



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 387 OF 2018

REPUBLIC.....APPLICANT

VERSUS

CATHERINE MUTHEU NDUNG'A.....1ST RESPONDENT

EMILY MWIKALI.....2ND RESPONDENT

(Being a revision arising from the orders of Hon. Nyakweba, Principal Magistrate,

made on 29th and 30th November, 2018 in Mombasa Chief Magistrate's Court

Criminal Case No. 2574 of 2012).

RULING ON REVISION

1. Through an application dated 3rd December, 2018 premised on the provisions of Sections 362, 363, 364 and 365 of the Criminal Procedure Code, Mr. Masila A. Masila, Prosecution Counsel filed an application on behalf of the Office of the Director of Public Prosecutions seeking the following orders:-

(i) Spent;

(ii) Spent;

(iii) That the Learned Honourable Judge varies the lower court's orders in terms of:-

(a) Allowing the prosecution to amend the charge sheet (sic); and

(b) Allowing the prosecution to re-open its case and allow the last witness being the Investigating Officer to testify.

2. Any other order that the court may deem fit and just to grant.

3. The applicant's case is that the respondents are accused persons in Mombasa Criminal Case No. 2574 of 2012 and that on 30th November, 2018, the Trial Court presided by Hon. Nyakweba, Principal Magistrate, ruled against the prosecution's application to amend the charge and consequently closed the prosecution's case.

4. The applicant through its Learned Counsel, Mr. Masila, submitted that on 29th November, 2018 the prosecution made an application to amend the charge under the provisions of Section 214(1) of the Criminal Procedure Code in respect to count 1, with regard to the amount of money that was allegedly stolen by the 1st respondent. He indicated that the application to amend the charge was disallowed by the Trial Magistrate on the basis that the variance between the charge and evidence that had been adduced in court was not a good enough reason to amend the charge. Mr. Masila further submitted that the application was made in good faith and if it had been allowed, the Prosecution would have recalled its witnesses if necessary, and the defence would have cross-examined them.

5. With regard to the issue of supply of statements on 30th November, 2018, Mr. Masila explained that the Investigating Officer was in court to testify after traveling from Nairobi but the prosecution realized that the said witness had not supplied his statement to the defence. Counsel for the Prosecution further stated that the said statement was later supplied to the Counsel for the defence who informed the court that he was

not ready to proceed as he had been supplied with the statement that morning. Mr. Masila indicated that the Trial Magistrate ordered the prosecutor to call any other witness but he had none other, save for the Investigating Officer who was to be the last witness. The court then closed the prosecution's case *suo moto*.

6. It was submitted for the Prosecution that the supply of witness statements to the defence is a continuous process. To fortress his submission, Counsel cited the case of **Dennis Edmond Apaa & 2 Others vs Ethics and Anti-Corruption Commission** [2012] eKLR. In reference to paragraph 27 of the said authority, the Prosecution Counsel submitted that the Court therein held that the duty of disclosure is a continuous process throughout the trial as the prosecution is required to avail all relevant evidence.

7. He argued that failure to supply the defence with the Investigating Officer's statement prior to 30th November, 2018 was an inadvertent error on the prosecution's part. He further stated that the Trial Magistrate decided not to hear the Investigating Officer because of the prosecution's failure to supply the said statement in advance, thus his evidence was shut out. He referred to Article 50(2)(j) of the Constitution of Kenya which provides for the supply of statements in advance and urged the court not to interpret the said provision to strictly mean that all statements must be supplied to the defence in advance of the trial. In his view, the Trial Magistrate should have given the defence ample time to go through the statement and to order the Investigating Officer to proceed with his evidence. The Prosecution Counsel contended that the Trial Magistrate had not give the prosecution the last adjournment but had given them hearing dates for 28th, 29th and 30th October, 2018.

8. Mr. Masila wound up his submissions by positing that a criminal trial is about fairness and it cannot be limited on either the side of the complainant or the accused person. He added that shutting out the Investigating Officer means that justice shall not be served as he was to produce all the exhibits that had been marked by other prosecution witnesses. He prayed for the reopening of the prosecution's case in order for the Investigating Officer to testify as the last witness.

