



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL REVIEW NO. 333 OF 2018

JOHNSON KOBIA M'IMPWI.....APPLICANT

-VERSUS-

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

JUDGMENT

[1] Before me is the Motion dated 28/09/2018 expressed to be brought pursuant to **Article 25 (c), 50 (2) (b – h) of the Constitution, Section 211 of the Criminal Procedure Code and all other enabling legal provisions and international conventions**. The applicant seeks amongst other orders: (1) Review and setting aside of the order issued on 27/09/2018 rejecting the appellant's application to be supplied with critical documents in the custody of the investigations officer to enable him to prepare and challenge evidence adduced in the lower court; and direct that they are released; and (3) declaration, direction and/or order that Criminal Case No. 2447 of 2014 is affected by the principles of *autrefois* convict and acquit the applicant.

[2] On 5/10/2019 this court made a partial ruling and noted that this application invokes the supervisory jurisdiction of the court. But observed that the application was challenging an order made on 27/09/2018 which was not on record. Mabeya J made similar observation on 5/11/2018 and was careful to note that the application was tantamount to asking the court to grope in the dark which is invariably an invitation to great possibility of embarrassment to the court. This court, however, gave the applicant another opportunity and directed him to file a certified copy of the order within 14 days.

[3] The applicant filed an order issued on 31st October 2018 and dated on 25th October, 2019. This order relates to the finding that he has a case to answer and was placed on his defence. He also stated that this is the order he served upon the DPP. I have looked everywhere in the file, and I do not see any order dated 27th September 2018. Despite the omission, I am duly commanded by article 159 of the Constitution to determine the application on merit as the part of the ruling which aggrieved him is easily discernible. On this position, see the Court of Appeal in the case of **Sheikh Ali Taib v George Ellam Wekesa & another [2017] eKLR** when it held as follows:

“That is not to dispute that the High Court has severally held that failure to attach a copy of the order is fatal to an application for review. See for example, *William Saina v. Joshua Cherutich, HCCC No 259 of 2001 (OS)* and *Suleiman Murunga v. Nilestar Holdings Ltd & Another, ELCC No. 1549 of 2013*. However, recently in *Peter Kirika Githaiga & Another v Betty Rashid, CA No. 210 of 2014*, this Court emphasized the fact that the law does not require attachment of a decree or order to an application for review and concluded:

“As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective.”

We reiterate that view and add that it is the most consistent with the requirement in Article 159 that courts should not pay undue regard to technicalities, particularly in a case like the present one where there was no dispute at all regarding what the court held in the first ruling, which the appellant wanted reviewed.”

THE APPLICANT'S GRAVAMEN

[4] The grounds upon which the application is premised upon are stated in the application and the supporting affidavit of Johnson Kobia M'Impwi sworn on 28/09/2018. He contended that it was against the principles of fairness, justice and fair trial for the defence hearing to proceed without critical documents for the applicant was never issued with copies of documents and exhibits to prepare and challenge the evidence. He concluded therefore that it will be in the best interest of justice if he is supplied with these crucial documents to enable him prepare his submissions and possible defence.

[5] He stated that he was charged in *Criminal Case No. 159 of 2015* which resulted in a conviction. And, yet, according to him, he is under trial in *Criminal Case No. 2447 of 2014* which arose from the same transaction. His view was that the offences were not continuous and formed the same transaction and he will suffer double jeopardy if he was to be convicted twice for the same offence. He beseeched the court to invoke the doctrine of *autrefois* convict and terminate *Criminal Case No. 2447 of 2014* since he has been convicted in *Criminal Case No. 159 of 2015* which arose from the same transaction.

DPP's view

[6] This was opposed vide the replying affidavit of Harrison Kiarie sworn on 20/11/2018. He deponed that in *Criminal Case No. 2447 of 2014* which is currently being heard, the applicant was charged with the offence of giving false information to a person employed in the public service contrary to **Section 129 (a) of the Penal Code CAP 63 Laws of Kenya**. That the applicant was supplied with all the necessary documents, exhibits and witness statements before the matter commenced. He was represented by counsel who actively participated in proceedings and at no point did he raise any issue of not being supplied with exhibits. It is only after the prosecution closed its case that the applicant made an application to be furnished with documents. The application was however declined and the court noted that all the documents and exhibits had been supplied to the applicant. He affirmed that *Meru CMCC No. 159 of 2015* and *Meru CMCC No. 2447 of 2014* are not similar and in any event the prayer he seeks cannot be granted as that can only amount to a defence.

