REPUBLIC OF KENYA

AT THE HIGH COURT IN MILIMANI

CRIMINAL DIVISION

MISC. CRIMINAL APPL. NO. 809 OF 2018

THE DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

KULDIP MADAN.....1ST RESPONDENT

ASHMAN MADAN.....2ND RESPONDENT

RULING

Background

1. The Office of the Director of Public Prosecutions, hereafter the Applicant brought the present application by way of a Notice of Motion dated and filed on 5th September, 2018 seeking orders, *inter alia,* that; the court be pleased to call for and examine the record of proceedings in **Chief Magistrate's Court at Nairobi, Milimani Criminal Case 2005 of 2017 (Republic *v.* Kuldip Madan Sapra & Ashman Madan Mohan Sapra)** for the purpose of satisfying itself of the correctness, legality and propriety of the court's ruling made on 23rd May, 2018 by Hon. Andayi, Chief Magistrate, the court be pleased to review, vary, reverse and/or alter the orders of the **Chief Magistrate's Court at Nairobi in Milimani Criminal Case 2005 of 2017 (Republic *v.* Kuldip Madan Sapra & Ashman Madan Mohan Sapra) a**nd the court be pleased to make any other orders that it deems fit in the interest of justice. The application was supported by an affidavit sworn by Naomi Atina, prosecuting counsel.

2. The 2nd Respondent filed a Replying Affidavit sworn by himself on 26th September, 2018 while Mr. Ndubi filed Grounds of Objection on 24th September, 2018. The common thread flowing through the pleadings in question was to call into question the failure by the Applicant to file an appeal as of right within the standard 14 days that were granted by the court. The Respondents also questioned the present application which they submitted amounted to an abuse of the process of the court. They also reiterated the correctness, legality, regularity and propriety of the ruling made by the trial magistrate on 23rd May, 2018. Finally, that a revision of the order of the trial magistrate would have the effect of embarrassing the High Court where Succession Cause No. 26 of 2011 is still pending.

Submissions.

3. The Application was canvassed before me on 11th December, 2018 with Ms. Atina acting for the Applicant while Mr. Ndubi and Mr. Bwire acted for the 1st and 2nd Respondents respectively. They choose to canvass the application by way of oral submissions while laying reliance on the pleadings.

4. Ms. Atina, for the Applicant laid the background of the matter before the Chief magistrate's Court at Nairobi before urging the court to exercise its supervisory powers as set out under Article 165 of the Constitution and Section 362 & 364 of the Criminal Procedure Code. She submitted that the trial court misdirected itself when it concluded that it lacked jurisdiction to entertain and determine matters which to it should be ably addressed in a pending Succession Cause. She noted that while the Law of Succession Act was comprehensive and possessed its own substantive procedures, it could not be relied upon in the instance case to advance a case in support of the ruling of the trial court. She thus submitted that the Penal Code was the only appropriate law in light of the ingredients of the offences charged which were of a criminal nature.

5. She submitted that the application was properly before the court as the same seeks revision and not appeal which may be time barred. Further, that Section 365 could not act as a bar to the application as the ends of justice were the ultimate objective of the exercise of the supervisory powers of the High Court over the subordinate courts.

6. She submitted that the charges were properly crafted and that they were consistent with Section 134 of the Criminal Procedure Code. That

if it became apparent that the fourth count was defective this should not have necessitated the blanket rejection of the full charge sheet. She submitted that the summary dismissal of the charges was premature as the court should have awaited the closure of the prosecution's case.

7. The Applicant submitted that notwithstanding the provisions of Section 76 of the Law of Succession Act, Section 193A of the Criminal Procedure Code allowed for civil and criminal proceedings to proceed concurrently. As such, she submitted that the process of annulling the grant in the Succession Cause could not act as a substitute to commencing criminal proceedings.

8. She noted that the Complainant had *locus standi* to lodge the complaint as she was a beneficiary of the estate and ought not be ostracised simply because she was facing a manslaughter charge.

9. Mr. Ndubi, for the 1st Respondent submitted that under **Section 89(5) of the CPC** a magistrate could reject charges preferred against an accused. Furthermore, the Applicant had failed to disclose any impropriety, illegality or incorrectness in the ruling made by the trial magistrate. As such, he argued that this was a matter that would be properly adjudicated in an appeal.

