



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL REVISION NO. 2 OF 2020**

**MICHAEL KOSGEI CHEPTUM.....1<sup>ST</sup> APPLICANT**

**JAMES CHEMJOR.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(From the Order made in Iten Senior Principal Magistrate's Court's Criminal Case No. 148 of 2017*

*by Hon. Kutwa, SPM on 17 December 2019)*

**RULING ON REVISION**

1. The two applicants were jointly charged before the Court of the Senior Principal Magistrate at Iten with three counts of malicious damage to property, and one count of creating disturbance contrary to **Section 339(1)** and **Section 96(1)(b)**, respectively, of the **Penal Code, Chapter 63** of the **Laws of Kenya**. They denied the allegations against them and their trial has been ongoing before the lower court. They approached the Court for review vide a letter dated **15 January 2020**, written on their behalf by their Advocate, **Mr. Momanyi**, complaining that on **17 December 2019** when the matter came up for hearing, the lower court prevailed on the applicants to make their defence, notwithstanding that their Advocate was not in attendance.

2. It was further their complaint that they were not given an opportunity to call witnesses in their defence; and that, instead, the lower court proceeded to fix the case for submissions. **Mr. Momanyi** also pointed out that, on **14 January 2020**, the trial magistrate was notified of the desire of the applicants to call their witnesses, who were then present before the court; and that the trial court unjustly refused to re-open the case for further defence hearing; and instead fixed it for judgment. He was therefore of the view that the proceedings had taken a tangent that was in blatant violation of the applicant's constitutional right to a fair hearing and therefore that the order in question ought to be reviewed and set aside.

3. Upon receipt of the application, the Court called for the lower court record, pursuant to its supervisory mandate under **Article 165(6) and (7) of the Constitution** and **Section 362** of the **Criminal Procedure Code**. **Article 165(6) and (7) of the Constitution** is explicit that:

**(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**

**(7) For purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.**

4. The Court of Appeal had occasion to consider the scope of this supervisory role, albeit within the context of a dispute in connection with the impeachment of a governor, in **Martin Nyaga Wambora & 3 Others vs. Speaker of the Senate & 6 Others** [2014] eKLR. Here is what it had to say:

**“Our reading of Article 165 (6) of the Constitution reveals that the role of the High Court for purposes of removal of a Governor from office is *inter alia* supervisory in nature to ensure that the procedure and threshold provided for in the Constitution and the County Governments Act are followed. If the process for removal of a Governor is unconstitutional, wrong, un-procedural or illegal, it cannot be said that the court has no jurisdiction to address the grievance arising therefrom. (See *Mumo Matemu – vs- Trusted Society of Human Rights Alliance & 5 Others (supra)*). In its supervisory role, the jurisdiction of the High Court is dependent on the process and constitutionality of the action taken. In the instant case, in**

its supervisory role, the High Court is to examine whether any procedural law was violated by the County Assembly or Senate in arriving at their decision.”

5. And for purposes of revision, **Section 362** of the **Criminal Procedure Code** provides that:

**“The High court may call for and examine the records 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.”**

6. In the same vein, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

**"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."**

7. Accordingly, the lower court record was called for, and a perusal thereof confirms that the case had substantially proceeded before **Hon. Nyaberi, SPM**, by the time the proceedings were taken over by **Hon. Kutwa, SPM**; and that, as **Hon. Nyaberi** had already made an order for the recall of two of the Prosecution witnesses who had testified for the purpose of further cross-examination, the incoming trial magistrate proceeded to preside over the further cross-examination before taking the evidence of two additional witnesses, who included the investigating officer. On the basis of the evidence on record, the trial magistrate ruled that the two applicants had a case and placed them on their defence to answer for purposes of **Section 211** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**.

8. With regard to the impugned proceedings of **17 December 2019**, the record shows that, when the matter came up for defence hearing, each of the two applicants addressed the lower court at the outset and alerted it that their Advocate was yet to arrive. The court then noted that it was 11.00 a.m. and without further ado proceeded to take the evidence of the two applicants. Thereafter, the matter was listed for submissions on **7 January 2020**. There is therefore no indication that the applicants were afforded time to get in touch with their Advocate or to ascertain the reason for his lateness and/or failure to attend court. Granted that this was the first time the defence case was coming up for hearing, in respect of a case that had been pending prosecution since **13 March 2017**, it is my considered view that the applicants have a genuine cause for complaint.

9. **Article 50(2)(g)** of the Constitution speaks to the right to legal representation; and there is no gainsaying that, the presentation of the defence case was a crucial moment for the applicants to benefit from the advice of their counsel. It was therefore imperative for the trial magistrate to give reasons for opting to proceed with the defence case in the absence of counsel. That the court record is silent on this is proof enough that the decision was unwarranted; noting that the right to fair trial under **Article 50(2)** is one of the non-derogable rights for purposes of **Article 25** of the Constitution. Indeed, it was recognized by the Court of Appeal in **Karisa Chengo & 2 Others** [2015] eKLR that the right to legal representation is essential to the realization of a fair trial.

10. In the premises, I find merit in the application for review, which is hereby allowed and the proceedings of **17 December 2019** set aside. It is accordingly ordered that the lower court file be remitted to the trial court with instructions to re-open the defence case with a view of taking the evidence of the two applicants and their witnesses in the presence of their Advocate.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> DAY OF NOVEMBER 2020**

**OLGA SEWE**

**JUDGE**