REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ANTI CORRUPTION AND ECONOMIC CRIMES DIVISION

(CORAM: MUMBI NGUGI J)

CRIMINAL REVISION NO 5 OF 2020

REPUBLIC.....APPLICANT

VERSUS

MOSES KASAINE LENOLKULA.....1ST RESPONDENT

STEPHEN SIRINGA LETININA.....2ND RESPONDENT

DANIEL NAKUO LENOLKIRINA.....3RD RESPONDENT

JOSEPHINE NAAMO LENASALIA.....4TH RESPONDENT

REUBEN MARUMBEN.....5TH RESPONDENT

PIUS MILTON.....6TH RESPONDENT

PAUL LOLMINGANI.....7TH RESPONDENT

BENARD LTARASI LESURMAT.....8TH RESPONDENT

LILIAN BALANGA.....9TH RESPONDENT

GEOFFREY BARUN KITEWAN.....10TH RESPONDENT

HESBON JACK WACHIRA NDATHI.....11TH RESPONDENT

RULING ON REVISION

1. By the letter dated 28th February 2020, the applicant, the Republic through the office of Director of Public Prosecutions (DPP) asks this court to exercise powers of revision in relation to a ruling of the trial court in **ACC No 3 of 2019- Republic v Moses Kasaine Lenolkulal & Others**. The ruling, which was made on 27th February 2020 by Hon. T. Nzyoki (SPM) related to a line of questioning adopted by the defence in cross-examination of a prosecution witness, PW2. The prosecution objected to the line of questioning employed by the defence on the basis that the witness was incompetent to render an opinion on the veracity of the charge sheet. It further argued that the witness was not well versed on all the requisite facts to be able to make a determination on whether the 1st accused unlawfully acquired public property. It was also the DPP's position in its objection before the trial court that the witness was a procurement 'expert' for the purpose of the trial and was therefore incapable of rendering a legal consideration on whether the accused person committed the offence with which he was charged.

2. In its ruling, the trial court dismissed the objection, holding that the witness was obliged to respond to the question based on his information and best knowledge. In the trial court's view, the question put to the witness was not required to elicit a legal opinion but was related to the charges against the accused. The DPP views this ruling by the trial court as wrong and seeks the following orders from this court:

a. This honourable court grants the applicants leave to address this court at the hearing of this Revision;

b. This honourable court grants a stay of proceedings in the lower court pending determination of this revision;

c. This honourable court bars defence counsel from questioning witnesses on the veracity of charges to propagate a prejudicial narrative and preempt a determination by the court;

d. This honourable court prohibits witnesses from making legal determinations on the veracity of charges in absence of the requisite expertise and background information.

3. Essentially, the DPP asks this court to exercise powers of revision to direct the trial court on which questions it should allow the defence to pose to a prosecution witness, and which it should not.

4. The powers of the court on revision are set out in sections 362-364 of the Criminal Procedure Code. These sections, so far as is relevant for present purposes, provide as follows:

362 Power of High Court to call for records section

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.

364 Powers of High Court on revision

(1) 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 its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(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:…

5. Both the DPP in his application and Counsel for the 1st respondent in a letter addressed to this court dated 28th February 2020, ask the court to grant them an opportunity to be heard on this revision. However, having considered the matter and the provisions of section 364(2), as will become evident shortly, I do not believe it is necessary to exercise discretion to allow the parties to argue the application before me.

6. The High Court is empowered, in exercising its powers of revision, to call for the record of a subordinate court and satisfy itself as to the '***correctness, legality or propriety***' of any ***'finding, sentence or order'*** of the trial court. The question is whether there is any incorrectness, illegality or impropriety demonstrated by the applicant with regard to the decision of the trial court to allow the defence to proceed with a particular line of questioning to warrant the exercise of powers of revision by this court. A more important consideration, however, is whether the High Court can properly exercise powers of revision with respect to every minutiae of a criminal trial, including the nature of questions or particular line of questioning that a party to criminal proceedings can put to another party.

7. Our courts have had occasion to consider situations in which questions upon which trial courts have pronounced themselves have been the subject of interlocutory applications for revision or appeal. The leading decision on this point, I believe, is the case of **Thomas Patrick Cholmondeley vs. Republic [2008] KLR** in which the Court of Appeal, in considering an interlocutory appeal by the accused person, expressed the following view:

""In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person;…..the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused."