10. He also underscored the fact that the application was a fishing expedition based on the fact that the parties herein are engulfed in a succession cause dispute. He cited the fact that the complainant in the trial is the wife of the deceased in a criminal trial she is charged with manslaughter. Her deceased husband was a brother to both Respondents who are the accused persons in the trial that is subject of this application. He pointed that the Respondents and the deceased owned properties together. They filed the disputed succession cause in which the complainant filed an objection.

11. For purposes of this application I do not think that it is necessary to delve into details of the dispute. I however underscore Mr. Ndumbi's submission that the succession dispute is what castigated the complainant to file the criminal complaints against the Respondents. It was his submission therefore, that the learned trial magistrate, Hon. Andayi was correct in rejecting the charges against the Respondents for being defective and for want of disclosure of offences. He emphasized that the charges were filed in bad faith.

12. Mr. Bwire, learned counsel for the 2nd Respondent argued that **Section 364(5) of the Criminal Procedure Code** barred this court from hearing an application for revision where an appeal lies. He argued that **Section 362 of the Act** restricted the court to only determinations on the illegality, impropriety and incorrectness of the proceedings of the subordinate court. Further, that reopening of the case would prejudice the Respondents and relied on **Stanley Munga Githunguri *v.* Republic[1986] eKLR** to buttress the submission. He stated that the reason the charges failed was that the first and second charges did not satisfy **Section 134 of the Criminal Procedure Code** while the third and fourth were based on bad faith. He noted that the children who are also beneficiaries sought for an alternative form of dispute resolution. That therefore, the filing of the instant application amounted to an abuse of the court process as it ought to have been considered as an appeal.

Determination.

13. I have carefully considered the submissions of the respective parties and the proceedings of the trial court file and I have isolated the issues for determination as follows:

> ***a. Whether the present application amounts to an abuse of the court process.***
>
> ***b. Whether the trial court properly applied Section 89(5) of the Criminal procedure Code.***
>
> ***Whether the application is an abuse of the court Process.***

14. The Respondents contend that the present application amounts to an abuse of the processes of the court for two main reasons, namely; (i) that the Applicant should have lodged an appeal against the decision of the trial court, and (ii) that the application did not disclose any issue for determination. These two questions are clothed in the broad question of whether there exists an incorrectness or illegality or irregularity or impropriety of the order of the learned trial magistrate rejecting the charges facing the Respondents. This is because the Applicant has come to court with a view to seeking a review of the order dismissing the charges and consequently urges the court to order that the accused persons take plea. It is therefore the duty of this court to determine whether the application meets the threshold set out under Section 362 of the Criminal Procedure Code and Article 165 (6) and (7) of the Constitution.

> ***15.*** Section 362 gives the High Court power to '***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.'***

16. This provision is buttressed by **Article 165(6)** and **(7)** of the Constitution, which provides:

> ***"(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 the 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."***

17. Article 165 crystallizes the purpose of the revisionary jurisdiction of the High Court as in furtherance of its supervisory jurisdiction over the subordinate courts. On the other hand, Section 362 restricts the application of the revisionary jurisdiction of the High Court. Further,

Section 364(5) prohibits invocation of Section 362 in the following terms:

> ***"When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."***

18. It was argued on behalf of the Respondents that the Applicant ought to have moved the court by way of an appeal as opposed to a revision. It is clear that by virtue of Section 365, a revision is not available to a party who failed to exercise its right of appeal from a finding, sentence or order of the court, when that right is available. Taking this into consideration, should the Applicant in this case have filed an appeal against the order of the trial court rejecting the charges and is as such locked out by Section 364(5)?

