



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. CRIMINAL REVISION APPL. NO. E001 OF 2021

NEWTON MWITL.....ACCUSED/APPLICANT

-VERSUS-

REPUBLIC.....PROSECUTOR/RESPONDENT

R U L I N G

1. Before this court is the Notice of Motion application dated 9th March 2021. The application is brought under the provisions of **Article 47(1), 50(2)(q) of the Constitution of Kenya 2010 and Sections 362, 364 and 367 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya).**

2. The application is premised on the grounds **THAT:**

- a. The Applicant is charged with the offence of threatening to kill contrary to **Section 223(1) of the Penal Code.**
- b. The Honourable trial court was satisfied that the Applicant had a case to answer and he was put on his defence.
- c. On 27th August 2020, the Applicant stated that he would give sworn evidence and call four witnesses.
- d. On 14th December when the matter came up for the Applicant's defence hearing, the prosecution counsel raised an objection on the ground that they had not been supplied with the documents that the Applicant was intending to rely on.
- e. The Applicant was then stepped down to enable the Respondent to look at the documents the Applicant intended to rely on.
- f. The learned trial magistrate exercised his discretion incorrectly and improperly hence the need to revise the orders compelling the Applicant to supply the prosecution with evidence prior to his defence hearing.
- g. There is no provision in law requiring an accused person to disclose his evidence to the prosecution.

3. The application is supported by the Applicant's own affidavit which largely reiterates the above stated grounds. The Applicant thus prays for this court to exercise its revisionary powers and quash or revise the Ruling of the Honourable learned S. M. Nyaga issued on 14th December 2020.

4. The application is opposed by the Respondent. It is the Respondent's contention that they were ambushed with several vital documents and not given time to prepare. In their view, the Respondent submitted that the alleged ambush suppressed the essence of a fair trial.

5. From the material before this court, the submissions of the parties as well as the authorities, the main issue for determination is whether this court should exercise its supervisory jurisdiction and interfere with the impugned order issued by the lower court.

Analysis

6. **Section 362 of the Criminal Procedure Code** provides as follows:

“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.”

7. Section 367 of the *Criminal Procedure Code*, on the other hand, provides as hereunder:

When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

8. The case of **Joseph Nduvi Mbuvi v Republic [2019] eKLR** provides a persuasive authority on the revisionary jurisdiction of the High Court as provided under **section 362 of the *Criminal Procedure Code***. In that case, **Odunga, J.** opined as follows:

*“A strict reading of section 362 of the *Criminal Procedure Code*, however, does not expressly limit the High Court’s revisionary jurisdiction to final adjudication of the proceedings. The section talks of “any criminal proceedings”. “Any criminal proceedings” in my view includes interlocutory proceedings.*

In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with.”

9. However, Section 364 of the *Criminal Procedure Code* provides that:

“(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 -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

10. From the foregoing it is clear that the High Court cannot exercise revisionary jurisdiction in an order of acquittal. It may however exercise the said jurisdiction in case of a conviction or ***in any other order***. The High Court is therefore empowered to exercise supervisory discretion where no appeal lies from the order. The court will intervene through its revisionary powers in order to correct mistakes, illegalities and irregularities and/or to prevent the miscarriage of justice. Revisionary jurisdiction therefore exists in all orders whether interlocutory or final.

11. In this case, what falls for determination is whether the defence in a criminal trial can be obliged to disclose its documentary evidence upfront.

12. Article 50 of the **Kenyan Constitution** provides as hereunder:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. information shall be given in language that the person understands.

(3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.

(4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

(5) An accused person—

(a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—

(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and

(b) new and compelling evidence has become available.

(7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

(8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”

It can clearly be seen from this Article, the emphasis is on the right of “an accused person” to a fair trial. This protection is based on the right of an accused to be presumed innocent until proved guilty. The burden of proof lies on the prosecution and the accused never assumes any burden to prove his innocence.