9. Mr. Jared Magolo, Learned Counsel for the respondents opposed the application for revision. He submitted that under the provisions of Section 382 of the Criminal Procedure Code (CPC), this court has limited jurisdiction because under the said provision, this court checks on regularity, correctness and illegality of a decision. He argued that issues of constitutionality of the Magistrate's decision and interpretation of the provisions of Article 50(2)(j) of the Constitution cannot be dealt with on revision. He stated that the lower court exercised its jurisdiction and discretion and unless discretion of the said court was not exercised judiciously, then no revision lies.

10. It was submitted for the respondents that the Prosecution Counsel had in the lower court applied to amend the charge because he could not prove the initial charge and the Trial Magistrate held that the explanation given was not adequate. Counsel for the respondent opined that the complaint herein should have been by way of an appeal. He further submitted that an amendment of the charge would have resulted in the prosecution recalling all the witnesses. He further stated that the lower court case commenced hearing in the year 2012 and that the court record does not show the reason why the amendment was being sought. Counsel indicated that the Trial Magistrate gave a written ruling on his refusal to have the prosecution amend the charge.

11. Mr. Magolo argued that as at 28th and 29th November, 2018, the person who was to be called as a witness was unknown to them. He added that on 30th November, 2018 the prosecution supplied the respondents with the statement of the Investigating Officer and they wanted them to proceed to hearing. He argued that failure of the prosecution to supply him with the said statement was not an inadvertent oversight on the part of the prosecution and as such, the decision made by the Trial Magistrate does not qualify for revision. He contended that the prosecution was trying to bulldoze the proceedings of the lower court and that allowing the application would frustrate the defence to finalize its case. He submitted that the process of prosecution of a case does not mean bringing in witnesses at the last minute. He relied on the decision in **Mombasa Constitutional Petition No. 110 of 2012 Gabriel Mbuti Mulei vs EACC & Another**

12. Mr. Masila in response to the respondents' submissions pointed out that he took over prosecution of the case on 10th November, 2018 from Mr. Wangila and that he realized on 29th November, 2018 that there was no statement that had been recorded by the Investigating Officer.

ANALYSIS AND DETERMINATION

The issue that this court has been called upon to decide is whether the Trial Court was right in disallowing the application by the prosecution to amend the charge and for closing the prosecution's case.

13. Section 214 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya provides for instances where a charge can be amended and what ought to follow once the amendment is allowed. The said Section states that:-

"Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that –

(i) Where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) Where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence

was committed is not material and the charge need not be amended for the variance if it proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary." (emphasis added).

14. I find that the application made by the applicant to amend the charge in count 1 was necessitated by the Prosecution Counsel's view that the evidence that had been adduced would not prove beyond reasonable doubt the amount in issue with regard to the 1st accused person (1st respondent). He urged the court to read over to the 1st respondent the new charge. Mr. Egunza Advocate, who was holding brief for Mr. Magolo Advocate, for the respondents, did not oppose the application for amendment of the charge in count 1. In a surprise turn of events, the Trial Magistrate stated that he had perused Section 214 (of the Criminal Procedure Code) and noted that it does not provide for amendment of the charge when the evidence adduced was not sufficient to sustain a conviction. He further stated that if the same was allowed, it would be a travesty of justice. He therefore declined to allow the amendment on the grounds set out by the Prosecutor.

15. In my understanding, what Trial Magistrate found wanting in Mr. Masila's explanation as to why he needed to amend the charge, is his failure to express himself in the words used under the provisions of Section 214 of the Criminal Procedure Code (CPC). However, this court's interpretation of what Mr. Masila told the Trial Court was that the evidence adduced could not support the charge in count 1 and he therefore sought the court's approval to amend the charge to be in tandem with the evidence adduced. It was as straightforward as that. Obviously, the Prosecutor could only rely on the evidence that had been adduced by its witnesses and as for whether the evidence would reach the threshold of being beyond reasonable doubt, that was within the purview of the Trial Court.

