



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO. 2 OF 2019

VINCENT ECHESA OKOTE.....APPLICANT

VERSUS

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

JUDGMENT

1. The applicant had been charged in Mumias SPMCCRC No. 818 of 2017 with cheating contrary to section 315 of the Penal Code of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence alleged that on the diverse dates between 2nd November 2012 and 7th March 2017 at Makate Market, Mayoni Location Mumias Sub-County within Kakamega County, by fraudulent means he obtained a sum of Kshs. 155, 000.00 from James Ongaro Ogote by falsely pretending that he was in a position to sell to him a parcel of land measuring 100 feet by 70 feet hived from North Wanga/Mayoni/147 a fact that he knew was false.

2. He pleaded not guilty to the charge and a trial was conducted, wherein the state called seven witnesses. The applicant gave an unsworn statement after he was put on his defence. He was eventually found guilty and sentenced to serve fifteen months in jail, and to pay Kshs. 160, 000.00 in default. It was further ordered that, should the applicant decide to pay the fine, Kshs. 155, 000.00 thereof was to be paid to the complainant.

3. The applicant was aggrieved, and applied to this court, through a letter by his advocate dated 11th February 2019, for revision of the decision of the trial court on the basis that the facts of the case did not disclose any criminal element. He argued that the two entered into a land sale transaction for a consideration of Kshs. 165, 000. Kshs. 120, 000.00 was paid leaving a balance of Kshs. 45, 000.00. The complainant allegedly took possession and utilised the land until 2017, when the applicant asked for the balance, whereupon the complainant stopped using the land and reported the matter to the police, arguing that the applicant had cheated him of his money.

4. When the matter was placed before me on 14th March 2019 for directions, the applicant and the state, through respective counsel, urged me to determine the matter on the basis of the available evidence and the court record.

5. The High Court is vested with supervisory powers over subordinate courts. That supervisory power is exercised through either appeal or revision. The power to exercise both appellate and supervisory jurisdiction over decisions of subordinate courts is conferred by Article 165(3)(e)(6)(7) of the Constitution, which provides as follows:

“3 ... the High Court shall have — (e) any other jurisdiction, original or appellate, conferred on it by legislation.

(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.”

6. The Criminal Procedure Code, Cap 75, Laws of Kenya, at section 347 confers appellate jurisdiction on the High Court with respect to appeals from decisions of subordinate courts in criminal matters. Section 347 provides:

“347. Appeal to High Court

(1) Save as is in this Part provided—

(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court; and

(b) (repealed)

(2) *An appeal to the High Court may be on a matter of fact as well as on a matter of law.*”

7. The constitutional provision on the revisionary jurisdiction of the High Court is echoed by section 362 of the Criminal Procedure Code, which provides as follows:

“362. *Power of High Court to call for records*

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.”

8. What I have before me is an application for revision. I have mentioned the provisions relating to appeal only so as to be clear on the what I am required to do in such cases. The court, in *Republic vs. Samuel Gathuo Kamau* [2016] eKLR, considered the distinction between the two jurisdictions, where he said:

“... supervisory jurisdiction may be exercised as may be provided by law – by way of appeal, revision, etc. It does not include any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals, the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal Procedure Code). As to revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See Article 165(7) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code.”

9. In *Republic vs. James Kiarie Mutungei* [2017] eKLR added to the discussion on the distinction between the two by saying:

“The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of the revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on merits ... In considering similar provisions under the Indian Criminal Procedure Code ... the Supreme Court in the case of *Sriraja Lakshmi Dyeing Works vs. Pangaswamy Chettair* (1980) 4 SCC 259 said as follows:

“The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa.”

10. The court in *Republic vs. John Wambua Munyao & 3 others* [2018] eKLR, weighed in on what criminal jurisdiction entails when it stated that:

“31. ... the powers of revision under section 362 of the Criminal Procedure Code are only to be invoked to enable this Court satisfy 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 subordinate court ...

32. ...

33. ...

34. ...

35. ...

36. ...the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision ...”

11. After considering the constitutional and statutory provisions on appellate and revisionary powers of the High Court, as well the judicial pronouncements thereon, I take the view that an appeal is broader than a revision, and that a revision is subsumed in an appeal. A person who approaches a court on revision is only asking the court to take a rather narrow look at the proceedings of the trial court where the focus ought to be on the regularity or propriety or correctness of the proceedings conducted or the decision arrived at. In other words, the challenge is more or less on the regularity or correctness or propriety of the process rather than on the merits the final determination of the trial court.

12. By contrast, an appellant invites the appellate court to consider the particular grounds raised, and the law requires the court to have a holistic approach to the matter so as to satisfy itself that the proceedings were conducted properly and regularly, and that the final verdict was supported by the evidence adduced and was within the law. That would mean that on appeal the appellate court looks for the propriety or regularity or correctness of the proceedings or order, as well as the merits of the decision that is the subject of the appeal.

