hearing and it is paramount for the Court to satisfy itself that the accused is mentally capable of defending himself against the charges levelled against him.

9. The prosecution counsel further urges this court to summon the respondent before this Court for purposes of making an independent physical assessment and for satisfying itself on whether the applicant's application has merit and that it will be largely prejudicial should the respondent be mentally unfit for trial to determine the matters in question more so if convicted and if respondent is found fit for trial, the prosecution will without any undue delay proceed with the case against the respondent.

10. In conclusion, the prosecution counsel urged this court to allow the application so as to uphold justice and to safeguard the rights of the respondent as a rightful measure having witnessed his demeanor and mannerisms during trial.

Response To Application

11. In response, the Respondent Vincent Birir Kipkemoi filed a replying affidavit where he avers that he is an adult of sound mind and sufficient mental capacity and that he is fully conversant with the facts and the motive behind this Application.

12. He avers that he has been accused by one Wilson Kipkonga and charged for replicate offences of Malicious damage of property in Eldama Ravine Criminal Case No 1390 of 2019 and E698 of 2021 but interestingly, the alleged property forms part of the estate of his late father Kimoi Chebyator and particularly his proposed portion and the basis of the twin charges arise from an elongated succession, acrimonious family feud and distribution of the Estate of his late father Kimoi Chebyator. He avers that he is not related with Wilson Chepkonga within any degree of consanguinity but he allegedly acquired property from his deceased brother even before the succession of his late father's Estate; that the said Wilson chepkonga is a Complainant in the two criminal cases and is an intermeddler and an opportunist who fraudulently trespassed into the estate of his late Father, erected structures and settled therein.

13. He further avers that the Complainant is aided and abated by his two brothers Billy Birir and Luka Birir who are witnesses in the two criminal cases and their only intention is to have him locked up to enable them proceed to administer his father's without his involvement. Further that the complainant had equally cited him and other beneficiaries to take out letters of administration and this prompted his two brothers to file a petition for grant of letters of administration in the estate so as to transfer part of the estate to the Complainant Wilson Kipkonga which together with other beneficiaries they vehemently objected to both the grant of letters of administration and alienation of their rightful inheritance.

14. He states that he was first arraigned in court on 19th June 2019 where he denied the charge and the trial has been proceeding without assistance of counsel until he was placed on his defence. That at the time of plea, he was presumed a sane person and no application for mental assessment was done neither has he raised defence of insanity to necessitate mental assessment but he is now at the verge of being adjudged a mad man and locked up at a mental facility at the president pleasure.

15. He avers that it was until 5th March 2024 that the prosecution deemed him a person of unstable mind and the court was not reasonable enough to decipher. He says it is an attempt by the prosecution to incapacitate him from prosecuting any matter in protection of the estate of his late father and argues that once he declines mental assessment, he should be presumed of normal mental state and was normal at the time the offence was allegedly committed and absence of the examination will not prejudice the prosecution case.

16. The respondent further avers that he has raised several complaints to police emanating from the trial proceedings, which include personal attacks on him and his family members, forgery and theft and no action has ever been taken; that he has been profiled and condemned as a mad man and has been outrightly denied justice on that basis alone; and now in an attempt to defeat the trial process and oust the proceedings in Eldama Ravine Criminal Cases No 1390 of 2019 and E698 of 2021, the Applicant herein tactfully filed the application dated 14th March 2024 and the mental assessment test is aimed at arriving at rendering him legally incapacitated.

17. He further avers that he is aware that the Learned Prosecutor herein as from 11th March 2024 unceremoniously ceased prosecuting matters before the trial court due to differences well known to her and the Court, matters which were publicly discussed by the Judicial Service Commission and it is clear that the application is two pronged fueled by malice, vendetta and bad faith; that the Applicant clearly want to settle scores and sadly, he is the pawn herein. He states that the application is prejudicial

and against his enshrined rights to fair trial and presumption of sanity and there is no illegality or impropriety committed by the trial court by affirming his sanity.

18. He further avers that the Applicant being aggrieved by the ruling issued on 5th March 2024 has an unfettered opportunity to an appeal and the premature revision is unjust and it is not in the interest of administration of justice for proceedings to be stayed pending this application.

Respondent's Submissions

19. The Respondent filed written submission and framed issues for consideration as follows: -

    a. Whether the proceedings, Ruling and order of 5th March 2024 issued by Hon R Koech SPM in Eldama Ravine Criminal Cases No 1390 of 2019 and E698 of 2021 are correct, legal, proper and regular.

    b. Whether the Respondent can be subjected to a Mandatory mental assessment.

    c. Whether the proceedings in Eldama Ravine Criminal Cases No 1390 of 2019 and E698 of 2021 should be stayed?