19. The scope of application under this provision was widely discussed in the case of **Abraham Wafula v Republic [2013] eKLR (Bungoma, HC Cr. Rev. No. 21 of 2013)** in the following words:

> ***'The Court in the case of BGM HCCR REVISION NO 27 OF 2013 MARTIN MARUTI KITUYI v REPUBLIC rendered itself accordingly on the Revision jurisdiction of the High Court in the following manner:***
>
> > ***"[11] Under Article 50(2) (q) of the Constitution, Appeal and Revision are part of the right to fair trial in a criminal proceeding. Both are constitutional processes for enforcement of legal relief. Except, the court must consider an Appeal as a matter of right whilst Revision under Article 165 (6) and (7) of the Constitution is a matter for the discretion of the court. In the new constitutional structure, Revision is a constitutional relief only that sections 362 to 367 of the CPC are merely the statutory expression of, and the procedural prescriptions attending the remedy of Revision. Therefore, the very nature of Revision as a discretionary remedy explains the policy underpinnings of section 364 (5) of the CPC; that Revision should not be a substitute for an Appeal whatsoever or insisted upon by a party who has not filed an Appeal where one was provided for. Revision primarily serves to put right instances where a finding, sentence, order or proceedings of a lower court are tainted by incorrectness, impropriety, illegality or irregularity. Those words are key pillars that define the Revision jurisdiction. Broadly put, whenever the integrity of any proceeding is put to question, the Revision jurisdiction of the High Court comes into play and may disturb the decision of the lower court purely in the best interest of justice.***
> >
> > ***[12] Having said that, section 364(5) of the CPC is not intended to preclude the High Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of Appeal which he did not utilize, and is not intended at all to derogate from the wide powers conferred by Article 165 (6) and (7) of the Constitution, and section 362 and section 364 of the CPC. This should explain what the word "insistence" in section 364 (5) entails. It should be understood that the Revision jurisdiction of the court can be set in motion by the court suo moto, even on information provided by the aggrieved party who had the right of Appeal but did not Appeal. On this explication of those sections see the cases of R v Ajit Singh [1957] E.A 822 and Walome v R [1981] KLR 497.***
> >
> > ***[13] The exercise or not of the discretion of the court should, therefore, depend on the circumstances of each case, and the nature of the things the court is being asked to probe and put right. Those which are clearly illegal as to constitute a breach of fundamental rights or freedoms guaranteed by the Constitution should ordinarily attract the exercise of Revision jurisdiction of the court unless they are matters which the court feels should be left for a claim for damages. But where the aggrieved party is proposing an Appeal from his pleadings, then the court should hesitate to exercise the discretion under Revision jurisdiction. In making this proposition, I am well aware of section 364 (1) (a) of the CPC which allows the High Court in a Revision cause to exercise the powers conferred on it as an Appellate Court in sections 354, 357 and 358 of the CPC. Except, it must be understood that those powers will only come to bear after the court is satisfied that the case is fit for the exercise of discretion under Revision jurisdiction. On that basis, there should be no room to read a contradiction in what I have said."***

20. In ***R. v. Ajit Singh s/o Vir Singh*** **[1957] E.A. 822 it was** observed as follows:-

> ***"In that case the Court clarified the situation in which the revision jurisdiction might be exercised even when the matter arising was one in which appeal lay (p.824 – Rudd, Ag. C.J.):***
>
> ***"We are of opinion that sub-s.(5) is not intended to preclude the Supreme Court from considering the correctness of a finding, sentence or order merely because the facts of the matter have been brought to its notice by a party who has or had a right of appeal. We do not think this sub-section is intended to derogate from the wide powers conferred by s.361 and s.363 (1). To hold that sub-s. (5) has that effect would mean that this court is powerless to disturb a finding, sentence or order which is manifestly incorrect…merely because the aggrieved party, who might well be an ignorant person, has not exercised a right of appeal but has asked for revision and thus brought the matter to the notice of the court. In our judgment the court can in its discretion, act suo motu*** *(sic)* ***even where the matter has been brought to its notice by an aggrieved party who had a right of appeal."***

21. In the present case, after the charges were rejected the trial court made an order discharging the Respondents. It is trite that an order of discharge does not amount to a bar to charging an accused person afresh. And therefore, a party aggrieved by such an order is at liberty to seek a correction of the illegality or irregularity or impropriety or irregularity occasioned by the magistrate's court to the High Court. The latter court would only do so by exercising its revisionary jurisdiction enunciated above.

