



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL REVISION CASE NO. 70 OF 2018

MAURICE KOMBE KIBONI.....APPLICANT

VERSUS

DIVISIONAL CRIMINAL

INVESTIGATION OFFICER -KILIFI1ST RESPONDENT

OFFICER COMMANDING

KILIFI POLICE STATION.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Mr. Bwire for the appellant

Ms. Sombo for the respondents

RULING

This revision arises out of the order of the Magistrate court at Kilifi allowing the applicant to be released on cash bail of Kshs.20,000/= pending any arrest that may be effected against him by the respondents.

Based on the aforesaid order the applicant has moved this court by way of revision. Being aggrieved of the omission by the Learned trial Magistrate for not granting the alternative order of not reporting to the respondents for an explanation why he was needed for interrogation. **Mr. Obaga** for the applicant relied heavily on the affidavit and grounds on the notice of motion.

Analysis

The Law in exercise of revisionary jurisdiction under Section 362 of the Criminal Procedure Code provides as follows:

“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.”

The source of revisionary jurisdiction is Article 165(6) & (7) of the Constitution which vests the High Court with supervisory jurisdiction over subordinate courts, any person or authority exercising a judicial or quasi-judicial function but not over a superior court. It is by virtue of this article that the High Court derives its authority to call for the record of any proceedings before any subordinate court or any other organ or authority under Sub-section 6. However, it would be only in exceptional circumstances that the High Court under the provisions and the necessity of justice that the power will be exercised to vary or set aside the impugned order or proceedings of another constitutional organ.

The settled legal principles thereto under Section 362 of the Criminal Procedure Code for such exercise of revisionary jurisdiction has to pass the following threshold:

1. That the Magistrate who has the jurisdiction vested in him by law fails to exercise such jurisdiction and as a result he errors in law and fact

2. That in discharging his function failed to exercise the jurisdiction so vested by the constitution and the statute.

3. That in so acting and exercising discretion the orders so granted or the proceedings become tainted with impropriety, illegality or material irregularity.

The conceptual issue raised by the applicant was whether the Learned trial Magistrate had the right in the specific situation not to direct the applicant to report to the police station for an explanation on the contemplated investigation.

In my view, there are three potential scenarios which could have undermined the enforcement of such an order. First, the National Police Service is a constitutional body established by the constitution under Article 243. The objects and functions as defined under Article 244 of the Constitution. More importantly, the Magistrate is not bound to ask the applicant to report to the police to seek clarification with regard to the discharge of their functions as defined in the constitution and enabling statutes.

Secondly, the Learned Magistrate was to address the application on bail pending arrest. It was apparent that for completeness the applicant was at liberty to submit himself to the police station to establish the relevant evidence and material in possession of the police requiring an answer or a response on his part. Thirdly, the test to give rise to a legal question under Section 362 of the Criminal Procedure Code is that when the Magistrate on consideration of the application, the discretion exercised in the course was tainted with illegality, irregularity or impropriety.

I affirm the following passage in **Rex v Natbell Liquors Ltd [1922] 2 A. C. 128,156** that it is quite clear that the intention behind Section 362 of the Criminal Procedure Code is for exercise of revisionary jurisdiction to see that the inferior court has not exceeded its own jurisdiction, and for that very reason it is bound. Subject to Section 362 the order or proceedings may be reviewed by the High Court where there is evidence of absence of jurisdiction on the part of the inferior court, tribunal or authority, gross irregularity or illegality in the proceedings or order.

In the instant application, I am satisfied that the trial court did not exceed its jurisdiction in dealing with the order not to direct the respondent to report to the police station to seek clarification for his arrest.

The anticipatory bail in accordance to Article 49 (h) of the Constitution and Section 123 of Criminal Procedure Code was sufficient to render the applicant at liberty to visit the office of the National Police Service.

I see no merit in the application indeed, I find it difficult to understand why an applicant who has been released on bail cannot just walk to the police station to inquire the reason of his imminent arrest.

It has not been shown by the applicant that the impugned decision offends against the principles of natural justice, due process or outside the jurisdiction of the Learned Magistrate.

On the other hand, the test of irregularity, impropriety or incorrectness of the order in the circumstances of this case has equally not been discharged to call for revisionary jurisdiction of this court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF NOVEMBER 2019.

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R. NYAKUNDI

JUDGE