



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL REVISION NO. E007 OF 2021

BETWEEN

OMOLO NYANGAGA alias MICHAEL AGWAMBO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Application.

1. By a letter dated 15th February, 2021, the applicant asks this Court to exercise powers of revision in relation to two rulings by the trial Court in Mombasa Chief Magistrate's Criminal Case No. 503 of 2019-Republic v Jumbe Abdalla & another delivered on 29th October, 2020 and 10th February, 2021. The applicant relied on the provisions of section 362 of the Criminal Procedure Code, Cap 75 Laws of Kenya and Article 50 (2) (n) (i) of the Constitution of Kenya, 2010.

2. The applicant and Jumbe Abdalla Gwatana (deceased) were jointly charged with the offence of dealing in wildlife trophy of an endangered species without a permit or other lawful exemptions contrary to section 92 (2) of the Wildlife Conservation and Management Act, 2013 in Count I and being in possession of wildlife trophy of an endangered species without a permit or other lawful exemptions Contrary to section 92 (4) of the said Act in count II.

3. The applicant urged the Court to declare the trial Court's proceedings, decision to charge the applicant, and the subsequent prosecution of the applicant unlawful, illegal and unconstitutional. The Court was invited to revise the proceedings and make findings on the following: -

(1) Whether it was legal and lawful for the learned magistrate to entertain and continue entertaining prosecution and trial of the accused based on criminal offences created by a statute that has been declared unconstitutional by the High Court.

(2) Whether it was legal and lawful for the for the trial Court to try the accused base on offences created by a statute law miscellaneous amendment Act in view of the decisions of the Court of Appeal pronouncing the law that a miscellaneous amendment Act cannot create substantive provisions such as penal provisions but is to be restricted to minor errors or cosmetic amendments/changes to the law.

(3) Whether it was legal and proper for the learned magistrate to hold the view that a preliminary objection should only be raised at the earliest stage in the proceedings, a finding that was made *per incur am*.

(4) Whether it was legal and regular for the trial Court to make a finding as she did that the accused had a case to answer when it was abundantly clear from the defence written submissions that the prosecution had not proved an essential ingredient of the offences, to wit that the trophy exhibit in question was of an endangered species (elephant tusk) that is specified in the sixth schedule to the Act, or in the CITES as from time to time amended.

(5) Whether it was legal and regular for the trial Court to admit the prosecution's chain of movement and custody document with respect to the trophy exhibit in spite of the defence objections, and when the document was sought to be produced long after pre-trial had closed, and when the document was not in the prosecution list of exhibits and when almost all the prosecution witnesses had testified, and when the defence had already cross-examined these witnesses and when they had not referred to or identified any such document, a case that may not rule out the view that the prosecution were "manufacturing evidence" to displace an otherwise accrued defence- that recovery, possession and movement of the exhibit were not documented and therefore they may have been tampering or that the exhibit recovered may not be the exhibit that was eventually analyzed/tested; evidence casting serious doubts on the integrity of the exhibit.

(6) Whether it was legal and lawful for the trial Court to ignore or fail to take into account the written submissions of the defence dated 26th October, 2020, preliminary objection dated 5th November, 2020 and further written submissions dated 10th December, 2020 and decisions of the High Court and the Court of Appeal relied on by the defence before the trial Court on grounds 1-4 above-stated and which were binding on the learned magistrate.

4. The applicant seeks the following orders from this court: -

a) That there be a stay of the criminal case and proceedings of the trial Court (in view of the fact that the matter is coming up for defence hearing on 6th April, 2021) pending hearing and determination of this revision;

b) A declaration that the trial Court's proceedings, the charge sheet, the prosecution, trial and continued trial of the accused (2nd accused since 1st accused is deceased) is illegal, unlawful and unconstitutional in view of the above stated reasons;

c) An order quashing the prosecution's decision to charge and the entire criminal proceedings against the 2nd accused for reasons that the essential element of the charges was not proved and more importantly that the prosecution and the trial Court's proceedings were based on offences created by a law that has since been declared unconstitutional; and

d) The 2nd accused be acquitted of all the charges and set at liberty but this Honourable Court.

5. In response thereto, the Respondent filed a replying affidavit sworn by CPL Jackline Maiyo (*Kenya Wildlife Service investigation officer*) on 9th March, 2021.

6. The Respondent deposed that the revision application is scandalous, frivolous and vexatious as the same is an attempt to defeat justice as it seeks to revise the trial Court's decision placing the appellant on his defence.

