



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CRIMINAL REVISION CASE NO. 18 OF 2019**

**PHILIP MAKANDA.....APPLICANT**

**-VERSUS -**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

**1. Philip Makanda**, the Applicant approached this court pursuant to the provisions of **Section 362** and **364** of the **Criminal Procedure Code** and **Article 165 (6) and (7)** of the Constitution seeking orders thus:

1. ....Spent

2. That this Honourable court be pleased to grant an Order for stay of proceedings in Kitui Criminal Case NO. 718 of 2017 pending the hearing and determination of this Application.

3. That in the alternative to prayer 2, the orders for payment to the complainant be varied to direct that the payments be made to court pending the hearing and determination of this Application.

4. That the decision of the trial Magistrate be reviewed in its entirety and the conviction and sentence be set aside.

2. The Application is premised on grounds that: The Applicant was charged with **obtaining money by false pretence Contrary Section 313 of the Penal Code**; he was convicted; and sentenced to compensate the complainant monies received together with expenses incurred since the case started; a few days before the judgment was delivered the complainant went and carried away 4000 bricks that he had made in the subject plot in a manner to suggest that he had anticipated orders of the court; the trial court in its judgment, delved into matters that are civil in nature and outside the ambit of Criminal proceedings; the trial court has aided someone who was in breach of contract.

3. That unless the orders of stay of proceedings is granted, the Applicant stands to suffer irreparable and substantial loss as the complainant is unlikely to be willing to reimburse the compensation amount should the revision succeed.

4. The Application is supported by an Affidavit deponed by the Applicant where he reiterated what is stated in the grounds upon which the application is based.

5. The Respondent/State filed grounds of opposition contending that the application is an abuse of the process of the court as prescribed under **Section 364 (5) of the Criminal Procedure Code** and should be dismissed for reasons that the Applicant seeks review through his Notice of Motion dated the **25<sup>th</sup> day of June 2019** and has filed an appeal through Petition of Appeal dated **2<sup>nd</sup> day of July, 2019**, both review and appeal that arise from the same decision which he seeks to have argued simultaneously. That the Law Prescribes for grounds for Review as distinct from grounds for appeal and no such grounds for review are made apparent in the application and therefore the applicant seeks to undermine the trite procedure and ultimately the end of justice gambling with options availed for redress.

6. The application was canvassed by way of written submissions. It was stated by the applicant that he has filed an **Appeal No. 23 of 2019**.

7. His contention is that there was an agreement for sale tabled before the lower court which was undisputed to the effect that the complainant was supposed to pay **Kshs. 70,000/=** for land but he only paid **Kshs. 50,000/=** leaving a balance of **Kshs.20,000/=** that was supposed to be paid in two (2) days. That he got onto the land, cut trees and made bricks. The sale was later objected to by an estranged wife of the Accused (Applicant) which should have been dealt with the civil way. The trial Magistrate was faulted for reaching a finding that the Applicant (Accused) agreed to refund **Kshs. 75,000/=** to the complainant and that the Applicant did not transfer the land to the complainant.

8. It was further argued that, the case was civil in nature as there was existence of a commercial agreement between the parties and that the applicant had no intention of defrauding the complainant.

9. With regard to the grounds of opposition raised, it was argued that the Application was seeking to have the improper, incorrect, illegal and irregular decision of the Magistrate's Court corrected. Therefore, an Appeal and an application for review can run simultaneously. That the grounds set out revolve around the correctness, legality and propriety of the orders of the Magistrate; and especially so the order of compensation made; and that the application is not intended to undermine ends of justice.

10. In its submission, the Respondent emphasized the fact that seeking Review and the Appeal to be heard simultaneously is an abuse of the process and that the Applicant ought to have moved the court by way of an appeal as opposed to a revision.

11. I have re-considered what transpired in the lower court and also the rival submissions of both parties and Case law cited.