20. On the first issue, the respondent submits that failure to subject him to a mandatory mental assessment will prejudice his case and he should not be compelled by this honorable court to undergo a Compulsory Mental Assessment as this request was made at the defence stage and for the first time on 5th March 2024 (Close to 5 years since arraignment and plea taking).

21. The respondent conceded and submitted to the jurisdiction of the High Court in supervising the subordinate Courts. He relied on the case of *Andrew Kibet Cheruiyot & Another v Medical Practitioners and Dentist Board & 2 Others Petition No. 260 of 2013* and John Kipngeno Koech & 2 Others v Nakuru County Assembly & Others [2013] eKLR and submit that the purpose of this Court in supervisory proceedings is to satisfy itself as to the legality, propriety, correctness and/or regularity of the order in question and taking Cognizance that the Honorable Court has called for the Record, the scope of revision therefore is more restrictive in comparison with the application as couched and submit that the instant application is an appeal engineered through draftsmanship; that the Applicant is inviting the High Court to rehear the case on mental assessment and even evaluate the Respondent in person in totality and come with a decision on the merits. That courts have cautioned applicants for disguising a Revision as an Appeal and relied on the case of Joseph Nduvi Mbuvi V Republic (2019) eKLR.

22. The respondent argue that this court should address itself to whether substantial justice has been done or will be done if he is subjected to a Mandatory Mental assessment at the whims of the prosecution and this being discretionary power, the discretion should be exercised judiciously and fairly.

23. Counsel for the respondent further argue that it is noteworthy that the application does not disclose any provision of the law the trial court either misapplied or ignored. Section 11 of the Penal Code presumes all accused persons to be of sound mind until proven otherwise. That further Section 12 of the Penal Code provides for the defence of insanity which is qualified and only available for the accused person, so long as it can be proved that he was not of sound mind at the time of committing the crime. That it is noteworthy that the Respondent herein has been placed on his defence and he has not raised a defence of insanity; and absence of the examination will not prejudice the prosecution case. That in any event, the trial court has residual powers to inquire into the fact of unsoundness and relied on the case of Republic v Msuya Ngolo Lewis [2021] EKLR where the court declined the application to subject an accused person to mandatory medical examination.

24. On whether the proceedings in Eldama Ravine Criminal Cases No. 1390 of 2019 and E698 of 2021 should be stayed, counsel submit that an order for stay of proceedings, particularly stay of criminal proceedings is made sparingly and only in exceptional circumstances. That it can issue where it is demonstrated that the prosecution is actuated by malice and there is abuse of the process of the court and/or where such prosecution is instituted for an improper motive such as to harass and exert improper pressure upon the Respondent.

25. Further, this Court's revisionary jurisdiction includes ensuring that where the proceedings 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; and submit that this is not a suitable case for grant of order of stay of proceedings and it is factual that the trial in Eldama Ravine Criminal Cases No 1390 of 2019 and E698 of 2021 is proceeding and as such no one is prejudiced; and further, the Applicant being aggrieved by the ruling issued on 5th March 2024 has unfettered opportunity to an appeal, and the premature revision is unjust and not in the interest of administration of justice proceedings to be stayed.

26. In conclusion, applicants submit that the Application has been brought late in the day as an afterthought with the sole intention of arresting the proceedings and disenfranchising the defence and the proceedings of the trial Court and do not therefore meet the legal threshold for revision and grant of the discretionary orders sought. He urged this court to find that the application herein lacks merit and dismiss with costs to the Respondent.

Analysis And Determination

27. I have considered arguments herein and wish to consider whether the application meets the threshold for revision of ruling delivered by the trial court on 5th of march 2024 in Criminal case No. E1390 of 2021 and E698 of 2021 where he declined the prosecution's prayer to subject the accused/respondent to mental assessment.

28. Section 11 of the Penal Code provide as follows: -

> " Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved"

29. Section 12 of the Penal Code states that: -

> " A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission, he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission; but a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission".