7. It further deposed that the charges facing the applicant are as under the wildlife conservation and Management Act, 2013 as amended in 2019 through the Statute Law (Miscellaneous Amendments) Act, 2018. The respondent averred that the issue of the constitutionality of the Statute Law (Miscellaneous Amendments) Act, 2018 was re-litigated in Constitutional Petition No 284 of 2019 as consolidated with petition No. 353 of 2019 and the Court suspended the orders nullifying the impugned Act for a period of 9 months from the date of judgment that is 29th October, 2020, during which time the respondents in the said petition ought to have complied with the necessary procedure as under Article 110 (3) of the Constitution of Kenya, 2010

8. It was the respondents case that the issue of the constitutionality of the charges facing the applicant was raised before the trial Court and the trial magistrate held that the argument was without basis and placed the applicant on his defence. To date, the applicant has not appealed against the said decision. The respondent stated that the applicant has not demonstrated that his prosecution has been actuated by malice or any exceptional circumstances to warrant an order for stay of proceedings.

9. The Respondent contended that there is no error apparent, illegality or impropriety of the proceedings facing the applicant herein thus the revision application ought to be dismissed and the applicant to await the trial to come to its logical conclusion and raise the grounds on close of its defense.

Submissions.

10. That on 18th March, 2021, the Court gave directions that the application herein shall be canvassed by way of written submissions. The applicant's submissions were filed on 9th April, 2021 by the firm of Wamotsa Wangila Advocates, while the respondent's submissions were filed on 7th May, 2021 by the office of Director of Public Prosecutions.

11. Mr Wamotsa, learned Counsel for the applicant relied on section 362 and 364 of the Criminal Procedure Code in arguing that this Court has the jurisdiction to entertain the revision herein. He also relied on the case of **Joseph Nduyi Mbuvi v Republic** [2019] eKLR where Odunaga. J held that section 362 of the Criminal Procedure Code talks of any criminal proceedings which in my view includes interlocutory proceedings

12. Counsel further relied on the case of **Republic v Moses Kasaine Lenolkul & 10 others** [2020] eKLR where Justice Mumbi Ngugi held that the High Court should very sparingly entertain interlocutory appeals and applications for revision and that the exercise of such powers should be confined to checking the correctness, legality or propriety' of findings or orders of the lower Court, and only in circumstances where to fail to do so would lead to a derogation of the Constitutional protection accorded an accused person under Article 50 (2) of the Constitution.

13. Therefore, this Court has jurisdiction under Section 362 pf the Criminal Procedure Code to entertain an interlocutory application seeking a determination of 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.

14. Mr. Wamotsa submitted that it is only the nullification of the Statute Law (Miscellaneous Amendments) Act, 2018 that was suspended by the High Court in its decision in **The Senate of the Republic of Kenya & 4 others v The Speaker of the National Assembly & another Nairobi High Court Constitutional Petition No. 284 of 2019 consolidated with Constitutional Petition No. 353 of 2019**. Accordingly, the declaration of the Court declaring the Act unconstitutional was not suspended and whatever parliament may come up with during the period of suspension cannot apply retrospectively.

15. It was submitted by Mr. Wamotsa that the trial Court is acting unconstitutionally, illegally and unlawfully in proceeding with the criminal case when the Act has been declared unconstitutional by this Court. That the Statute Law (Miscellaneous Amendments) Act, 2018 could not legally and validly create substantive offences as it did under section 92 of the Act. Therefore, the applicant could not be legally charged or tried with the offences contained in the charge sheet.

16. Learned Counsel argued that the trial Court noted that the applicant should have raised his preliminary objection early during trial and proceeded to fix the case for defence hearing. In **Panfield Investments Ltd (New Eldoret Total Service Station Ltd) v Sisibo Luxury Shuttle Ltd** [2018] eKLR the Court held that a preliminary objection can be raised at any stage in the proceedings before judgment. Therefore, the trial Court could not on one hand find that it lacked merit (connoting that the Court considered the P.O) and on the other hand that it was raised late in the day (connoting that that the court did not consider it) thereby the orders being ambiguous.

17. Mr. Wamotsa invited this Court to not only invoke its revisionary jurisdiction but also its broad constitutional supervisory jurisdiction under Article 165 96) & (7) to ensure the fair administration of justice.

18. Ms. Karanja on the other hand submitted that the applicant was charged under the Wildlife Conservation and Management Act 2013 as amended in 2019 through the Statute Law (Miscellaneous Amendments) Act 2018 which Act is not unconstitutional. She further submitted that the issue of whether the Statute Law (Miscellaneous Amendments) Act 2018 has been declared unconstitutional cannot be the province of a revision application.

19. Learned Counsel argued that there is no apparent, illegality or impropriety of the proceedings facing the applicant to warrant the application herein. She submitted that the Court in **Constitutional and Human Rights Petition No. 353 of 2019** suspended the orders nullifying the impugned Act for a period of 9 months from 29th October, 2020 and this period has not lapsed. Ms. Karanja submitted that the orders sought by the applicant are meant to summarily conclude an ongoing criminal case without the rigors of an appeal, in any event, issues of retroactive application of a law or a decision of A Court ought to be left to the province of an appeal.

Analysis and Determination.