12. I have been asked to review the decision of the trial court in its entirety, both the conviction and sentence imposed. This court is clothed with jurisdiction to supervise the subordinate court and to make orders that are appropriate for the purpose of fair administration of justice. **(See Article 165(6) and (7) of the Constitution.**

13. **Section 362 of the Criminal Procedure Code** provides thus:

**'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.'**

14. In the case **Martin Mavuti Kituyi Vs. Republic HCCR. Revision No. 27 of 2013 (BGM)** the court rendered itself thus:

**"..... the very nature of Revision as a discretionary remedy explains the policy underpinnings of Section 364(5) of the Criminal Procedure Code; 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....."**

15. The submissions filed by the Applicant which are detailed query the decision reached by the trial court. In its judgment the trial court gave reasons for its decision. At the point of filing the Application for review, the applicant had not filed an appeal against the decision of the trial court.

16. **Section 364(5) of the Criminal Procedure Code** provides thus;

**"(5) 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".**

17. In the case of **Wahome Vs. Republic 1981 (497)** the court stated that;

**"Revision is a discretionary remedy which if exercised, a right of appeal lies but where the judge declines to exercise this power there is no right of Appeal".**

18. The grounds upon which the application is premised question the correctness and propriety of the sentence meted out. In meting out the sentence, the court rendered itself thus:

**"The accused is directed to settle the issue through compensation of the monies received plus expenses incurred since the start of the case".**

19. Unless stated otherwise, sentencing is discretionary and in particular **Section 31 of the Penal Code** states as follows;

**"Any person who is convicted of an offence may be adjudged to make compensation to any person injured by his offence, and the compensation may be either in addition to or in substitution for any other punishment".**

A court has the discretion of making a compensation order in substitution of any punishment. But such an order is only made where the offence does not attract a minimum sentence.

20. Where the court purports to act pursuant to **Section 171 of the Criminal Procedure Code**, in the case of the Subordinate Court, the sum awarded cannot exceed ten thousand shillings and in that respect, a dissatisfied party has a right of appeal from the order awarding costs. Where the court purports to order compensation for costs incurred in relation to proceedings, it ought to have evidence of such costs. In such an instance the court must be guided by same factors as provided in **Section 175(3) of the Criminal Procedure Code** thus;

**"(3) No order shall be made under subsection (2)— (a) so as to require payment of an amount that exceeds the amount that the court making the order is authorized by law to award or confirm as damages in civil proceedings; or (b) in any case**

where, by reason of— (i) the complexity of evidentiary matters affecting the quantum of damages; (ii) the insufficiency of evidence before it in relation to such damages or their quantum; (iii) the provisions of the Limitation of Actions Act (Cap. 22); or (iv) any other circumstances, the court considers that such an order would unduly prejudice the rights of the convicted person in respect of the civil liability”.

21. And of importance is the fact that an order for compensation can only take effect on expiry of the time limited for appeal against the conviction or sentence in respect which the order was made (**See Section 175 (4) of the Criminal Procedure Code**)

22. This is a case where the trial court purported to make a compensation order in substitution of the punishment: In doing so it did not follow the laid down process. It failed to take into account the stipulated procedure.

23. Further, looking at the record, the order was made on the 20.6.2019 and the Applicant was given four (4) days to comply with the order.

24. **Section 349 of the Criminal Procedure Code** provides thus;

**“The appeal must be lodged within 14 days of sentencing. The time can be extended if failure to lodge has been occasioned by the inability of the accused or his advocate to obtain judgment and proceedings through no fault of their own”.**

25. Having had **fourteen (14) days** within which to appeal, it was improper for the Trial Magistrate to purport to ensure compliance of the order within four (4) days.

26. Having satisfied myself of what transpired in the lower court, I find that the sentence meted out was improper. In the result, **I set it aside and direct the Deputy Registrar to place the file before the Chief Magistrate’s Court for purposes of meting out a proper sentence.**

27. Mention on the **25/9/2019**.

28. It is so ordered.

**Dated, Signed and Delivered at Kitui this 11<sup>th</sup> day of September, 2019**

**L.N. MUTENDE**

**JUDGE**