



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 146 OF 2015

JOHN NJENGA KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This matter is now before this court for the application of John Njenga Kamau (the applicant) dated 25/1/2019. The same is brought under **Art. 159 of the constitution** and is supported by the Affidavit of the Applicant sworn on 25/1/2019. The same seeks basically 2 substantive orders:-

- i)** That this Honourable Court do stay the proceedings in **Criminal Case Number 1502 of 2016 at the Chief Magistrates Court at Milimani**, Nairobi pending the hearing and determination of this application.
- ii)** That the Honourable court do interpret paragraph 17 of the ruling delivered on 14/9/2016 and give directions.

The application has been opposed by the state through learned counsel,

Ms Nyauncho

It was submitted by the applicant that he seeks the interpretation of the Judgment of this court in **HCCR. Appeal No. 146/2015**, which had been filed to challenge the Judgment in the lower court **Criminal Case Number 225/2010 (Milimani)** in which he was convicted and sentenced to serve 3 years probation and also compensate the complainant. That on appeal, the High Court (this court) ordered for a retrial without giving directions on the sum of Kshs. 235,000/= already paid by the applicant to the complainant before the trial court pursuant to the original Judgment.

It was the contention of the applicant that the implication of all these is that he has already been found guilty and convicted since part of the money he has paid to the complainant and which has not been paid back to him, was based on the Judgment now set aside. In his view, a retrial would therefore not ensue and would be improper. That this would be contrary to Article 50, as he would have been convicted even before trial i.e. the principle of innocence until proven guilty (presumption) of innocence).

The applicant relied both on the **High Court Misc. 355/2015** and the court of **Appeal Cr. Application No. 7/2015**, in which the 2 courts declared that in case of success of his appeal, a refund could be made.

The 2nd issue the applicant raised is that whereas in the lower court, there were 2 accuseds (himself and another), in the new case pending before the lower court, the other accuse has never taken plea.

Counsel for the state opposed this application. It was submitted that this is merely an abuse of the process of the court and only meant to delay the process of justice. That the retrial was ordered to be completed within 9 months, a period long past. That part **17 of the Judgment of the High Court (Ong'udi J.)** is very clear and does not include an order of refund of the money already paid out as compensation. That in case of acquittal, appropriate orders would be made regarding the money.

Learned counsel also drew the court's attention to the finding of the court of Appeal that there was no evidence that in case of the Appeal being successful, the Respondent would not pay. And lastly, that the orders of the High Court (Ong'udi J.) were only against the applicant who had appealed and not his co-accused before the lower court. Counsel urged that this application be dismissed so that the case pending before the lower court, which has now taken 10 years may be heard and concluded.

I have considered the submissions of both the applicant and the Respondent sides. Indeed, this is an old case, first registered before the lower court in 2010. A brief appraisal of the history of this case would be necessary if this court is to give the directions that the applicant now

seeks. As already stated, it all started when on 3/3/2010, the applicant was charged in the Chief Magistrate's court in Criminal Case Number 225/2010 with 2 counts of obtaining money by false pretences contrary to section 313 of the penal code. The charge read that he together with others not before court, obtained the alleged sums of money. There is nothing on record to show if the "others not before court" ever took plea or faced the trial. The case went through trial and in a Judgment dated **10/6/2015, the Hon. E.C. Cheronno (SPM)** convicted the applicant as charged. The said Judgment was read out by the Hon. A Kithinji (PM) on behalf of the Hon. Cheronno, on transfer on 10/6/2015. He was eventually placed on probation for 3 years with an order that he compensates the complainant within the period of probation. This was on 17/6/2015.

Being dissatisfied by the conviction and sentence, the applicant filed on Appeal before this court on 21/9/2015, being HCCR Appeal No. 146/2015. In allowing the appeal, the court (Hon. Justice Ong'udi) ordered for a retrial of the case and that the applicant do present himself for fresh plea and other that the fresh case be determined within 9 months.

The applicant again felt aggrieved and filed an appeal at the court of Appeal, being Criminal Appeal No. 203/2016. In a Judgment delivered on 7/12/2018, the Court of Appeal confirmed the finding of the High Court and dismissed the Appeal. The order of retrial was confirmed and the same was ordered to be completed within 9 months.

It is worth noting that in the meantime as the appeal remained pending before the High court, the applicant filed an Application before the court, being **Misc. Cr. Application No. 355/2015**.

The same sought for an order of stay of the execution of the sentence particularly the order to pay the compensation to the complainant. The High court (Hon. Kimaru J.), while dismissing this prayer, noted that no evidence had been placed before the court to support the assertion that the complainant would not be able to refund the money if the applicant refunds the same to him.

Again, the applicant challenged this finding at the court of Appeal in Criminal Application No. 7/2015. The court of Appeal in its ruling on 11/3/2016, dismissed the application of the applicant and confirmed the orders of the High Court of 8/10/2015 (Kimaru J).