30. From the foregoing, every accused person is presumed innocent unless the contrary is proved and from section 12 of penal code above a person with mental illness may be found criminally liable. I take note of the fact that in murder cases, accused persons are subjected to mental assessment before plea is taken. It is however not disputed that there is no legal provision for such mental assessment to be done but it

is a matter of practice than law. In the case of Republic v Lewis (Criminal Case E077 of 2021) [2021] KEHC 272 (KLR) the court held as follows:

> " The insistence that an accused be fit to stand trial arose out of a concern in the common law that, criminal trials be fairly conducted. The justifications for the requirement that the accused be fit to stand trial may be divided into four:

i. a recognition that it was fundamentally unfair to try an unfit accused;

ii. a recognition that it was inhumane to subject an unfit accused to trial and punishment;

iii. a perception that a trial of an unfit accused was comparable to the trial of an accused in absentia

iv. a procedure the legal system repudiated and a concern to avoid diminution of the public's respect for the dignity of the criminal justice process if unfit accused were subjected to trial and punishment."

1. From the foregoing mental status of an accused is important but it is done when the need arise and in respect to murder cases as observed above, it is done before arraignment as a matter of practice not law. The court has discretion to order for mental assessment during trial if the need arise to establish whether the accused knew whether what he was doing was wrong.

32. The court of appeal in the case of Leonard Mwangemi Munyasia - Vs- Republic (2015) eKLR, stated as follows: -

> " Considering, both section 12 aforesaid and the McNaughten Rules, in the given circumstances, the accused person will not be acquitted but under section 167 (1) (b) of the Criminal Procedure Code, he will be convicted and ordered to be detained during the President's pleasure, because of the insanity, where he requires treatment rather than punishment, hence detained as patients and not prisoners."

33. The Court of Appeal further pronounced itself as follows:

> " We are of the view that a court cannot, as the trial Judge in this matter did, assume without considering surrounding circumstances that the suspect was not suffering from mental disorder at the time the offence was committed. Thus, it is permissible for the court to rely on evidence from which it can form an opinion regarding the mental status of the accused person at the time when the crime was committed. Such evidence will be based on the immediate preceding or immediate succeeding or even the contemporaneous conduct of the accused person. There is also medical history of the accused person to be considered as the backdrop. What he avoided and what this court has warned against in the two decisions relied on by the Appellant's Advocate in this appeal is the likelihood of sentencing to death a person with mental disorder..."

34. In opposing prayer for mental assessment, the respondent clearly states that he does not wish to raise defence of mental insanity either during trial and at time of alleged offence. He argues that he has conducted trial without counsel upto defence stage and at no point during that process of trial was his mental status questioned.

35. There is no doubt that it is the duty of trial courts to inquire into issue of insanity if raised by defence or if it becomes apparent to court from the conduct of the accused in court.

36. I have perused the lower court record and confirmed that witnesses testified and the respondent personally cross-examined witnesses and no issue of insanity was raised during the hearing. Record show that the trial court ruled that the accused/Respondent has a case to answer and at the stage of defence hearing, the prosecution made application for his mental assessment. Even though the prosecution counsel aver that the respondent appeared unfit and incapable of defending himself, no such comments were made in proceedings during the prosecution hearing. A reading of the proceedings do not suggest that the respondent exhibited improper behavior. The trial court has had opportunity of observing conduct of the respondent from the time of plea to the hearing and close of prosecution's case. One wonders why the issue of insanity did not arise during plea taking and during hearing of prosecution case. If the respondent without assistance of counsel has proceeded to close of prosecution case, the question that arise is, what has prompted the necessity of inquiring into his mental status during defence hearing? In my view, the application may not have been made in good faith.

37. The trial court had opportunity to observe and note conduct suggesting impaired mental status if the same was demonstrated during prosecution hearing and exercise discretion to call for mental assessment. In the absence of such, there is no legal basis to compel the respondent to undergo mental assessment. The accused has clearly indicated that he does not wish to rely on defence of insanity and in view of the fact that the respondent/accused fully participated without counsel to defence stage and the trial court having not made any observation suggesting that he had mental disorder, the prayer for mental assessment is without merit.

38. From the foregoing, I do not see reason to interfere with ruling delivered on 5th March,2024 in Eldama Ravine Magistrate's Criminal Case No. E 1390 OF 2021 and E698 of 2021 and proceed to dismiss the application dated 14th March 2014.

Final Orders:-

1. I hereby decline to revise ruling delivered on 5th march 2024.
2. Hearing of Eldama Ravine criminal case number E1390 of 2021 and E698 of 2021 to proceed before the trial court.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 9TH DAY OF OCTOBER 2024.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Karanja, CA.

Mr. Chumo for the Applicant.

Respondent present.

Ms. Omari for State.