REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL REVISION NO. E009 OF 2021

GEOFFREY GITONGA……..……APPLICANT

VERSUS

REPUBLIC……...…….RESPONDENT

RULING

1. Muthuri & Company Advocates who have the conduct of **Mavoko Senior Principal Magistrate's Court Criminal case Number 67 of 2020- Republic Vs Geoffrey Gitonga** has written a letter dated 22nd January, 2021 seeking the High Court to examine the proceedings before the Magistrate's court and satisfy itself as to the correctness, legality or propriety of findings by the trial magistrate and to order the reversal of the same namely staying the scheduled hearing for 18/2/2021 pending further orders and to order the case to start de novo before another magistrate and in the alternative, the witnesses be recalled for cross-examination but before another magistrate.

2. The genesis of the complaint as captured in the said letter inter alia; is that on the 25/1/2020 the applicant had a confrontation with one Erick Karengori Jacob who was his neighbour in Mlolongo where they both operated businesses; that the Applicant reported to Mlolongo Police Station vide O.B No. 66/25/1/2020; that on the same day as the Applicant was about receive treatment for injuries suffered, he was arrested and locked up at the said Police Station; that the Applicant was taken to Immaculate Hospital but he was not given the medical report as the police refused to give him; that on 6/2/2020, he was taken to Mavoko Court where he was charged with attempted murder contrary to section 220 (a) of the Penal Code; that the Applicant was in remand for seven months until 20/7/2020 when he got a surety; that the criminal case came for hearing on 6/8/2020 and again on 20/9/2020 but it did not proceed; the applicant was looking for money to hire an advocate and on 3/12/2020 his advocate applied for an adjournment on the following grounds:

a. That he wanted to get an extract of the O.B Number 66/25/1/2020 which the accused had made at Mlolongo Police Station.

b. That he wanted to get the medical records of the Accused from Immaculate Hospital where he was taken by police.

c. That he wanted to know why the accused person was not issued with P.3 from and pursue the matter till he was issued with one.

3. The applicant had hoped that the adjournment would be allowed to enable the Advocate cross-examine the complainant and his witnesses and generally prepare for the defence. Upon the refusal of the adjournment by the trial court, the applicant's advocate withdrew from acting and that the case proceeded with two witnesses testifying.

4. The applicant contends that the trial Court was biased against him in refusing the adjournment since it was the first application for adjournment by his advocate. Again the documents which the advocate wanted to get from Mlolongo Police Station were crucial to the hearing and eventual outcome of the case. The applicant also feels that the court did not consider the seriousness of the matter and the possible sentence in case of conviction.

5. The applicant now prays for the following orders:

a. That the hearing scheduled for 18/2/2020 be stayed pending further orders of this court.

b. The court file be recalled and the Honourable Judge do order for a trial to commence De novo before another Magistrate.

c. *Alternatively, the witness may be recalled* for a cross-examination but before another Magistrate.

6. The application for revision was opposed by the respondent who filed a replying affidavit sworn on17/2/2021 by Martin Mwongera who raised several grounds of objection inter-alia; that the accused person was charged with an offence of attempted murder with contrary to S. 220(a) of the Penal Code Cap 63 of the laws of Kenya; that the accused person was released on bond on 28th July,2020; that on 28/9/2020 the matter came up for the first hearing. The prosecution was ready to proceed with witnesses. The applicant requested for an adjournment to find legal representation; that on 26/10/2020 the matter was scheduled for hearing. The prosecution had three witnesses present in court. The Applicant sought an adjournment again to get legal representation; that on the 3/12/2020 the defence counsel came on record and sought for an adjournment; that the trial court declined the adjournment since the applicant had already been indulged by the court twice; that the defence counsel withdrew from acting for the applicant and the matter proceeded to hearing; that upon close scrutiny of the application, it seems to be ill-advised frivolous and abuse of the court process.

7. Learned counsels agreed to dispose the matter by way of written submissions. The applicant's submissions are dated 23.2.2021. The respondent opted to file grounds of opposition which is a reiteration of the averments in the replying affidavit. Learned counsel for the applicant submitted that the applicant's rights under article 50 have been violated as he was not accorded adequate time and facilities to prepare for his defence and to be represented by an advocate of his choice. Counsel added that even if he had withdrawn on 3.12.2020 the same is not a bar to acting for the applicant at any stage of the proceedings once engaged by the applicant. Finally, counsel indicated that they have now secured the needed documents and that the defence now request that the witnesses who have testified be recalled and the matter be heard by a different court as nobody will be prejudiced.