22. That said, it follows that the Applicant properly came before this court and that the application is therefore not an abuse of the court process. It is gainsaid then that this court is empowered at this point to determine whether there exists any incorrectness, illegality or

irregularity or impropriety in the order of the learned trial magistrate in rejecting the charges faced by the Respondents. Be that as it may, even if I were to find that an appeal lay as opposed to a revision, the court would judiciously exercise its wide discretion to weigh if a revision would be entertained. That drives the court to determine the last issue of whether the learned trial magistrate properly applied Section 89(5) of the Criminal Procedure Code.

Scope of application of Section 89(5) of the Criminal Procedure Code.

23. Before immersing into the determination of the main question, it is important to duplicate the entire of Section 89. It reads:

> ***"(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.***
>
> ***(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.***
>
> ***(3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.***
>
> ***(4) The magistrate, upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer.***
>
> ***(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."***

24. The rules of statutory interpretation are now formally established and this court will simply reiterate those that form the basis of its present bid to construct Section 89(5) of the Criminal Procedure Code. The court is aware, as was ably stated by Lord Nicholls in **Secretary of State for the Environment, Transport and the Regions and Another Ex Parte Spath Holme Limited, R *v.*[2000] UKHL 61**, that:

> ***"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective."***

25. He went on to define what was meant by 'intention of Parliament', astutely stating that:

> ***"The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used."***

26. In seeking to determine the intention of Parliament when it legislated Section 89(5) of the Criminal Procedure Code the court will follow the path strewn by Lord Herschell who in **Bank of England *v.*Vagliano Brothers[1891] AC 107**, held that:

> ***"…the proper course is in the first instance to examine the language of the statute and to ask what is the natural meaning,…"***

27. The court, in undertaking this task, must be weary of the fact that in some instances courts fail to dig into the background of a provision so as to understand not only its intention but the environment under which such provisions are legislated. In so stating, I echo the words of Lord Denning in **Magor and St. Mellons Rural District Council *v.* Newport Corporation[1950] 2 All ER 1226**, that;

> ***"We do not sit here to pull the language of Parliament to pieces and make nonsense of it. We sit here to find the intention of Parliament and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."***

28. Section 89 as a whole falls within a part of the Criminal Procedure Code titled; '***Institution of Proceedings'***, under the sub-heading '***Making a complaint'***. Thus, the sections in this part are concerned with the institution of proceedings through the making of a complaint. This is buttressed by Section 89(1) which states, inter alia, that proceedings may be instituted either by (***a) making a complaint or (b) bringing the person arrested before the magistrate.*** What constitutes the making of a complaint indicated in (a) above is elaborated in Section 89(2) which states, inter alia, ***that on the basis of reasonable and probable cause that an offence has been committed one may make a complaint regarding the same to a magistrate.***

29. The nature of such a complaint is then explored in Section 89(3) which states, inter alia, ***that the complaint may be oral or in writing*** and provides for the procedure to be followed in case of an oral complaint. Section 89(4) sets out the duty of a magistrate upon receiving a complaint and mandates him to draw or cause to be drawn a formal charge containing a statement of the offence charged unless such a charge is signed and presented by a police officer. The magistrate then undertakes his mandate under Section 89(4) subject to the provisions of Section 89(5) which allows the court to refuse to admit any complaint or formal charge that does not disclose an offence.

30. It is my view that provisions of subsection (5) appear to have been misconstrued severally by the subordinate courts and this (High Court) as giving wide ranging powers to magistrates to refuse formal charges that are presented to them by prosecutors. I hold the view that this trend ought to be reversed because my interpretation of subsection (5) drives me to hold that the power espoused therein is applicable only with regards to complaint or formal charge made under the entire section. That therefore, a court cannot narrowly interpret subsection (5) without having regard to the intention and purpose of the entire Section 89. A purposeful interpretation must be made.

31. It may be pointed out that the provision refers to both a complaint and formal charge. The "*complaint*" takes on the meaning set out in Section 89 as ably set out above. That leaves the court to define what a formal charge is under sub-section (5). One may argue that this refers to a charge formally drawn under Section 134. Far from this as the formal charge envisaged therein is a charge that has been reduced into writing by a police officer and presented to the court subsequent to a complaint envisioned by subsections (3) and (4).

