REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL MISCELLANEOUS APPLICATION NO. 109 OF 2019

STANLEY MUIA MAKAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from the Rulings and or Orders in Machakos Chief Magistrate's

Criminal Case No. 114 of 2018 presided over by Hon. C. Ocharo,

Senior Principal Magistrate)

RULING

1. This Application came to this court by way of a certificate of urgency and a notice of motion under Article 50(2)(a), 159(1) and 258 of the Constitution and Section 208, 362 and 364 of the Criminal Procedure Code. The application was filed on 24th July, 2019 and was supported by an affidavit sworn by the applicant on even date.

The facts leading to this revision cause were as follows; There was a criminal case in the trial court where the applicant is the accused charged with an offence of assault causing actual bodily harm. Pw1 was the complainant, Joseph Ndambuki Kioko who was examined in chief, however during cross-examination he rejected the written statement and averred that the signature on the statement was not his.

2. This culminated into the trial magistrate directing and ordering that the investigating officer does record the complainant's statement and supply it to the defence. She allowed a pre-trial disclosure to happen after the trial had commenced. There are a number of issues to note that arise from this action by the trial Magistrate as observed from the record:

a. The complainant testified as Pw1 and denied his statement.

b. The investigating officer was called to explain the circumstances of recording the statement and he did confirm that the statement he had recorded indeed belonged to the complainant and even identified the signature.

c. The trial court made a ruling and executed it. The trial Magistrate handed over the right to the prosecution to correct an anomaly in the evidence and fill in the gaps that were noted by the accused's counsel.

d. Whereas both parties were represented, there is no record showing where they made any submissions on whether or not to allow a fresh statement. The investigating officer testified that the complainant signed the statement and he was not cross-examined. The complainant admitted having signed a statement and he testified that he was shown a wrong signature whereupon the counsel for the accused took a date for hearing. On 26.9.2018 counsel told the court that he had not received the statement whereupon the court directed that the investigating officer record a statement and on 16.12.2018 counsel for the accused insisted that he wanted the statement that was drawn by the complainant and signed by him that he had mentioned on 1.8.2018.

e. From the account of the prosecution, there was only one statement and the complainant disputed having signed it.

3. There is something strange about the conduct of this case by the prosecution.

4. Turning to this application, the enabling law for revision is Under **Article 165(6) and (7) of the Constitution** and **Section 362 as read**

together with Section 364 of the Criminal Procedure Code. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the same. Reproduced 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 its knowledge, the high court may**
>
> **…….**
>
> **b. in the case of any other order 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;**
>
> **Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.**
>
> *……;*
>
> **(*5*).When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."**

5. For the Applicant, it was submitted that he read mischief in the way the complainant was ordered to supply a fresh statement and yet he confirmed that he signed a statement. It is argued that the application be allowed.

6. Prosecution Counsel for the respondent on his part conceded that a revision be made after perusing the proceedings of the lower court. He added that the court ought to have confined itself to the issues before it and leave the matter to the DPP because there is a question of partiality that arises.

7. After carefully perusing the record and the submissions of both counsel, I am of the considered view that the applicant was denied an opportunity/right to be heard. The Article 50 of the Constitution is alive to this right. Everyone is entitled to the right to be heard. The constitution also provides for a fair hearing. In the case of **Evans vs Bartlam [1937] AC 473 at 480,** the Court stated that unless and until the court has pronounced a judgment upon the merits of the case or by consent of the parties, it is to have power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure.

8. Similarly the question of pre-trial disclosure was settled by the constitutional court of Uganda in ***Constitutional reference No. 6 of 2007 Soon Yeon Kong Kim and Kwanga Mao versus Attorney General*** **(2008) UGCC 2.**

In its unanimous decision the Constitutional court held as follows at pages 12-13 of its Ruling;

> ***We have*** **stated here above that Article 28(1) and (3) require an accused person charged with any criminal offence to be presumed innocent and to be afforded all material statements and exhibits to enable him or her prepare his or her defence without any impediment. This is pre-trial *disclosure. This disclosure is not limited to reasonable information only. Counsel for both parties have agreed that the right to disclosure is not absolute. We* respectfully accept that view. Both the Kenyan case of Juma & Others v AG (2003) 2 EA and the South African case of Shabalala (supra) support this view. Such a disclosure is subject to some limitations to be established by evidence by the State on grounds of State secrets, protection of witnesses from intimidation, protection of the identity of informers from disclosure or that due to the simplicity of the case, disclosure is not justified for purposes of a fair trial. This means that an accused person *is prima facie entitled to disclosure but the 'prosecution may by evidence justify denial on any of the above grounds. It's the trial court that has discretion whether the denial has been established or not."***

9. The accused was entitled to have the statements before the trial commenced in line with his right to a fair trial and in any event the complainant told the court that he signed a statement meaning that as at 1.8.2018 the statement was in existence and by extension, at the time when the criminal proceedings were commenced, the statement was in existence. Learned counsel for the applicant/accused insisted that he wanted that statement and no other as there was no need for a fresh statement. There is standard procedure under the Evidence Act and Section 150 of the Criminal Procedure Code Act under which a court may in *suo moto* call for additional evidence. In ***Kulukana Otim v R*** **[1963] EA 257**, the Court of Appeal, in considering section 148 of the Ugandan Criminal Procedure Code which is, in *pari materia* with our section 150, stated that:

> **"It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself…."**

10. In ordering for a fresh statement in respect of a witness who had given evidence, I find the same irregular and a miscarriage of justice

because there was a breach of a right to fair trial as indicated above.

11. I now turn to the most difficult part of this revision; i.e. remedies**.** A Reading of the pleadings of the applicant, the applicant pleaded that he seeks a review of the impugned order and sought other orders as the court deemed fit and has sought no specific order. However Section 364 of the Criminal Procedure Code Act provides that ***in the case of any other order than an order of acquittal, alter or reverse the order,*** in this regard I shall reverse the order complained of. The order directing the investigating officer to record a fresh statement from the complainant is hereby reversed. The trial court is directed to proceed with the trial based on the statements of witnesses already made and supplied to the defence prior to commencement of the trial. This is without prejudice to the prosecution's right to seek to introduce new evidence upon application with the defence being accorded an opportunity to respond thereto.

12. I make no orders as to costs since the issue arose during a judicial officer's duties while handling the matter placed before her.

It is so ordered.

Dated and delivered at Machakos this 19th day of September, 2019.

D. K. Kemei

Judge