8. I have considered the applicant's request and the submissions presented as well as the lower court record. The issue for determination is whether the application for revision has merit. Upon receipt of the applicant's complaint, this court called for the lower court file in Mavoko Senior Principal Magistrate's court criminal case number 67 of 2020. In that case the accused had been charged with an offence of Attempted Murder contrary to section 220(a) of the Penal Code. The matter was to begin for hearing in earnest on the 28.9.2020 when the prosecution had three witnesses but the applicant sought for adjournment on the grounds that he was in the process of looking for a lawyer whereupon the trial court granted the applicant a last adjournment. The matter was then rescheduled to 3.12.2020 when the prosecution availed witnesses only for the applicant's counsel to apply for an adjournment which request was rejected by the trial court. The applicant's counsel then withdrew from acting for the applicant who duly cross-examined three witnesses at length. It appears the gist of the applicant's complaint revolves around the trial court's refusal to grant the applicant's counsel and adjournment and that he now seeks for the matter to start de novo before another court or in the alternative the witnesses who have testified be recalled for further cross-examination before a different court.

9. The enabling law for revision is under Article 165(6) and (7) of the constitution and section 362 as read together with section 364 of the Criminal Procedure Code. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the case. Reproduced as follows:

> ***"362.The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes 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.''***
>
> ***364. (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 the knowledge, the high court may;***
>
> > **……**
> >
> > ***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 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 written law creating the offence concerned.***
> >
> > **……;**
> >
> > ***(5). When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.''***

10. It is the contention of the applicant that a travesty of justice has been visited upon him as he was denied an adjournment. On the other hand, the respondent maintains that the applicant had been granted adjournments in the past with the preceding one being a last adjournment and hence the trial court did not err by rejecting the adjournment and directing the case to proceed.

11. After perusing the reasons advanced for and against the application and being cognizant that Article 50 of the constitution provides that everyone is entitled to the right to be heard and that the same constitution also provides for a fair hearing, I am at cross roads because it is evident that both parties were heard. In the case of **Evans vs Bartlam [1937] C 473 at 480**, the court stated that unless and until the court has pronounced a judgement upon the merits of the case or by consent of the parties, it is to have power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure. In the same case, Girvan J observed that there was no compelling reason to give a provisional view of a probable outcome meaning that at this point it serves no purpose to interfere with a matter that is still at its formative stages yet the applicant still has a chance to appeal against the final decision.

12. In **Hitila VS Uganda [2969] 1 E.A. 219**, the Court of Appeal of Uganda held that in exercising its power of revision the High Court could use its wide powers in any proceedings in which it appeared that an error material to the merits of the case or involving a miscarriage

of justice had occurred. It was further held that the Court could do so in any proceedings where it appeared from any record that had been called for by the Court, or which had been reported *for orders, or in any proceedings which had otherwise been brought to its notice.*

13. This means that revision is not a call to superintend the subordinate courts but to address an error material to the merits of the case.

14. Was there an error material to the merits of the case? The Alaska Supreme Court in Re Curda, 49 P.3d 255, 261 held as follows*:*

> ***"All judges make legal errors. Sometimes this is because legal principles are unclear. Other times the principles are clear, but whether they apply to a particular situation may not be. Whether a judge has made a legal error is frequently a question on which disinterested, legally trained people can reasonably disagree. And whether legal error has been committed is always a question that is determined after the fact, free from the exigencies present when the particular decision in question was made. Further, Judges must be able to rule in accordance with the law which they believe applies to the case before them, free from extraneous considerations of punishment or reward. (Emphasis added). This is the central value of judicial independence. That value is threatened when a judge confronted with a choice of how to rule-and judges are confronted with scores of such choices every day-must ask not "which is the best choice under the law as I understand it," but "which is the choice least likely to result in judicial discipline?"***

15. In addition, under the doctrine of the separation of powers, the ability of judges to exercise discretion is an aspect of judicial independence.