32. This is buttressed by Section 90 of the Criminal Procedure Code which echoes the unique nature of Section 89 and offers a parallel procedure for the issuing of warrants and summons when the complaint or formal charge has been brought under Section 89. It is also apparent that the provision of this parallel system of bringing suspects to book was necessary in the old days of Kenya judicial system when the prosecutorial procedure may not have been properly structured and so charges would be drawn in court when a suspect has already been presented upon apprehension. See Lord Wilberforce in **Royal College of Nursing of the United Kingdom *v.* Department of Health and Social Security[1981] AC 800** ,that;

> ***"In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known to Parliament to be existing, at the time. It is a fair assumption that Parliament's policy or intention is directed to that state of affairs."***

33. It is my view that the formal charges properly drafted by a police officer or a public prosecutor as is currently the procedure in our jurisdiction should be governed by Sections 134 to 137 of the Criminal Procedure Code. Even if these provisions do not expressly provide for a rejection of a charge, that omission does not fetter the court's inherent powers to control its processes from abuse. This is in view of the fact that courts of superior jurisdiction have settled the jurisprudence that would render a charge sheet defective, which argument can be advanced before a magistrate to persuade the court to reject a charge. Therefore, nothing stops an accused from advancing that a charge sheet is defective within the scope of the settled law after which a court may find accordingly. A magistrate, if persuaded to reject a charge should also address himself to whether the charge satisfies Section 134 of the Criminal Procedure Code. That ought to apply to each charge in the instant application.

34. Having made my observation on the application of Section 89 of the Criminal Procedure Code, I feel that courts should not continue to apply this piece of legislation to reject charges. The provision no longer speaks to the current procedure used of bringing charges to court. It no longer retains the meaning it had when Parliament legislated it.

35. Finally, it is important to interrogate the trial magistrate's finding that the charges facing the Respondents, in so far as their crux was the Succession Cause No. 26 of 2011 should not have been preferred, rather that determination of the matters in question fell in the ambit of the court undertaking the Succession Cause as per the provisions of Section 76 of the Law of Succession Act. The trial court's reasoning in reaching its conclusion was clear to see from its holding that:

> ***"In my understanding, the succession court will have to deal with the issues laid before it to determine whether they satisfy any of the grounds for annulment or revocation of a grant if at all that is what the complainant herein is pursuing in her application."***

36. While the genesis of the charges preferred against the Respondents was the Succession Cause, it is clear that the charges facing them are coherent charges framed within the provisions of Section 134 to 137 of the Criminal Procedure Code and as such should be the subject of a conclusive trial. Further, it is clear that the trial magistrate based his finding by equating the criminal proceedings to a bid to revoke the grant issued to the Respondents. While that may be the logical conclusion that flows from the conclusion of the present trial, the fact is that if a criminal act is committed within the course of a civil or probate matter, nothing stops the investigators to investigate the criminal culpability element. I therefore align myself with Section 193A of the Criminal Procedure Code which allows for civil and criminal proceedings to proceed concurrently. The Respondents ought to disprove their involvement in the commission of the act at trial. Consequently, any criminal charges are in order and legal.

37. While the Respondents did submit before the trial court that the criminal case was intended to scuttle the proceedings in the Succession Cause they failed to qualify their assertion and it thus remained just that, an assertion.

38. Having so found that the learned magistrate applied an illegality of dismissing the charges under Section 89(5) of the Criminal Procedure Code this court is now seized with powers to correct the illegality by applying its revisionary jurisdiction enunciated earlier in this ruling.

39. I accordingly set aside the orders of the learned trial magistrate rejecting the charges against the Respondents in Criminal Case 2005 of 2017 at the Chief Magistrate's Court at Milimani. I reinstate the charges facing the Respondents. I order that the Respondents should face the trial. They should be presented before the Chief Magistrate, Milimani to take plea not later than the 14th March, 2019. The trial shall be conducted by another magistrate other than the one who delivered the ruling. It is so ordered.

DATED and **DELIVERED** this 11th day of **March, 2019.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Miss Atina for the Applicant.*

2. *Mr. Ndumbi for the 1st Respondent*

3. *Mr Bwire for the Respondent.*