In effect therefore the matter of retrial has been ruled on both at the High Court (Ong'udi J.) and the court of appeal (JJA's Waki, Nambuye and Kiage). Similarly the issue of the refund of the money to the complainant has been ruled on both by the High Court (Hon. Justice Kimaru) and the court of Appeal (JJA's Visram, Karanja and Kariuki). The 2 superior courts ordered for a retrial while declining to order any stay of execution of the order of compensation to the complainant. This court is both bound by and guided by these decisions of the 2 superior courts.

The applicant has now filed the present application. It is noted that when this matter first came up before me, I duly made inquiry if the parties were comfortable with me handling this application. This was on 23/7/2019 and this is because the applicant had appeared before me on the same matter while I sat at as the Chief Magistrate at lower court. None of the parties raised any objection. I have accordingly proceeded to hear this application.

Now on the application itself, it is noted that prayer number 2 of the application for stay of the lower court case was issued first on 23/7/2019.

The said order of stay has remained in force and extended from time to time till this moment. The said order therefore stands spent with this ruling.

The next substantive prayer in this application is for interpretation of paragraph 17 of the ruling delivered on 14/9/2016, and for directions. As already stated above, these are orders that were issued by the Hon. Lady Justice H. I. Ong'udi. It would have been proper and just for her ladyship to make that interpretation herself. However, because the parties had no objection to my handling this application, I have had to proceed. This is an old case now running to 10 years in the corridors of the courts and it would only be reasonable in the circumstances that this application is dealt with without delay. This goal would not have been met were an order be made that the Hon. Lady Justice Ong'udi be personally present to hear this application since she is now stationed on far off stations outside of Nairobi. I have also considered the nature to the prayers on the application vis a vis the various orders issued both by the High court and the Court of Appeal and I find it proper that I may proceed to give the directions sought.

The applicant seeks to challenge the order of retrial as contravening Article 50 of the constitution. His main ground is that since the sum of Kshs. 235,000/= he paid to the complainant as compensation (part) pursuant to the original order of sentence it would infringe on his right to fair trial should the retrial commence before he is repaid this amount. That this would be tantamount to going through the trial while he is already convicted. Is this so?

Article 50 gives instances of what would constitute a fair hearing. The applicant has not mentioned or cited any ground (amongst those mentioned under Art. 50) that is likely to be infringed or has been infringed by the fact of retrial as to lead to any abuse to his right to fair hearing. Both the High Court and the Court of Appeal ordered for retrial and the retrial is expected to be carried out according to the law taking into consideration all the rights of the applicant as an accused person.

I do not believe that the failure to be refunded part of the money he had already paid as part of the sentence is tantamount to him being tried while already on conviction. As I see it, a retrial is a fresh trial. It is a fresh trial like any other. There is no Judgment or conviction or sentence that the applicant can lay his claim on. The conviction and sentence passed by the lower court was set aside fully by the High Court, affirmed by the Court of Appeal.

Perhaps it would help to give a related analogy of an order of retrial made after an Applicant has served part of a prison term set by the trial court. Would the sentence served before the order of retrial is made be considered as a conviction as to be a breach of the right of the applicant (the accused) to a fair trial? I think not. A retrial is a retrial and is not based on or related to any conviction. In my view, if there are

any breaches to the rights of the applicant as a result of the order of retrial (if such breaches are proved), then the remedies for the applicant would lie in other causes. The claim, if at all, cannot be a bar to the order of retrial being carried out as ordered by the superior courts.

Neither can such a claim be a ground for staying the orders of retrial as accordingly made.

In our instant case, both the High Court and Court of Appeal considered the issue of the money to be paid as compensation and confirmed the orders of the trial court. I only note that these superior courts have ordered for a retrial. It would in my view not be reasonable or logical to proceed with the case and also expect the applicant to continue with the payments to the complainant. The payments made pursuant to the original sentence which has since been set aside must stop so that the case may proceed as a new case. As for the monies already paid, I am guided by the findings of the superior courts that there is no material placed before the court to show that the complainant is in a position to refund the same should the applicant be acquitted of the charges at the end of the retrial or in case of any order to do so from the correct tribunal. I leave the matter at that.

On the objection that the other co-accused has not taken plea herein and faced trial in the first instance, again both the High Court and the Court of Appeal considered this issue and left it as such. I also do not give any substantive orders on the same.

In view of the above observations and not being convinced that accused's rights to fair trial would be infringed if the order of retrial of his case is executed in the manner ordered, this court can only give one direction, which I hereby do. That the retrial of the accused (i.e Milimani CM's Court, Criminal case Number 1502/2016 do proceed to full hearing to its logical conclusion. In view of the age of this matter, I order that such hearing be expedited and concluded as is reasonably possible. I also order that the lower court file be mentioned before the Chief Magistrate's court on 27/1/2020 (Monday) for directions on fixing a hearing date for the same.

Dated at Nairobi This 22nd Day of January 2020

HON. OGEMBO D. O.

JUDGE

In the Presence of:

1. The Applicant – present in person
2. Ms. Kimani holding brief for Ms. Nyauncho for the state