



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MAKUENI**

**HCCR REV. NO. 5 OF 2020**

**PETER MUTUA MUSILA..... ACCUSED**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RULING**

1. This miscellaneous matter has been pending in this court since March 2020. I see an application by way of Notice of Motion dated 2<sup>nd</sup> March 2020, but none of the counsel, not even the applicant's counsel referred to that application in their written submissions. Instead each of the counsel has given various stages of the progress of a criminal case pending finalization in the magistrates' court at Kilungu – Criminal Case No. 256 of 2019.

2. I however, presume that the application by way of Notice of Motion dated 2<sup>nd</sup> March 2020 brought under Article 165 (6) (7) of the Constitution and section 362 of the Criminal Procedure Code, is the application I am requested to consider and determine.

3. The said application seeks the following orders:-

***1) That the proceedings in the original PM's Criminal Case No. 256 of 2019 at Kilungu Law Courts be stayed pending determination of this application.***

***2) That the court file together with the copy of the proceedings in the Principal Magistrates' Court at Kilungu Criminal Case No. 256 of 2019 be called to the High Court of Kenya at Makueni for examination and revision.***

***3) That this honourable court be pleased to examine and revise the order issued by the Magistrate E. Muiru (P.M) at Kilungu putting the applicant on his defence and substitute with a no case to answer and accordingly acquit the applicant of the charges of traffic (sic) of narcotic drugs and being in possession of narcotic drugs.***

***4) That the original case be terminated.***

***5) Costs of the application be in the cause.***

4. The application is supported by an affidavit sworn on 2<sup>nd</sup> March 2020 by Peter Mutua Musila the applicant.

5. The application is opposed through a replying affidavit sworn by James Kihara – Prosecuting Counsel on 29<sup>th</sup> June 2020.

6. The applicant's counsel Mr. Okinyo Isaac filed written submissions on 1<sup>st</sup> September 2020, while the Director of Public Prosecutions filed written submissions on 16<sup>th</sup> September 2020. Counsel on both sides also highlighted the written submissions before me.

7. In the oral highlights, Mr. Okinyo for the applicant emphasized that the accused person cannot be put on his defence to a charge he did not plead to as had been decided by the trial magistrate herein. According to counsel, the accused herein was charged with possession of narcotic drugs but at the close of the prosecution case, the charge was wrongly said to be for trafficking which the accused had not pleaded to. Counsel also submitted that the accused should not have been put on his defence in a case where the prosecution had raised an issue regarding some of the witnesses and even requested an adjournment to carry out enquiries on the authenticity of witnesses, but later failed to serve the court with the report concerning the authenticity of the said witnesses.

8. According to Mr. Okinyo, the ruling of the trial court herein putting the accused on his defence raised constitutional issues on the functions of the court *visavis* the powers of the Director of Public Prosecutions. Counsel also felt that the charge of possession of narcotics as framed did not comply with the provisions of sections 74 of the relevant Act, and urged this court to exercise its constitutional and statutory power to review the trial court orders, this court being the supervisor of the magistrates' court.

9. Ms. Gakumu the Senior Principal Prosecuting Counsel in response, submitted that though the accused person initially pleaded not guilty to a charge of possession of narcotic drugs, on 1<sup>st</sup> April 2019 fresh charges were substituted and read to him, and that he pleaded to the new charge. Thus the charge before the trial court was proper.

10. With regard to the adjournment sought by the Prosecution to enquire into the authenticity of witnesses, counsel submitted that the trial court merely relied on evidence on record to put the accused on his defence, and not purported evidence not tendered in court. Thus in counsel's view the magistrate was correct in putting the accused person on his defence as the accused person and his counsel had the opportunity to cross-examine the prosecution witnesses before the trial court. In any case, neither the court nor the defence was entitled to be privy to internal discussions between the Director of Public Prosecutions and prospective witnesses.