13. In **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, the Court of Appeal held that:

“We start from the point that in each and every criminal prosecution, the burden of proof of guilt is invariably upon the prosecution and at no stage does that burden shift to an accused person whether the accused person be the meanest beggar on our streets, or Lord Delamere whose grandson the appellant is said to be. So if at the beginning of the trial, the Constitution obliges everybody to assume that an accused person is innocent, what case is he to disclose in advance? Mr. Tobiko's position appears to be that if the accused person chooses to give evidence and call witnesses then he ought to be able to disclose his case to the prosecution. That contention, however, ignores one basic distinction. The privileges, if we may so designate them, of the accused person are conferred on him by the Constitution. As soon as he is arrested, he shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged. Nobody is ever likely to arrest the Republic of Kenya and charge it with a criminal offence so that it

would require it to be informed of the nature of the offence against it. The question of reciprocity is, therefore, misplaced... Muga Apondi, J, appreciated that Parliament had not conferred on the prosecution the same rights as those conferred on accused persons. He, therefore, resorted to his inherent jurisdiction as a court and since he thought it would be convenient for the prosecution to have the same privileges as those of the accused person, the learned Judge would himself confer such powers on the prosecution through the exercise of his inherent jurisdiction. That approach by the learned Judge creates the dangerous theory that what is convenient and would expedite the disposal of a matter is lawful. The proposition ignores the fact that the rights of an accused person are considered to be so important that they are protected under section 77 of the Constitution. Against whom are those rights protected? The answer to the question must be obvious. The rights can only be protected against those who have the unlimited capacity and resources to deprive individual Kenyans of their life, liberty, security of the person, freedom of conscience, freedom of expression, of assembly and of association... It is the state who has the capacity to deprive individual Kenyans of their rights guaranteed by sections 70 to 82 inclusive of the Constitution... We would repeat these sentiments here to emphasize the point that the courts in the country in spite of their perceived previous failures, must now rigorously enforce and enforce against the state the fundamental rights and freedoms of the individual guaranteed by the Constitution. Those rights cannot and must not be allowed to be diluted by purported exercise of inherent powers by judicial officers allowing the state to claim reciprocal privileges. The state is the usual and obvious violator against whom protection is provided in the Constitution and it ought not to be allowed to claim the same privileges... In other words there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state. No statute gives the state such privileges, and the Constitution, wisely in our view, does not give the prosecutors such powers. They cannot be given through the inherent power of the court.”

14. Justice Ondunga while relying on **Joseph Nduvi Mbuvi v Republic (supra)**, on the above authority pronounced himself as follows:

“It is therefore clear that Article 50(2) only applies to the accused person. Accordingly, Article 50(2) of the Constitution which provides for right to be *informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence* can only inure to the benefit of the accused. The prosecution cannot therefore rely on the said provision as a basis for seeking that it be informed in advance of the evidence the accused intends to rely on and to have access to the same.”

15. The applicant herein has challenged the subject decision by the trial court on the ground that the defence has no reciprocal duty to disclose its case or supply the prosecution with its defence. The legal position is that it was wrong for the trial court to compel the Applicant to supply the prosecution with his documentary evidence as it was contrary to the rights of the accused to a fair trial as enshrined under **Article 50 of the Constitution** and would accession an injustice to the accused.

Conclusion

16. In view of the foregoing, I opine that the order issued by the trial court on 14th December 2020 in Marimanti was improper wrong and illegal. The right of an accused person to fair trial cannot be limited. Article 25© of the Constitution provides that- “Despite any other provision in this constitution, the following rights and fundamental freedoms shall not be limited- c) the right to a fair trial.” The order is only good for revision and setting aside. The said order is revised and altered with an order dismissing the prosecution’s/Respondent’s application to be supplied in advance with the evidence that the accused/applicant intends to rely on in his defence. This however does not take away the right of the prosecution to cross-examine the applicant based on the evidence tendered on oath.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 5TH DAY OF JULY 2021.

L. W. GITARI

JUDGE

5/7/2021

The ruling has been read out.

L.W. GITARI

JUDGE

5/7/2021