8. In his decision in **John Njenga Kamau v Republic [2014] eKLR**, Kimaru J considered section 347 and 354(3) of the Criminal Procedure Code and expressed the following view with respect to interlocutory appeals:

"…It is clear from the foregoing provisions of the Criminal Procedure Code that only a party who is convicted can file an appeal to this court. The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court's considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case."

(Emphasis added).

9. In Joseph **Nduvi Mbuvi v Republic [2019] eKLR** which related to an application for revision of an order made by the trial court in the course of a trial, Odunga J took the view that interlocutory appeals and revisions are not limited by the Criminal Procedure Code to the final adjudication of a matter. With respect to applications for revisions provided for under section 364 of the Criminal Procedure Code, he stated that:

> **"13. From the foregoing it is clear that the High Court cannot exercise revisionary jurisdiction in an order of acquittal. It may however exercise the said jurisdiction in case of a conviction or <u>in any other order</u>.**
>
> **14. It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion."**

10. Finally, in my decision in **ACEC Appeal No. 24 of 2019- James Ambuso Omondi v Republic** which was an appeal on the admissibility or otherwise of certain exhibits before the trial court, I considered section 347 of the Criminal Procedure Code, which relates to interlocutory appeals to the High Court and observed as follows:

> **20. It appears to me, then, that there is no provision in the Criminal Procedure Code for appeals from orders of the trial court in the course of proceedings. In particular, there is no provision for interlocutory appeals against orders of the trial court admitting or failing to admit any evidence into the record."**

11. What emerges from the above decisions, in my view, is that the High Court should very sparingly entertain interlocutory appeals and applications for revision. 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. This was the basis of the decision in the above decisions: in both **Thomas Patrick Cholmondeley vs. Republic and Joseph Nduvi Mbuvi v Republic** (Supra), the orders in question related to requiring the defence to disclose to the prosecution their statements and documentary evidence.

12. The DPP has referred the court to the decision in **Fellowes, McNeil v. Kansa General International Insurance Co 1998 CarswellOnt 3962, 9 C.C.L.I. (3d) 17** with regard to the place and role of an 'expert' in a trial. I have read the decision and note that it related to a civil claim for outstanding legal fees and disbursements alleged to be owed by Kansa to Fellowes, McNeil. I am not persuaded that it is applicable to the present circumstances. Further, I believe that the court would be required to consider its applicability in the event that it is persuaded that it is proper to examine the merits of the decision of the trial court under challenge in this matter.

13. Having considered the DPP's application, however, I am not satisfied that there is any illegality or impropriety demonstrated by the decision of the trial court to warrant orders of revision. The trial court, in my view, properly exercised its discretion in rendering a ruling on whether a particular line of questioning in cross-examination is permissible or not. It would be to unjustifiably enter into micro management of a trial if the High Court, in exercise of powers of revision, were to venture into the arena and begin to inquire whether or not the trial court should allow a particular line of questioning or not. It seems to me that to do that would amount to serious micro-management of the trial process, would take away the discretion of the trial court in the conduct of trials before it, and would thereby greatly hamper the conduct of a trial.

14. Further, whether or not a particular line of questioning should be adopted or not appears to me to be secondary to the question whether the evidence thereby elicited is admissible or not, and whether or not such evidence is ultimately relied on by the trial court in reaching its decision. That, in my view, is the point at which the High court, in exercise of its appellate jurisdiction, can consider whether or not evidence relied on to reach a particular decision, whether a conviction or acquittal, was admissible or not. The question of admissibility of evidence, or the question of the line of inquiry adopted in cross-examination or even examination in chief in a trial cannot, in my view, be a proper subject of revision or interlocutory appeal.

15. Accordingly, I decline to call for and examine the record of the trial court in **ACC No 3 of 2019- Republic v Moses Kasaine Lenolkulal & Others** for purposes of revision. The application for revision by the DPP dated 28th February 2020 is dismissed.

Dated and Signed at Nairobi this 5th day of March 2020

MUMBI NGUGI

JUDGE