REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO. 173 OF 2019

(Makadara Chief Magistrate's Court Criminal case No 2023 of 2016)

ONESMUS KIMANYI NGILA ..... APPELANT

VERSUS

REPUBLIC…..... RESPONDENT

JUDGMENT

This matter had been fixed for hearing on 4.2.2020 for the hearing of the appellant's application dated 16.8.2019. However on the said date, the parties agreed to have the application (for stay of proceedings of lower court, Makadara Cr. 2023/2016) abandoned so that the matter could proceed to the hearing of the main appeal. Appropriate orders were accordingly made and the appeal having been duly admitted, the same proceeded to hearing as agreed.

The petition of appeal was filed herein on 9.8.2019. The same lists 3 grounds of appeal namely:

(i) That the honourable trial magistrate erred in law in failing to hold that the defect in the charge sheet was incurable.

(ii) That the honourable trial magistrate erred in law in holding that the defect in the charge sheet was not prejudicial to the applicant.

(iii) That the honourable magistrate erred in law in holding that the appellant had a case the answer.

The filed appeal seeks that the trial court's ruling of 29.7.2019 be wholly overturned and that the applicant be set at liberty under section 210 of the criminal Procedure Code. At the hearing of the said appeal, counsel for the applicant condensed the 3 grounds of appeal and argued the same as a single ground. It was submitted by counsel for the appellant that the applicant faces 2 counts at the lower court being:-

Count I: assaulting a police officer contrary to section 254(b) of the Penal Code.

Count II: aiding a prisoner to escape contrary to section 14(a) of the Penal Code.

That the applicant has been tried under a defective charge sheet which is against his right to a fair trial. That section 137 (a) (1-2) of the criminal procedure code that one must only be charged with reference to a section of the law. And that in this case section 254 of the Penal code does not contain sub-section (b) and the same deals with kidnapping which is fundamentally different from the charge the appellant faces.

Counsel added that section 137(a) demands that a reference be made to the section so that the accused understands what he is charged with. And so, in the absence of ingredients of the offence, one cannot defend himself.

With respect to count II, again it was submitted that the penal code does have section 14(a) but that the same deals with the age of a person who can be criminally responsible and nothing to do with aiding a prisoner to escape.

Counsel argued that these defects are incurable by way of an amendment since the prosecution has already closed its case (section 214 of criminal procedure code). And that neither can the same be cured under section 179 of Criminal Procedure Code providing for conviction for a lesser offence.

The defence relied on the case of (John Cardon Wagner Vs. Republic (2011)eKLR, page 8-9, that a charge sheet may only be amended before close of the prosecution's case. He pleaded for acquittal under section 210 of the CPC.

Ms. Nyauncho for the state opposed this application. First that the Penal code provides for appeals only on final orders whereas the orders placing the appellant to his own defence are not final orders. That to that extent, this appeal is incompetent. That the ground raised herein could be raised on appeal in case of a conviction and the court should not pre-empt the decision of the magistrate's court.

It was further submitted that this appeal is only meant to delay the final conclusion of the case and should be dismissed since the appellant has no right of appeal against the interlocutory ruling. Counsel went further that the alleged defects can be cured under section 382 of the CPC, since the appellant fully took part in the proceedings and so understood well the charges he was facing and the particulars of the same as spelt out. Counsel urged that this appeal be dismissed.

In a short further reply, counsel for the appellant, Mr. Saruni basically re-iterated his earlier submissions.

I have considered the submissions of the 2 learned counsel for the appellant and the respondent. By an appeal filed herein on 9.8.2019, the appellant seeks that the ruling of the Hon. E. Kanyiri, (SRM) in Makadara Criminal case number 2023/2016, Republic Vs. Onesmus Kiruanyi Ngila made on 29.7.2019 be set aside and that the appellant be acquitted of the charges before the lower court under section 210 of the criminal procedure code. This is an appeal against an interlocutory order of the court putting the appellant to his defence upon a finding that the appellant has a case to answer on the 2 charges that he faces before the trial court. It is my view that the initial question that this court ought to determine is whether this appeal is properly before this court i.e whether it is proper for this court to entertain this appeal and or issue the orders sought therein in this manner. This determination would be material and must be made before the court may proceed on to consider the veracity or correctness of the said orders issued by the lower court.

The matter of appeals from the subordinate courts to the High Court are covered under section 347 of the criminal procedure code, thus; section 347 (1) save as is in this part provided –

1. A person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and (b) (repealed)

2. An appeal to the High Court may be on a matter of fact as well as a matter of law.

This provision presupposes that an appeal from a subordinate court to the High Court lies only once a person has been convicted. As it were, the present appeal is challenging an order of the court made under section 210 of the criminal procedure code. No conviction has been meted out against the appellant as he is yet to conduct his defence. And from the submissions of learned counsel for the appellant, no law has been cited as to persuade this court on the issue of whether or not this appeal as drafted and filed can be competently handled by this court. On my part, I also see or find no such law that this court can apply in exercising the said jurisdiction.

The court was referred to section 137(a) (1-2) of the criminal procedure code. I have considered the said section. Same relates to elements of charges and information. They do not, with respect, answer to whether this court has power to entertain this appeal, which has already postulated above, is the initial determination that this made must make.

From the jurisprudence available, the High Court has only allowed interlocutory applications for revision or appeals in exceptional circumstances or sparingly. And the rationale here is to avoid hearing appeals in a piece meal manner and also to avoid undue delay in the conclusion of the case before the lower court. A case in point and to which I am guided is Isaac Karanu Mbugua Vs. republic (2018)eKLR, in which the Hon. Justice Joel Ngugi, sitting at the High Court is Kiambu stated;

> "*I should begin by observing that our jurisprudential policy is that interlocutory revisions of this nature are only sparingly allowed by the High court. This is to avoid hearing appeals in a piecemeal manner with the risk of producing conflicting and embarrassing outcomes as well as unduly delaying criminal trials.*

In the same case, the court further held that such powers of revision or appeal at interlocutory stage could only be exercised in cases of grace injustice. The court otherwise held that the salutary general rule is that appeals are not entertained piecemeal (pages 3 – 4 therein). So, does the appellant herein stand to suffer grave injustice should the orders sought not issue? I think not. This is because the appellant has undergone the trial before the lower court till this stage. He has participated fully in the same. He has not raised any breach of his rights as an accused person in the course of his trial until this moment. Having been well aware of the evidence presented in court, participated in the trial and had the opportunity to cross-examine the prosecution witnesses, I do not see or find any prejudice that he stands to suffer should his case before the lower court proceed to its conclusion.

In short, therefore, this court is not convinced that this application is competent or that the orders sought can issue as prayed. It is the firm view of this court that all the issues raised by the appellant including whether the alleged defects on the charge sheet can be curable, can be dealt with by the trial court. And the determination on these issues could then be appealable at the conclusion of the case. This court therefore refrain from issuing any substantive opinion on the issues raised by the defence in this appeal at this stage.

The sum total is that the appeal filed herein by the appellant dated 9.8.2019 is incompetent and lacks in any merit. Same is accordingly dismissed. The appellant, having been placed to his defence in the lower court Makadara court Criminal case number 2023/2016, is accordingly ordered to appear before the said trial court on 18.2.2020 for directions on how to proceed with his trial to its conclusion. Orders accordingly. Right of appeal 14 days.

D. O. OGEMBO

Judge

13.2.2020

COURT:

Judgment read out in open court in the presence of the appellant, Ms. Ngania holding brief Saruni and Ms. Kimani for the state.

D. O. OGEMBO

Judge

13.2.2020