16. Article 157(6) of the Constitution provides that the Director of Public Prosecutions (DPP) is empowered to institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence alleged to have been committed. It is therefore upon the DPP to file charges in court, be present during plea taking and at all pre-trial proceedings, attend court when a case is being mentioned and to attend the main trial to prosecute the case. Put another way, it is the prosecution that sets the agenda as to the charges to prefer against an accused person, when to amend the charge or when to withdraw it. The Prosecution Counsel gauges how the case is progressing and if the evidence tendered is likely to support the charge. If not, the DPP is at liberty to amend the charge to an appropriate one, if the evidence tendered discloses a different offence, other than the one an accused person has been charged with or if there is an error in the manner in which the charge was drafted. The court's duty is to consider the application to amend and if it allows an amendment to be done, it reads out the amended charge to the accused person and records the plea made by the accused person. A court can however decline to allow an amendment of a charge if it appears that it is being done in bad faith.

17. The prosecution is therefore in charge of how it will conduct its case and the Trial Court is in charge of the judicial process of recording of proceedings, considering applications made and determining the case. As an arbiter, the Trial Court should not be seen to be curtailing the prosecutorial powers of the DPP by unreasonably denying a Prosecution Counsel the opportunity to amend the charges brought to court. After all, when all is said and done, the prosecution would still be obligated to prove the amended charge beyond reasonable doubt. Even in the worst case scenario where an application for amendment is made after the accused person has been put on his defence, the Trial Court is empowered to acquit the accused person. Moreover, at the end of the trial, the Magistrate presiding over the case will have the duty of determining if the amended charge was proved beyond reasonable doubt. In this matter, I am of the considered view that the action of the Trial Court of denying the prosecution an opportunity to amend the charge with respect to Count 1 was both unjustifiable and unreasonable.

18. If amendment of the charge would have been allowed, the CPC gives the right to the accused person to request for the recall of prosecution witnesses to testify on the charge as amended and for them to be cross-examined. No prejudice would therefore have been occasioned to the respondents if an amendment of the charge in count 1 would have been allowed.

19. The other issue of complaint against the said Magistrate was the fact that he denied the prosecution an opportunity to call its last witness. The Prosecutor in his oral submissions stated that on 30th November, 2018, he realized that the defence had not been supplied with a copy of the Investigating Officer's statement. The provisions of Article 50(2)(j) of the Constitution provides for the supply of statements in advance. A perusal of the lower court file shows that the respondents were first arraigned in court in the year 2012. The case had been mentioned before several Magistrates and prosecuted before two of them. The case commenced hearing on 5th June, 2015 before Hon. V. Kachuodho, Resident Magistrate (RM), when one witness who was testifying was stood down because she was referring to some documents the defence Counsel had not been supplied with. As at that time, the lower court case was being prosecuted by Ms Ochola, Prosecution Counsel.

20. On 23rd November, 2016, the record shows that the case was heard by E. Kagoni, Senior Resident Magistrate (now principal Magistrate). The Prosecutor was Ms Ochola. In the course of examination-in-chief Mr. Magolo indicated that the witness who was at that time testifying, was referring to some documents the defence had not been served with. The matter was rescheduled for hearing to 5th December, 2016. On the said date, Mr. Magolo for the respondents did not turn up in court. The case was rescheduled for hearing on 6th March, 2017. Ms Fundi appeared for the State, PW1 Victoria Horsey was recalled for cross-examination, in the course of her examination-in-chief, Mr. Magolo interjected and said he had not been supplied with copies of the cheques that the witness was referring to.

21. The said witness testified further on 30th August, 2017 before Kagoni, Principal Magistrate (PM), with Ms Fundi as the Prosecution Counsel. The case was then fixed for hearing on 11th October, 2017 when Ms Fundi, informed the court that she had 5 witnesses. The case could not proceed on that day as Mr. Magolo had a civil case before this court. Hon. Kagoni, PM, listed the matter for hearing on 29th, 30th and 31st January, 2018. On that day, Mr. Asige Advocate, who was watching brief for the complainant indicated that it appeared as if the case was being handled at the convenience of Mr. Magolo and that he was being given preference. He therefore applied for the court to recuse itself. The Hon. Magistrate considered the application and stated that he did not wish to be in a position where the victim of a crime thought that he was biased. He further stated that much as he was doing the work to the best of his ability, since the complainant thought otherwise, he would recuse himself from the case.

