



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 5 OF 2019

JOHN OMOLLO NYAKONGO.....APPLICANT

VERSUS

1. REAGAN WANJALA 1ST RESPONDENT

2. PETER JUMA SIMIYU 2ND RESPONDENT

3. OFFICE OF THE DIRECTOR OF PUBLIC

PROSECUTION 3RD RESPONDENT

RULING

1. On 6th February, 2018 the applicant filed an application under the provisions of Articles 50(1), 22, 47(1), 159(1)(2) and 165(3)(6)(7) of the Constitution 2010, Sections 362, 364, 100 and 202 of the Criminal Procedure Code, Sections 3, 4, 5, 7 and 9 of the Fair Administration Act, 3, 4, 5, 7 and 9 of the Fair Administration Act, 2015 and all enabling provisions of the law. The applicant prays for the following orders:-

(i) That this Honourable Court be pleased to revise, review and set aside the order of dismissal of criminal case No. 685 of 2015 as consolidated with CMCR No. 1338 of 2016 against the 1st and 2nd respondents respectively and substitute it with an order of reinstatement and direct the case to proceed before any other court other than Hon. E. Kagoni;

(ii) That this Honourable court orders for the proceedings of criminal case No. 685 of 2015 as consolidated with CMCR No. 1338 of 2016 (sic); and

(iii) Spent.

2. The application is anchored on the grounds in support of it and the affidavit of John Omollo Nyakongo sworn on 5th February, 2019. The 2nd respondent filed grounds of opposition on 21st February, 2019 and a replying affidavit on 22nd February, 2019. The applicant filed a further affidavit on 13th March, 2019.

3. In arguing the application, the applicant submitted that Auctioneers broke into his office without orders of the court. Thereafter the police investigated the case and recommended that the culprits, Peter Juma Simiyu and Reagan Wanjala be charged. The applicant stated that the police first arrested the 1st respondent after which he was charged. The 2nd respondent was arrested and charged later.

4. The applicant submitted that he testified against the first respondent but not against the 2nd respondent as he was arrested later. The applicant asserted that he was never summoned to go before the trial court a second time to give evidence. He also said that some witnesses were not called by the Director of Public Prosecutions (DPP) to testify.

5. The applicant indicated that a case was filed against him and the DPP by the 1st and 2nd respondents after they were acquitted under Section 202 of the Criminal Procedure Code as the police file was missing on the day the criminal case was scheduled for hearing. The applicant explained that he was shocked to learn that the 1st and 2nd respondents were acquitted and only got to know about it because of the civil cases filed against him and the DPP. He stated that he had no prior information about their acquittal.

6. The applicant submitted that he wrote to the DPP complaining about the acquittal of the 1st and 2nd respondents and asked them to apply for review but he got no response and that is the reason why he filed the present application. He stated that the 2nd respondent replied to the

application on 21st February, 2019. That necessitated his filing of a further affidavit. He urged the court to go through his supporting and further affidavits and allow the application by reviewing the orders made by the Hon. Magistrate.

7. Mr. Akanga for the 1st respondent informed this court that the 1st respondent died in December, 2018. He therefore filed a replying affidavit for the 2nd respondent.

8. He submitted that an Auctioneer was instructed by the applicant's landlord to levy distress for rent arrears of Kshs. 300,000/= after the grace period the applicant had been given by the landlord elapsed. The applicants items were thereafter carted away. It was submitted that the applicant filed a miscellaneous application which was dismissed. He then went to Central Police Station and lodged a complaint which resulted in prosecution of the 1st and 2nd respondents.

9. He indicated that Mombasa Chief Magistrate's Court Criminal Case No. 1338 of 2016 and 685 of 2016 were consolidated and heard together. It was further indicated that the applicant testified.

