REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL REVISION NO. 36 OF 2019

RICHARD KAI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Justice Reuben Nyakundi

Mr. Alenga for the State

The Applicant in person

RULING

The applicant brought this application against the respondent jointly and severally with the Senior Principal Magistrate Court at Kaloleni seeking various remedies as stated in the application. The applicant avers that the withdrawal order of the Sexual Offences Case Number 45 of 2018 and subsequent discharge of the accused was irregular.

The applicant contends in his application that as a person who has a direct sufficient interest in the matter is aggrieved by the decision of the Senior Resident Magistrate and the Director of Public Prosecutions whom he thinks, interfered or meddled with the sanctity of the proceedings.

Determination

The jurisdiction of the court on revisionary power is both donated by **Article 165 (6) and (7)** of the Constitution and **Section 362** of the Criminal Procedure Code.

In this regard, the High Court is vested with powers to call for the record of the subordinate court or tribunal to inquire into the legality, regularity, correctness or impropriety of the proceedings or order of the court.

In this context the position of the law is as stated in Black's Law Dictionary 8th Edition, defines **"an illegality as an act, that is not authorized by the law or state of not being legally authorized."**

An illuminating consideration of the concept of illegality is found in **Ajangote Patricia & 4 Others v Anthony General HCCRMc No. 303 of 2013** in which the court held as follows:

> **"When the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint, acting without jurisdiction or ultra-vires or contrary to the provisions of the law or its principles are instances of illegality."**

The principle is also well reflected in **Thugitho Festo v Nebbi Municipal Council (Arua) HCCRA No. 15 of 2017. The court held that:**

> **"An action or decision may be illegal on the basis that the public body has no power to take that action or decision or has acted beyond its powers."**

Similarly, the England courts in **Council of Civil Service (1985) AC 374 ALL ER 935** held the definition of irrationality to mean:

> **"A decision which is outrageous in defiance of logic or of accepted moral standards that no sensible person who has applied**

his mind to the question to the decided could have arrived at it. Whether the decision falls within the category is a question judges by their training and experience should be well-equipped to consider, it else there could be something wrong with our judicial system."

With that background where its alleged that in the course of the legal proceedings a decision made is legally flawed, the inferior court must answer one or more of the following three questions.

1) Did the court have jurisdiction to determine the issue?

2) If the answers yes, was anything gone wrong?

3) If the answer is once again yes? What did the court do about it?

The answer depends on a number of factors in a new constitutional dispensation. The aggrieved party can apply to the High Court and with its inherent supervisory jurisdiction over all inferior courts and tribunals to decide on the issue whether, the decision maker made an error to be remedied.

On revision, the court deals with interlocutory issues which also include errors arising during the process of adjudication. The types of errors amenable to revisionary jurisdiction include; taking into account of an irrelevant consideration, failing to take into account relevant matter, exercising power for an improper purpose or misapplied the relevant facts or made a mistake as to the decision with that background. It is clear to the court that certainly the issues raised in this matter on withdrawal would not meet the admissibility requirements under **Section 362 of the Criminal Procedure Code**.

My perception of the matter before me is informed by the elaborate principles elucidated elsewhere as to what constitutes illegality on the part of the decision maker. This means that the issue sought to be addressed by the revision is infact a contestation on the exercise of the functions and powers of the Office of the Director of Public Prosecutions under **Article 157 (7) and (8) of the Constitution** and the exercise of jurisdiction by the trial court under **Article 50(1) of the Constitution.**

Section 362 of the CPC on revision does not permit an application for revision filed against an order of adjournment exercised by the trial court, unless the applicant proves evidence of impropriety, irregularity, incorrectness or unjustness of the order. Further, that the power to decline adjournment was not in tandem with the proper exercise of discretion of the learned trial magistrate. That in either way would have an effect of finally disputing of the hearing and determination of the case. The test here is whether the inferior court being questioned by the applicant acted within its legal bounds. This is the only concern of the High Court revisionary and supervising jurisdiction powers under **section 362 of CPC and Article 165 (6) and (7) of the Constitution.**

In my considered view the trial court in issuing the order to decline adjournment so as to secure the investigating officer did not act illegally in the exercise of its jurisdiction. Therefore, the order is not amenable to revision.

Consequently, the application to interfere with the decision of the Magistrate Court at Kaloleni on 16/12/2018 is lost.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF APRIL, 2021

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Alenga for the State