20. I have considered the applicant's application, the replying affidavit, and the written submissions by counsel in this matter. The issue for determination is whether the finding of the order of release by the trial court was rigged with illegality, irregularity, incorrectness or an error apparent to the law to warrant an application for revision.

21. 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.”

22. 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.”

23. A strict interpretation of section 362 of the **Criminal Procedure Code**, in my view does not limit the revisionary jurisdiction of the High Court to a finding sentence or order. The Court can also deal with interlocutory proceedings. The above cited section enables 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.

24. **In admitting criminal revision applications, judicial officers have to do so with extreme caution in order to avoid instances where parties bring forth an appeal in disguise of a criminal revision. In Joseph Nduvi Mbuvi v Republic** [2019] eKLR the Court made the following observation;

*“In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin Mohd Jani and Another** [1996] 4 LRC 728 at 734, 735:*

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

25. The applicant contends that the proceedings before the trial Court are illegal and unconstitutional since the Statute Law

(Miscellaneous Amendments) Act, 2018 which introduced section 92 of the Wildlife Conservation and Management Act, was declared unconstitutional null and void by the High Court in Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) [2020] eKLR. The applicant filed a preliminary objection before the trial Court on this ground and in its ruling the trial Court held that it lacks merit and dismissed the same.

26. The prosecution on the other hand argued that as much as the Statute Law (Miscellaneous Amendments) Act, 2018 was declared unconstitutional, the high Court suspended the nullification for a period of 9 months as from 29th October, 2020 when the said judgment was delivered. I have had an opportunity to go through the judgment in Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties) (supra) and the Court held as hereunder: -

“We are properly guided, and in the circumstances of this case we shall suspend our orders nullifying the impugned Acts for a period of 9 months from the date of this judgment within which period the respondents ought to have complied with the provisions of Article 110 (3) of the Constitution and regularized these Acts and in default they stand nullified. Orders accordingly.”

27. In light of the foregoing, it is evident that the Court suspended its orders nullifying the impugned acts for a period of nine months from the date of judgment. That since the judgment was delivered on 29th October, 2020, the nine months’ period is expected to lapse on 29th July, 2021. This in effect means that at the time the applicant was charged before the trial Court to date, the Statute Law (Miscellaneous Amendments) Act, 2018 was and is still in effect since the 9 months’ suspension period has not yet lapsed.

28. The Supreme Court in Suleiman Said Shahbal v Independent Electoral and Boundaries Commission & 3 others [2014] eKLR held that: -

“The lesson of comparative jurisprudence is that, while a declaration of nullity for inconsistency with the Constitution annuls statute law, it does not necessarily entail that all acts previously done are invalidated. In general, laws have a prospective outlook; and prior to annulling-declarations, situations otherwise entirely legitimate may have come to pass, and differing rights may have accrued that have acquired entrenched foundations. This gives justification for a case-by-case approach to time-span effect, in relation to nullification of statute law. In this regard, the Court has a scope for discretion, including: the suspension of invalidity; and the application of “prospective annulment”. Such recourses, however, are for sparing, and most judicious application – in view of the overriding principle of the supremacy of the Constitution, as it stands.

29. The Supreme Court was very clear that laws have a prospective outlook. Therefore, in the event the respondents in the case of Senate of the Republic of Kenya & 4 others (supra) do not comply with the with the provisions of Article 110 (3) of the Constitution and regularized the impugned Acts thus rendering the said Acts unconstitutional, null and void, it does not automatically mean that the nullification shall apply retrospectively thus rendering the charges against the applicant unconstitutional.

30. In my view, the nullification shall take effect from 29th October, 2020 and will have no impact on the charges facing the applicant herein before the trial Court since it shall be prospective in nature. On the issue of recovery, possession and movement of the exhibit, the parties did not submit on it therefore this Court shall not comment on the same. On whether the prosecution had proved the essential ingredient of the offences to wit that the trophy exhibit in question was of an endangered species (elephant tusks), This Court finds, that the trial Magistrate correctly exercised her discretion and placed the applicant on his defence after finding that the prosecution had established a prima facie case against him and the applicant had a case to answer.

31. In light of the above, I find that there is no compelling and/or sufficient reasons to warrant this Court to interfere with the trial Court’s decision since the same is not based on any illegality and/or impropriety. To that end, the application dated 15th February, 2021 is hereby dismissed. There shall be no orders as to costs.

It is so ordered.

Dated, signed and delivered in Open Court /online through MS TEAMS, this 22nd day of July, 2021

HON. LADY JUSTICE A. ONG’INJO

JUDGE

In presence of:

Mr. Wamotsa Advocate for Applicant

Mr. Karanja for state for Respondent

Ogwel – Court Asst.

COURT

Certified copies of proceedings and ruling to be supplied on payment of copying charges.

Mention on 5/08/2021 before trial Magistrate.

Hon. Lady Justice A. Ong'ino

Judge