10. Mr. Akanga argued that the applicant should have appealed through the Director of Public Prosecutions and that the applicant lacked the *locus standi* to apply for orders of revision. He referred to the provisions of Section 364(1)(b) of the Criminal Procedure Code (CPC) and submitted that they expressly provide that an order for revision is not available in instances where there was an acquittal. He stated that the 1st and 2nd respondents were acquitted under Section 202 of the CPC.

11. He cited the provisions of Section 365 of the CPC and stated that no order of revision can lie where an appeal can be filed. He regarded the application herein as an afterthought as the acquittal was made in the year 2017. He was of the view that this application was filed after the malicious prosecution suit in the lower court was filed. He saw the applicant as being intent on scuttling the said case as he had waited for 2 years since the acquittal of the 1st and 2nd respondents. He prayed for dismissal of the application.

12. Ms Marindah, Prosecution Counsel, for the 3rd respondent conceded to this application. She submitted that the shortcoming on the part of the police should not be visited upon the applicant. She stated that the failure to bond him should not go to the benefit of the 1st and 2nd respondents. She prayed for reinstatement of the lower court case for hearing before another Magistrate.

13. In his rejoinder to the 2nd respondent's submissions, the applicant stated that following distraint for rent, he went to court and got orders for stay of execution for 14 days. The said orders were to elapse on 9th March, 2016. He submitted that on 10th March, 2016 the 1st and 2nd respondents without the benefit of a court order broke into his office and took away his goods. He indicated that after investigations, police arrested the 1st and 2nd respondents for breaking into his office and taking away his goods.

ANALYSIS AND DETERMINATION

14. The applicant herein in his affidavit states that he wrote a letter to the Office of the Director of Public Prosecutions requesting the said office to apply for review of the decision of the Trial Court but he received no response. He has thus moved this court for revision. The applicant's complaint is that the 1st and 2nd respondents were acquitted under the provisions of Section 202 of the Criminal Procedure Code for his failure to attend court. The applicant herein is the one who had lodged a complaint at Central Police Station, Mombasa when the 1st and 2nd respondents who were Auctioneers broke into his office and carted away various items. He submitted that the 2 respondents as at 10th March, 2015 did not have any court orders that allowed them to do so.

15. Mr. Akanga on his part submitted that the 2 Auctioneers lawfully executed their duties pursuant to an order for distraint for rent which had been issued against the applicant. The above issue however is not what is before me. The issue that calls for determination is if this court can through an application for revision order for reinstatement of Mombasa Chief Magistrate's Court Criminal Case No. 685 of 2016 consolidated with Criminal Case No. 138 of 2016 following the acquittal of the 1st and 2nd respondents under the provisions of Section 202 of the Criminal Procedure Code.

16. The supervisory jurisdiction of the High Court is conferred by Article 165 (6) and 7 of the Constitution and Section 364 (1) of the Criminal Procedure Code. The latter provisions state as follows:-

“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 –

(a) In the case of a conviction, exercise any of the powers conferred on it, as a Court of Appeal by Sections 354, 357 and 358, and may enhance the sentence;

(b) In the case of any other order other than an order of acquittal, alter or reverse the order;

(c)

(2)

(3)

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction;

(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.” (emphasis added).

17. This court has perused the proceedings that led to the acquittal of the 1st and 2nd respondents. On 23rd October, 2017 they attended court. The Prosecution Counsel was Ms Fundi. She informed the court that she was waiting for the police file from DCI Urban. The Trial Magistrate, Hon. Kagoni placed the file aside for half an hour.

18. At 11:00 a.m., Ms Fundi applied to withdraw the case under the provisions of Section 87(a) of the Criminal Procedure Code because the police file had not been availed. Mr. Sewe for the 1st respondent opposed the application for withdrawal of the case and stated that since the consolidation of the two cases, the prosecution had never been ready to proceed. He stated that the prosecution had sought and had been granted several adjournments and the prosecution had been granted the last adjournment at a previous hearing.

19. Ms Oyier for the 2nd respondent associated herself with the submissions of Mr. Sewe and opposed the application for adjournment.