22. The case was re-allocated to Hon. Nyakweba who rescheduled the hearing to 12th, 15th and 19th March, 2018. On 12th March, 2018, Prosecution Counsel, Mr. Wangila attended court and sought an adjournment as he did not have the Police file with him. The case was then

adjourned to 15th March, 2018. For an undisclosed reason, the court file was not taken to Hon. Nyakweba but to Hon. Kassam, SRM, who gave it a mention date for 26th April, 2018. On the said date, the file was taken to Kagoni, PM, who explained that the trial court was not sitting. He fixed it for mention on 10th May, 2018. On that day, Hon. Nyakweba fixed the case for hearing on 4th and 5th September, 2018. On 4th September, 2018, Mr. Mwamboje held brief for Mr. Magolo for the respondents herein and sought an adjournment as Mr. Magolo was engaged in the hearing of criminal appeals before the High Court during the service week. The prosecution had 3 witnesses in court. The Trial Magistrate granted the last adjournment on the part of the defence. The case proceeded for hearing on 4th October, 2018 before Hon. Nyakweba. Mr. Masila was the Prosecution Counsel on that day. PW1, Victoria Horsey testified again and Mr. Magolo cross-examined her at length. 4 other witnesses testified thereafter on different dates without any hitches.

23. On 30th November, 2018 when the case came up for hearing, Mr. Egunza complained that he had been served that morning with a witness statement dated 29th November, 2018 for a witness who was expected to testify as PW6. Mr. Masila explained that the witness he intended to call was the Investigating Officer and that Mr. Egunza should have applied to be given time to prepare to cross-examine the said witness. He further said that the witness had come all the way from Nairobi to testify and that the case had dragged on since the year 2012. He prayed for expeditious hearing of the case.

24. The Trial Court denied the prosecution an adjournment and closed the prosecution's case. The reasons given were that the respondents had a right to a fair trial as per the provisions of Article 50(c) and (j) of the Constitution and the purpose of a pre-trial was so as to give the defence the evidence that the prosecution would rely on at the hearing of the case. The said Magistrate however agreed that the prosecution could supply evidence as it emerged in the course of the trial. He found that the prosecution was trying to steal a march against the defence and it was a clear violation of the respondents' rights to a fair trial. The Trial Court ordered the Prosecution to call any other witness and declined to hear the witness whose statement had been supplied to the defence on the morning of 30th November, 2018. He further directed the prosecution to close its case if it had no other witness. Mr. Masila refused to close the prosecution's case and the Trial Court made an order closing the prosecution's case.

25. The Constitution of Kenya in Article 50(2)(c) provides for the right to a fair trial which includes at paragraph (c) the right to have adequate time and facilities to prepare a defence and at paragraph (j) for an accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence. Mr. Masila's explanation as to why the Investigating Officer's statement was availed late was that he had taken over prosecution of the case from Mr. Wangila and only realized the day before the hearing that the Investigating Officer had not availed his witness statement. He gave that explanation to this court but not to the Trial Court which was seized with the discretion to adjourn the case if a proper explanation had been put forth before it. It once again boils down to the issue of communication. It therefore needs to be emphasized that a Prosecution Counsel is under duty to explain his non-compliance with court directives with a degree of clarity and not to take it for granted that the Trial Court is bound to grant it all the prayers it seeks.

26. Having gone through the proceedings that took place before the lower court, it is apparent that the prosecution had in most instances been ready to prosecute its case and did avail its witnesses in court. The case did meet with several applications for adjournment due to Mr. Magolo's non-availability on several occasions. I note from the lower court proceedings that Mr. Masila took over prosecution of the case on 4th October, 2018 from Mr. Wangila and the case proceeded fairly fast after that. Having taken over prosecution of the case many years after the respondents were charged in court, it is plausible that he did not realize until very late that the Investigating Officer had not recorded a statement. Had he expressed his predicament well to the Hon. Magistrate, his oversight may have been played down.

27. The obligation that the prosecution has in disclosing the evidence it intends to rely in a case cannot be overstated. It however should not be forgotten that parties to a dispute are usually either two or more. Article 50(1) of the Constitution of Kenya provides as follows:-

"Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

28. The Office of the DPP institutes cases that are criminal in nature on behalf of aggrieved parties. It cannot be said that the right to a fair trial is only available to an accused person but not to the DPP on behalf of complainants. In my considered view, the right to a fair trial cuts across the board and is applicable to the prosecution and an accused person alike.