Submissions

[7] This matter was canvassed by way of written submissions. The applicant submitted by reiterating what he had stated earlier. He added that his application is meritorious for his constitutional rights have been violated depriving him of a fair trial. Moreover, he is a senior member of the community aged 65 years suffering from diabetes who is being subjected to punishment for an offence he had already been punished for previously.

[8] The respondent submitted that the applicant was treated according to the law from the time of plea-taking until the conclusion of the trial. He participated in the proceedings referring to statements and documents and posing questions to witnesses which means that he was referring to documents that he was supplied with. Furthermore, there is no double jeopardy as the two cases were different, one is from DCIO and the other for anti-fraud. Besides, they were brought under different statutes and or provisions of the law that require independent points to proof and cannot form part of the same evidence and transaction.

ANALYSIS AND DETERMINATION

Issues

[9] The following issues fall for determination by the court: **whether the review of the order of 27/09/2018 is merited and whether the applicant will suffer double jeopardy.**

[10] Review of earlier decision by the court in a criminal revision should be weighed against the reasons advanced and the law. In the criminal jurisdiction discovery of new and important matter or evidence is a basis for review. I should also think that review on account of some mistake or error apparent on the face of the record is also potent ground. Any other sufficient reason should warrant a review. For instance, the gravity of the matters complained of, say, infringement of fundamental rights and freedom should form sufficient reason to review the earlier order of the court.

[11] The applicant stated that at all material times during the prosecution of the criminal case he was not supplied with documents which he considered critical to enable him challenge the evidence adduced by the prosecution and facilitate the preparation of his defence.

[12] This argument brings to focus **Article 50 (2) (j) of the Constitution**. The Article *provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence; while sub-article (c) provides for the right of the accused to have adequate time and facilities to prepare his defence. These article relate to fair trial. Even before the enactment of the Constitution of Kenya, 2010, the Court of Appeal in the case of Thomas Patrick Gilbert Cholmondeley v Republic[2008] eKLR held:*

“We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified.”

[13] The current provision of the Constitution was considered by Mativo J who stated as follows in the case of Joseph Ndungu Kagiri v Republic [2016] eKLR

“Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.

The latter cannot be met if the accused is not furnished with the evidence the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.”

[14] According to the respondent, they supplied the applicant, who was represented by counsel, with all the documents and exhibits they relied upon, before commencement of trial. The DPP averred that it was only after the prosecution closed its case and the applicant was put on his defence that he raised this issue. They took the view that the trial court carefully considered the issue and rejected the application since the applicant has already been supplied with all the documentation and exhibits.

[15] The applicant alleges that he was not supplied with the documents and exhibits relied upon by the prosecution in his case. In this mix he ought to have substantiated his claims especially because the trial magistrate confirmed in her ruling that the applicant was supplied with all documents and exhibits. The applicant merely alleged without providing evidence that he was not supplied with all the necessary documentation relied upon by the respondent. I do note that he actively participated in the trial and nothing from the record shows that he raised non-provision of documents before trial. I have observed that the applicant is literate and keen person in his pursuits. I do not therefore find anything which suggests that he was not supplied with documents and exhibits before trial.

[16] But before I conclude, I consider **Double jeopardy** to be a matter of great importance in criminal justice. Double jeopardy is not only a procedural defence but a constitutional protection of a person who has been acquitted or convicted on a charge, from being tried on the same crime or a lesser crime that is in law included or merged within the crime. I should, therefore, determine whether the claim of double jeopardy is potent reason to review the order in question.

[17] According to the applicant, having been convicted in Meru *CMCC No. 159 of 2015* his prosecution in *CMCC No. 2447 of 2014* which arises from same transaction amounts to double jeopardy. The respondent is of a different opinion. Their position is that both cases related to different offences. I should state here that a person may be charged for perjury, or giving false information to a person in authority. Yet, this does not abrogate the substantive offence to which the perjury or the false information relate. In addition, given the nature of double jeopardy, it is desirable an objection to the charge should be raised at earliest time possible before the trial, or during the trial and latest, as a defence. That notwithstanding, I note however that judgment was delivered in *CMCC NO. 2447 of 2014* on 20/12/2018 where the applicant was set free. In light thereof, this application has been overtaken by events. Even on the basis of other findings above, the application has no merit. Consequently, the application is dismissed.

Dated, signed and delivered at Meru this 3rd day of June 2020

F. GIKONYO

JUDGE

Representation: -

- 1. Applicant acting in person**
- 2. DPP, Meru for Respondent**