20. The Prosecutor agreed that they had been granted the last adjournment. She further said that the police file could not be traced and that ***is why witnesses had not been traced. She also said that there was a complainant whose interest had to be considered*** (emphasis added). Hon. Kagoni noted that on 10th May, 2017 the police file was not availed in court and it was not availed on the 23rd October, 2017 as well. He noted that the prosecution had been granted the last adjournment and that a file which had (an order for) a last adjournment should not be misplaced by the police.

21. The Hon. Magistrate noted that the complainant was not in court, meaning that he might as well have lost interest in the case. The said Magistrate agreed with the defence that under the circumstances, Section 87(a) of the Criminal Procedure Code could not be in the interest of both the absent complainant and the accused persons, who had been diligently attending court. He then proceeded to acquit both the 1st and 2nd respondents under the provisions of Section 202 of the Criminal Procedure Code. The said Section provides as follows:-

“ If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then if the complainant, having had notice of the place and time appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event, it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.” (emphasis added).

22. It is clear to this court that in the proceedings of 23rd October, 2017, the Hon. Magistrate heard and recorded that the Prosecution Counsel had said that the police file had not been traced and therefore witnesses had not been traced. It is therefore not understandable why the said Hon. Magistrate acquitted the 1st and 2nd respondents under Section 202 of the CPC. My understanding of the said provisions is that a Trial Court has to be shown evidence that witnesses had been bonded but failed to attend Court. There was no such evidence presented before the said court. There is therefore no doubt that witnesses were not bonded to attend court on 23rd October, 2017.

23. The lower court proceedings reveal that the applicant herein testified against the 1st respondent before that case and the other case against the 2nd respondent were consolidated. The applicant was supposed to be bonded to adduce evidence once more, after consolidation of the cases. He was never bonded.

24. This court therefore believes his assertion that he knew of the acquittal of the 1st and 2nd respondents when he was served with pleadings for suits for malicious prosecution by the said respondents.

25. In the present application, this court is not being requested to turn an acquittal into a conviction. The applicant is seeking an order for reinstatement of the lower court cases.

26. In the case for **Reuben Nyamai Bichange, vs Republic** [2005] eKLR when making reference to the provisions of Section 364(4) of the CPC, the Court of Appeal stated thus:-

“The meaning of this Section is in plain language. Where an accused person has been acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction.” (emphasis added).

27. Mr. Akanga submitted that the applicant should have appealed. I think not. The inclusion of the supervisory jurisdiction of the High Court in the provisions of Articles 165 (6) and (7) gives this court wide powers to make orders on revision. Under the said provisions, the High Court can make any order or give any direction it considers appropriate to ensure fair administration of justice, depending on the circumstances of the case. It is common knowledge that appeals can at times take years to be heard. Revision is an avenue that is open to litigants to ventilate their complaints in a more simplified and expeditious manner as long as the High Court in so doing does not turn an order of acquittal into a conviction.

28. A copy of the 1st respondent's burial permit was attached to the replying affidavit of the 2nd respondent. The foregoing therefore means that no criminal case can be brought against him.

29. Ms Marindah, Prosecution Counsel, was right in conceding to the revision. After an analysis of the lower court proceedings and having heard the submissions made, I am of the considered view that the application dated 5th February, 2018 has merit.

30. This court orders for the reinstatement of Mombasa Chief Magistrate's Court Criminal Case No. 1338 of 2016, **Republic vs Peter Juma Simiyu**. The said person shall be arraigned before the Mombasa Chief Magistrate's Court on 14th November, 2019 to answer to the charge he faced previously in the lower court. The lower court case file shall be returned to the relevant registry.

31. The case will be heard by any other Magistrate who has jurisdiction save for Hon. Kagoni, Principal Magistrate, whose order forms the subject of this revision.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 1st day of November, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-,

Applicant present in person

Mr. Muthomi, Prosecution Counsel for the DPP

Mr. Oliver Musundi - Court Assistant