



IN THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL REVISION NO. E002 OF 2021

COSIMO ROSAFIA.....1ST APPLICANT

ELIAS KITI TENAR.....2ND APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

Coram: Justice Reuben Nyakundi

Mr. Alunga for State

Dogo Mwango Kayange & Co. Advocates

RULING

This is an application by the victim of the offence in a pending criminal case referred as case No. 319 of 2017 at Kilifi Senior Principal Magistrate's Court.

The applicant is seeking an order of this court under **Section 362 of the Criminal Procedure Code** for the first instance court to re-open the proceedings and thereafter admit the evidence of the investigating officer.

Background

In the pending trial at Kilifi Law Courts one **Rosafia Tenar** is facing two counts under the Penal Code, thus **Count 1** – conspiracy to defraud contrary to **section 317 of the Penal Code**. **Count 2** – forcible detainer contrary to **section 92 as read with section 36 of the Penal Code**.

In both indictments the author of the letter is listed as the complainant (victim) of the offence. In the court below all witnesses expected to testify in support of the prosecution had all given their respective testimonies save for the investigating officer.

On 24/11/2020 in spite of a vigorous attempt made by the prosecution counsel to adjourn the matter in order to procedure the said investigating officer, the trial court thought otherwise and declined the adjournment. That dismissal of an application for adjournment triggered the present application. The complainant is therefore aggrieved with that decision by the learned trial magistrate declining further adjournment.

Determination

The crucial issue upon which the determination of this application depends is whether, or not the applicant has shown sufficient reason to interfere with the decision of the trial court.

Revision under **section 362 of the Criminal Procedure Code** is the procedure used by the High Court to supervise the exercise of discretion by the subordinate courts. It is a means by which improper exercise of such power can be remedied to give effect to fair administration of justice. The court usually takes into account various factors to determine whether the subordinate court's decision or order is amenable to revision.

The critical question on those factors would be whether the subordinate court exercised a jurisdiction not vested in it by law or is stated to have neglected to exercise a jurisdiction so vested or is alleged to have acted in the exercise of its jurisdiction tainted with illegality or material irregularity.

In the present case the applicant has moved to this court dissatisfied that in the exercising jurisdiction vested in that court it acted with irregularly for not permitting a further adjournment to admit the evidence of an investigating officer.

In the letter by the complainant he feels aggrieved that the decision by the trial court to refuse an adjournment would prevent admission of the evidence by the investigating officer. From the record, first there was consultation on the issue and at time the prosecutor failed to give sufficient reasons for that adjournment.

In exercising discretion, I presume there are clearly certain matters which the learned trial magistrate took into account to manifest the decision. It is not lost upon this court that a magistrate presiding over a trial court occupies a noble position where he or she has a large measure of discretion as to the decision which he or she may reach in a particular case.

The threshold at which the High Court could find the inferior court or tribunal decision amenable to revisionary or review jurisdiction on the passage of irrationality, procedural impropriety or irregularity is found in the words of the court in **Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 – 410 – 411** thus:

“By “illegality, as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.”

By irrationality, I mean what can be now be succinctly referred to as “Wednesbury unreasonableness” (Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived

at it. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system...”

I have described the third head as “procedural impropriety” rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.”

Having considered the record primarily the trial court in my view was right in stamping its authority not to exercise discretion in favor of the prosecution. This was a case where no valid reasons were given in support of the adjournment. The delay in disposal of cases relating to criminal matters is significantly increasing arrears and the courts should not be held hostage by indolent parties for the matter. To reduce the amounting arrears in the trial courts and to secure speedy disposal of cases, certain steps have to be taken including refusal of adjournments on flimsy grounds.

In consonant with **Article 50 (2) (e) of the Constitution** the right for the trial to begin and be concluded without unreasonable delay was at stake in that trial of the accused. The act of adjournment contributes immensely to backlog of cases in our justice system. The motion is denied for lack of merit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF APRIL, 2021.

.....

R NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21(1) of the Civil Procedure Rules. (dogomwango@gmail.com)