1. The Prosecuting Counsel thus urged the court to find that the magistrate was correct in putting the accused person on his defence.

12. This is an application for review of the magistrate's orders or proceedings in a criminal case. I have considered the application and the written and oral submissions of the counsel and the law. The supervisory powers of the High Court in criminal cases are governed by the provisions of Article 165(6) and (7) of the Constitution of Kenya 2010, which provides as follows:-

***165(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) for the purposes of clause (6), the High Court may call the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

13. This being a criminal case, the powers of this court to review proceedings and decisions of magistrates' courts are also governed by section 362 through to section 367 of the Criminal Procedure Code (cap.75). In particular sections 362 and 365 provide as follows:-

***362. The High Court may call for and examine the records 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 the proceedings of any subordinate court.***

***165. No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision.***

***Provided that the court may when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364(2).***

14. As stated above, this court allowed counsel for the applicant and the Prosecuting Counsel for the Director of Public Prosecutions to make written and oral submissions before this court.

15. Having perused the trial court record, I find that indeed, the accused person (*applicant*) was initially charged with possession of bhong contrary to section 3(1) (a) as read with section 3(2)(b) of the Narcotic Drugs and Psychotropic Substances Act. He pleaded not guilty to the charge and the hearing was fixed for 27/5/2019. However, from the record, on 1<sup>st</sup> April 2019, the charge was amended and substituted by two charges, one for trafficking narcotic drugs contrary to section 3(2)(b) of the Narcotic Drugs and Psychotropic Substances Act, and one count for possession of narcotic drugs. He pleaded not guilty to both charges. Later on 12/4/2019 Mr. Okinyo came on record for the accused person. Thus it cannot be said, as alleged by defence counsel that the accused was not aware or did not plead to a charge of trafficking of narcotic drugs. In any event, Mr. Okinyo on 16/7/2019 said that he had not been served with the amended charge, and the case did start *de-novo*. Thus it cannot be said that the substituted charge of trafficking was not read to the accused and pleaded to by him. The substituted charge was read and pleaded to by the accused person before Mr. Okinyo came on record.

16. With regard to prosecution enquiries on authenticity of witnesses, the Director of Public Prosecutions in my view, has absolute discretion to call the witnesses he wants to call and to determine which witnesses to rely on. In this regard, the powers of the Director of Public Prosecutions in commencing and terminating criminal proceedings and calling witnesses are covered by the provisions of Article 157 of the Constitution of Kenya. In my view, unless the Director of Public prosecutions declares a certain witness who is testifying in court to be a hostile witness, the court cannot be involved in determining the authenticity of prosecution witnesses. In any case, the accused, who was represented by counsel herein was entitled to cross-examine all the prosecution witnesses who testified, and could not be adversely affected by witnesses who did not testify.

17. With regard to the trial court putting the accused person on his defence, that is statutory power of a trial court, in that at the close of the prosecution case, the trial court has to consider whether or not the prosecution has established a prima facie case against the accused person, not whether the prosecution has established a case beyond any reasonable doubt – see **Ramanlal Bhatt –vs- R (1957) E.A.** even after being put on his defence, an accused person has three options under section 211 of the Criminal Procedure Code in conducting his or her defence. One of the options is merely to keep quiet – if he or she thinks that the prosecution evidence on record is hopeless in proving the

charges. He cannot be prejudiced by merely being put on his defence, unless there are other special reasons which have not been raised herein.

18. I find no error of procedure or decision made by the trial court herein that can justify a review of the trial court's proceedings and orders. I decline to exercise this court's revision powers and order that the trial court proceeds with the criminal case hearing to its conclusion. The Deputy Registrar will return the trial court file to Kilungu Court for further progress of the criminal case.

**DELIVERED, SIGNED & DATED THIS 21ST DAY OF JULY 2021, IN OPEN COURT AT MAKUENI.**

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**GEORGE DULU**

**JUDGE**