REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION MILIMANI

MISCELLANEOUS CRIMINAL REVISION NO 231 OF 2019

JOHN MUTUGA KIMUNYI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The subject of this ruling is a notice of motion application dated; 3rd May 2019, premised on the provisions of; sections 202, 362, and 364 of the Criminal Procedure Code, (cap 75), Laws of Kenya, Articles; 25, 27 and 50 of the Constitution of Kenya, 2010 and section 72 of the interpretation of General Provisions Act, (cap 2), Laws of Kenya and all the enabling provisions of the law.

2. The applicant is seeking for orders as here below reproduced:

a) That, the Honourable court do issue an order staying proceedings in Milimani MCCR 1413 of 2018, pending hearing and determination of this application;

b) That, the Honourable court do exercise its discretion in revision of the ruling by, the Hon. SRM Ms C. M. Nzibe made on 25th of April 2019, wherein the said Magistrate refused to uphold nor consider the accused/applicant's objection to the prosecution application for adjournment.

c) That, the Hounourable court do exercise its discretion in revision of the ruling by the Hon. SRM. Ms C. M. Nzibe made on 25th of April and uphold the objection by the Applicant and acquit him on count one for non- attendance of the complainant on the said count.

3. The application is based on the grounds on the face of it and an affidavit of even date sworn by the applicant. He avers in a nutshell that, he was arraigned in the Chief Magistrate's Court at Milimani

Nairobi, on 25th July, 2018, charged vide Criminal Case No; 1413 of 2018, with the offences of; Stealing by servant contrary to section 281 of the Penal Code, (cap 63) Laws of Kenya, in count one and Stealing contrary to section 268 as read with section 275 of the Code in count two.

4. That, he pleaded not guilty to both counts and was released on cash bail of; Kshs 50,000. On 10th and 20th August 2018, the prosecution confirmed during the pre-trial sessions that, they were ready to proceed with the case, and sought for a hearing date. The case was then set for hearing on; 23rd August, 1st October, 15th November 2018 and 11th February and 25th April 2019.

5. That, on all these occasions, the complainant did not attend court due to an alleged emergency, that required him to leave the country. However, according to the applicant, as much as the complainant travelled out of the country, he had no emergency, in that, he usually travels out of the country for business and leisure. The applicant thus avers that, the complainant is out to frustrate him and unduly delay the

hearing of the case.

6. Further, a sum of Kshs 36,000 was deducted from his salary for the month of May 2018, which sum forms the subject matter of count one of the charges. Therefore, the charges in relation to the same are malicious and informed by a case; *ELRC No. 60 of 2018*, which he filed against the complainant at Kericho High Court. That, he resisted the pressure to withdraw that case as a pre-condition for withdrawal of the criminal charges herein.

7. Similarly, the reasons advanced by the prosecution that, they have not recorded other witness statements, is a delaying tactic as all statements were supplied at the pre-trial stage. He avers that, the delay herein violates his constitutional rights to have the trial conducted without unreasonable delay.

8. Further, the reason given by the prosecution to adjourn the case was not sufficient as the complainant was aware of the court appearance and there was no evidence to prove the alleged emergency. As such it is only fair that the objection raised be upheld.

9. The application was opposed by the Respondent vide grounds of opposition dated 22nd June, 2021, which states as follows:

a) That the application is bad in law and made in bad faith;

b) That the application does not raise any constitutional issue;

c) That the application is premature for consideration at this point in time;

d) That the application is misconceived as the Trial Magistrate acted within the law

e) That the applicant has not demonstrated existence of any error on the correctness, legality or propriety on the orders made by the Trial Magistrate

f) That the orders sought are discretionary and to that effect the appellant has failed to demonstrate that they are deserving of the court's discretion.

g) That the application is misconceived and an abuse of the court process

h) That the application lacks merit and the same should be dismissed in its entirety.

10. Subsequently, the application was disposed of by filing of submissions, which I have considered alongside all other materials placed before the court. I find that, some of the issues raised by the applicant, such as to whether he should be acquitted on count one, go to the merit of the case. However, this being an appellate court cannot pronounce itself on issues before the trial court.

11. In that case, the court will only consider the impugned ruling herein rendered on the 25th April, 2019, wherein, the applicant seeks for revision of the subject order. The application is premised on the provisions of; section 362 of the Criminal Procedure Code, which state 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"

12. Similarly, the applicant relies on the provisions of; section 364 of the Criminal Procedure Code state as follows:

"*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 his knowledge*

(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 person unless he has had an opportunity of

being heard either personally or by an advocate in his own defence."

13. It therefore follows that, for a decision of the subordinate court to be revised by the High Court based on the above provisions, the applicant must satisfy the court that, the subject decision is irregular, incorrect or lacks propriety.

14. In the instant case, I have considered the impugned ruling and I note that, first and foremost, the proceedings in the Criminal Case No. 1413 of 2018 were not annexed to the affidavit in support of the application. Further, when the applicant filed the "list of documents" dated 30th July 2020, on 1st August 2021, he provided the impugned ruling alone without the rest of the proceedings. The consequences thereof are that; the court is denied the history of the matter.

15. However, the saving grace is that, the lower court file has been called for and therefore the court is able to consider the same. Upon perusal thereof, I find that, on 20th and 23rd August 2018, the matter could not proceed for pre-trial and was adjourned on the application by the applicant's counsel.

16. On 1st October 2018, the matter proceeded with hearing of the evidence of; PW1- George Kamau. However, the applicant's counsel sought for an adjournment to prepare for the case as he had just been supplied with documents during the hearing. The prosecution had no objection.

17. On 15th November 2018, PW1 proceeded with his evidence to cross-examination wherein the applicant sought that, the witness be stood down to avail receipts. The Respondent had no objection. The request was allowed. The cross-examination proceeded on 11th February 2019 and the witness concluded his evidence. The matter was set for hearing on 25th April 2019.

18. However, when the Respondent sought for an adjournment due to unavailability of its witness who was out of the country, the applicant objected and the court allowed the application for adjournment. Based on the aforesaid, I find no evidence of previous adjournment of the matter on prosecution application. To the contrary, it is the applicant who had previously sought for time to prepare for the matter and was granted the same.

19. Therefore, I find no irregularity, impropriety, incorrectness or any prejudice in the Honourable Magistrate's order allowing the application for adjournment. It was merited.

20. As a consequence of the aforesaid, the applicant has not met the threshold of the provisions of; sections 362 and 364 aforesaid. In the circumstances, I dismiss the application and direct that, the lower court file be returned to the trial court for further hearing.

21. Finally, it is important to allow a matter at the trial court to proceed to conclusion and any issues as to the merit thereof awaits the appeal process (if need arises).

It is so ordered.

DATED, DELIVERED VIRTUALLY, AND SIGNED ON THIS 13TH DAY OF SEPTEMBER 2021.

GRACE L NZIOKA

PRESIDING JUDGE

In the presence of

Mr Momanyi for the Applicant

Ms Chege or the Respondent

Edwin Ombuna – Court Assistant