13. With respect to the matter before me, I note that the applicant is not raising any questions of lack of correctness nor impropriety nor

irregularity with the subject proceedings or decision. He is not challenging the process, in terms of questioning its propriety or correctness or regularity. Instead, the challenge is on the merits. He points to the facts of the matter, and asserts that from those facts criminality had not been established.

14. Consequently, it is my finding that the application ought not have brought an application for revision, instead he should have lodged an appeal against the decision, since that would have afforded the court opportunity to review the evidence on record as a whole, and to come up with its own conclusions, given that this court would be handling the matter as a first appellate court. See *Okeno vs. Republic (1972) EA 32*, *Mwangi vs. Republic* [2006] 2 KLR 28, *John Irungu Macharia vs. Republic* Criminal Appeal No. 23 of 2008 and *Jackline Vidanye Baraza vs. Republic* [2015] eKLR.

15. I would have let the matter rest at that point. However, I have stumbled on a decision recently delivered in *Joshua Njiri vs. Republic* [2017] eKLR, where the court, while citing Articles 159 and 165(6) of the Constitution, held it could entertain an application for revision in a case where the applicant ought to have brought an appeal. It was the opinion of the court that appeals and revision provide the court with supervisory power to correct any injustice that might have occurred during the trial of the matter at the subordinate court.

16. I am persuaded that, in view of the constitutional provisions cited by the court in *Joshua Njiri vs. Republic* (supra), that the court can look beyond the technicalities of procedure with a view to doing justice to the parties. The applicant is aggrieved by the decision made by the trial court. He would like a higher court to look at the proceedings and decision of the trial court, and assess whether or not the same was handled properly and whether the decision of the court was reached upon a proper evaluation of the evidence. I shall therefore proceed to determine the matter on its merits, as if it was an appeal.

17. The applicant's case is that what was between him and the complainant was a transaction for sale of land. Money changed hands. The complainant took possession, but when the applicant asked him to pay the balance of the sale price so as to complete the sale, he reacted by rushing to report to the police that the applicant had cheated him on the sale. The complainant conceded the issue of the balance. The evidence from both sides clearly points to a civil dispute, which ought to be resolved through a civil process.

18. I have noted from the record that neither the state nor the applicant ever presented any material at the trial to establish that the subject land was registered in the name of the applicant. That would have been critical in evaluating whether or not the applicant had capacity to enter into any sale transaction over it. The property in question appears to be agricultural land, to which the Land Control Act, Cap 302, Laws of Kenya ought to apply, yet none of the parties mentioned anything about whether or not any attempts were made to comply with the provisions of the said law. I doubt whether the threshold had been reached to sustain a conviction in that matter.

19. In *John Oduor Ojera vs. Republic* [2009] eKLR, the court allowed an appeal where it held that criminal proceedings used to recover civil debts amount to an abuse of the court process. I dealt with a similar matter in *Juma Okhala Oparanya vs. Republic* (2019) eKLR, where I held that in cases of such nature as the instant one the remedy lies not with initiating criminal proceedings but with either commencing a civil suit before the Environment and Land Court to recover the land or the subordinate court to recover the money paid as a civil debt upon collapse of the transaction. See also *Edward Njiru Ndwiga vs. Republic* [2018] eKLR and *David Mwanza Kyule vs. Republic* [2018] eKLR.

20. In *Peter Macharia Ruchachu vs. Director of Public Prosecution & another* [2014] eKLR, the court stopped criminal proceedings, where the applicant had entered into a contract with the complainant for supply of timber and had not delivered the same, upon concluding that the predominant purpose in the institution of the criminal proceedings against the applicant was for reasons other than the purpose for which such proceedings are commenced. It was asserted that the prosecution was influenced by ulterior motives other than upholding criminal law. The court concluded that the case was meant to bring pressure to bear upon the applicant to settle a civil dispute.

21. I need not say more. The application before me has merits. The conviction on the one count of cheating contrary to section 315 of the Penal Code is hereby quashed and the sentence imposed set aside. Should the applicant be in prison custody, I hereby direct that he be released therefrom forthwith, unless he is otherwise lawfully held.

22. There is a final thing for me to say. Neither the state nor the applicant, who was represented by counsel, addressed me on the points of law that arose in the matter, either by way of oral or written submissions. The applicant had been convicted. To overturn a conviction is no simple matter. Both sides have a duty to address the court in such matters and place relevant case law to guide it. Advocates come on record in matters before the court so that they can assist the court. They can only do so by pointing it to the relevant statutory provisions and case law. It is abdication of their responsibility to just leave everything to the court without making any attempt at all to place persuasive legal material before it. Representation does not end with the advocate filing the pleadings.

DELIVERED DATED AND SIGNED AT KAKAMEGA THIS 14TH DAY OF JUNE 2019

W MUSYOKA

JUDGE