16. Judicial Independence is proved for under Article *160 (1) and (5) of the Constitution. It provides as follows;*

> ***(1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subjected to the control or direction of any person or authority.***
>
> ***(5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.***

16. **Australia Apple & Pear Marketing Board v Tonking (1942) 66 CLR 77** At Page 83, cited in Words & Phrases Legally Define Vol 2: D-J at page 496, stated that:

> ***"The term 'Judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a Judicial act seems to be an act done by a competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."***

17. Black's Law Dictionary, 9th ED at page 28 defines a judicial act as 'an act involving the exercise of judicial power.' Judicial power or authority on the other hand, as defined by *the same dictionary at page 924 as follows:*

> ***"The authority vested in courts and judges to hear and decide cases and to make binding judgements on them; the power to construe and apply the law when controversies arise over what has been done or not done under it."***

18. Judicial independence is not a privilege of the individual judicial officer. It is the responsibility imposed on each officer to enable him or her to adjudicate a dispute honestly and impartially on basis of the law and the evidence, without external pressure or influence and without fear of interference from any one. The core of the principle of judicial independence is the complete liberty of the judicial officer to hear and decide cases that come before the courts and no outsider be it government, individual or even another judicial officer should interfere with the way in which an officer conducts and makes a decision. **R vs Beauregard, SC of Canada, (1987) LCR (Constn) 180 at 188** per chief Dickson.

19. Judicial independence ought to be distinguished from judicial immunity. In Sirros v Moore, [1974] A11 ER 776, 781-782, Lord Denning expounded on the meaning of immunity as follows*:*

> ***"…it has been accepted in our law that no action is maintainable against a Judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all charitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a court or appeal or to apply for habeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the Judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."***

20. Because the judiciary is designed to be independent, judicial officers must have discretion in order for the legal system to function properly. Discretion refers to the power or right given to an individual to make decisions or act according to his/her own judgement. Judicial discretion is therefore the power of a judicial officer to make legal decisions based on his or her opinion but within general legal guidelines.

21. In Black's Law Dictionary 5th Edition, "judicial and legal discretion" is defined as "discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained." Judicial discretion does not therefore provide a license for a judge to merely act as he or he chooses.

22. Ideally, judicial decisions will involve minimal discretion as judges apply proven facts to the established law, and a case could be given to any judge and the results would be the same. However, legal issues are not always clearly defined as black and white, right and wrong. It is not possible issue that could come up in a given case. Therefore, judicial Officers must make many discretionary decisions *within each case that influence the outcome of the case or the legal recourse of the parties.*

23. The applicant beseeches this court to review the orders of the learned trial magistrate made on the 3.12.2020 declining to grant an adjournment and ordering the applicant to proceed with the hearing. The applicant also seeks that the case starts de novo before another court. I have seen the record of the proceedings of the relevant date and note that the trial magistrate pointed out that the applicant had been granted numerous adjournments in the past and that the prosecution had all along been availing witnesses. The trial magistrate felt that it was necessary to pursue a just, fair and expeditious disposal of the matter. Indeed, the applicant thereafter tackled all three witnesses availed by the prosecution. Learned counsel for the applicant confirms that the applicant has now secured the requisite documents and seeks to have the witnesses recalled for further cross-examination. The request for recall of witnesses should ordinarily be made before the trial court for consideration. It is noted that the applicant is yet to do so and that there is no evidence that such a request has been declined by the trial court and hence the revision sought in that regard appears to be premature. The applicant has also sought for the matter to be tried before another court. However, the applicant has not presented any cogent reasons why the trial magistrate should not continue with the matter. If the applicant's request is allowed, then the same will lead to a floodgate of applications by parties seeking to move from one court to another once they are not satisfied by the trial court's rulings and orders. Judicial officers must be given the latitude within which to exercise their judicial duties especially where no evidence of bias has been availed by a party. This state of affairs should not be encouraged as it will permit forum shopping. As the applicant has not availed any grounds of bias by the trial court, I am unable to find fault at the trial court as it duly exercised it discretion. I find no irregularity in the proceedings which were conducted on the 3.12.2020. The rights of the applicant under Article 50 of the constitution have not been violated or infringed. Suffice to add that the applicant's counsel has confirmed that the documents the defence had been seeking from the police have since been obtained and all they now need to do is to approach the trial court for recalling of the witnesses for further cross-examination if need be. The applicant's request for the case to start afresh ought to be made before the trial court which has powers to consider the same under the provisions of section 200 of the Criminal Procedure Code. As no such application has been made before the trial court, the Applicant's request is misplaced and lacks merit.

24. Finally, learned counsel for the Respondent has contended that the Applicant's counsel having withdrawn from acting for the applicant should be denied audience in the matter. I am not persuaded by the said objection for the simple reason that the applicant is entitled to re-appoint the same counsel to represent him in any matter if he so desires as it is part of his constitutional rights. That being the position, the respondent's objection must be rejected outrightly.

25. In view of the foregoing observations, it is my finding that the Applicant's application for revision lacks merit. The same is dismissed. The matter shall proceed before the same trial court.

It is so ordered.

Dated and delivered at **Machakos** this **13th** day of **May, 2021.**

D. K. Kemei

Judge