29. In the case relied on by Mr. Magolo in **Gabriel Mbiti Mulei vs EACC** (supra), the court was of the view that the DPP should have disclosed the evidence it was going to rely on to prosecute the said case before the petitioner therein went to court for plea taking. In the decision relied on by Ms Marindah of **Dennis Edmond Apaa & others vs EACC & Another** (supra), Judge Majanja was of the view that the words **"to be informed in advance"** as per the provisions of Article 50(2)(j) of the Constitution cannot be read restrictively to mean in advance of the trial. He further stated that the duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it and under Article 50(2)(c) of the Constitution, by being accorded adequate facilities to prepare for his or her defence.

30. In **Republic vs Stinchcombe** [1991] 3S.C.R 326, the Supreme Court of Canada held as follows:-

".....failure by the prosecution to disclose would impede the ability of the defence to make full answer and defence, a common law right which was subsequently included in the Canadian Charter of Rights and Freedoms and was one of the pillars of criminal justice system which ensured that the innocent were not convicted. The obligation to disclose was a continuing one and was to be updated when additional information was received....."

31. I am also of the view that the prosecution's duty to disclose is a continuing one throughout the hearing of the prosecution's case and is not limited to witness statements and documentary evidence being given to the defence during the pre-trial stage. If the provisions of Article 50(2)(c) and (j) of the Constitution were to be construed in a restricted manner, then it would make a mockery of the provisions of Section 150 of the Criminal Procedure Code which donates to the court the power of continuity in disclosure of evidence. This is aimed at arriving at a fair determination of the case after the Judge or Magistrate has heard a witness or witnesses but the court deems it necessary to clarify certain aspects of the evidence or to call for further evidence.

32. The said Section provides as follows:-

"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case;

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

33. In this case, I note that the Investigating Officer was present in court on 30th November, 2018 ready to testify. Having reached the tail end of the prosecution's case, I find that the Hon. Magistrate did not exercise his discretion judiciously in his decision to shut out the Investigating Officer from testifying in the lower court case. In the interest of justice, the Hon. Magistrate should have adjourned the case in order to give the defence sufficient time to go through the statement of the Investigating Officer. This court finds the decision that was made as being unreasonable and unfair to the prosecution. The Trial Magistrate knew that the case before him rested on documentary evidence which had been marked for identification and the said documents were awaiting production by the Investigating Officer. In making the said decision, the Hon. Magistrate was directly throwing out the evidence that had been adduced by the prosecution witnesses, through the window.

34. With regard to the constitutional provisions on jurisdiction of the High Court in making orders of revision, Articles 165 (6) and (7) of the Constitution of Kenya, 2010 reads as follows:-

"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising 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 the subordinate court or person, body authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice. (emphasis added).

35. The provisions of the criminal procedure code that empower this court to deal with the issue at hand are Sections 362 and 364. They provide as follows:-

"362. 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 (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 his knowledge

(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."

36. **In conclusion and having analyzed the proceedings that took place before the lower court, I am of the considered view that the applicant's complaint is grounded on a solid basis.** I therefore invoke the provisions of Article 165(7) of the Constitution of Kenya and Section 364(1)(b) of the Criminal Procedure Code and hereby quash the orders made by Hon. Nyakweba, Principal Magistrate, on 29th and 30th November, 2018 wherein he declined to allow the Prosecution Counsel to amend the charge in respect to Count 1 and for closing the prosecution's case before the Investigating Officer had testified, despite the fact that he was present in court. It is my finding that this court has the mandate to ensure the fair administration of justice.

37. I hereby make the following orders:-

(i) The application for revision is hereby granted as prayed;

(ii) The Deputy Registrar shall remit the court file for Mombasa Chief Magistrate's Court Criminal Case No. 2574 of 2012 to the Chief Magistrate's Criminal Court for re-allocation;

(iii) The said case will be mentioned before the said court on 27th June, 2019 for fixing of a further hearing date for the prosecution's case; and

(iv) For the avoidance of doubt, the Prosecution shall be permitted to amend Count 1 of the charges leveled against the 1st accused (1st respondent).

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 14th day of June, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Ogwen, Principal Prosecution Counsel, for the DPP

Mr. Paul Magolo for the respondents

Mr. Oliver Musundi – Court Assistant