



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL REVISION NO. 39 OF 2019

REPUBLIC.....APPLICANT

VERSUS

MOHAMMED KAKUNDI KIBONI.....RESPONDENT

(Being a revision of orders related to release of exhibit in Traffic Case No. 426 of 2019 determined on 6.8.2019 by Hon. S. D. Sitati (R.M))

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Jubale for the Respondent

RULING

This revision arises out of the proceedings in Criminal Case No. 426 of 2019 at Kilifi Law Court being presided over by **Hon. S. D. Sitati – Resident Magistrate.**

In the proceedings the accused person **Mohammed Kakundi Kiboni** is facing the following counts:

A charge of causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 of the Laws of Kenya.

Count 2:Driving a public service vehicle on a public road without an inspection certificate contrary to Section 17A (1) (b) as read with Section 29 (1) of the Traffic Act.

Count 3:Driving a public service vehicle on a public road without an insurance contrary to Section 4 (1) as read with Section 4 (2) of the Insurance Motor Vehicle Third Party Risk Act Cap 405 Laws of Kenya.

Background

The brief facts on the main charge are that on the 25.2.2019 about 15.00 hours along the Matano Mane – Kilifi road at Dida Forest area being the driver of the motor vehicle registration number KAV 310 N make Nissan Matatu drove the said motor vehicle along the said road in a manner which is dangerous to the public and caused the death of a passenger namely **Claris Tabu Mangi** who died as a result of the accident.

When the accused first appeared in court he pleaded guilty to all the seven counts filed against him by the state. The prosecution sought an adjournment on 10.5.2019 to present facts on each count on the alleged offences which was scheduled for 15.5.2019.

At the second hearing the accused person through his legal counsel applied for a change of plea to that of not guilty. It followed therefore that the Learned trial Magistrate entered a verdict of not guilty with regard to each of the seven counts. The accused was released on bond of Kshs.100,000/= with a surety of identical amount or cash bail of Kshs.50,000/=. The matter was certified ready for hearing on 25.6.2019 when the prosecutor applied for an adjournment on grounds that he had not received the police file.

The record shows that the same day an application was made by legal counsel on behalf of the accused to have the court release the driving license to the accused. The prosecution opposed the application on the basis its for the main exhibit at the trial.

The order for release of the exhibit is the subject matter of this revision to this court.

Analysis and determination

The matter is one of considerable interest. It is necessary first to consider the principles on the jurisdiction exercised by the High Court in relation to criminal proceeding before the Magistrate Courts.

1. The first is constitutional under Article 165 (b) jurisdiction, broadly categorised as supervisory jurisdiction over subordinate courts, tribunals and or other body, authority exercising a judicial and onus judicial function. The court in consideration of matters within Article 165 (7) of the constitution is rendered to call for the record and any proceedings before any such surrounding court or person, body or authority referred to in clause (6) and make any order or give any direction it considers appropriate to ensure the fair administration of justice.

(2). The second jurisdiction is that of an appellant jurisdiction to hear appeals from a decision of a tribunal and subordinate courts as mandated in Article 165 (2) (c) of the constitution.

(3). The power to exercise revision falls within the provisions of Article 165 (6) (7) of the constitution in conjunction with Section 362 of the Criminal Procedure Code. The wording of Section 362 of the code empower the High Court to call and examine the record of any criminal proceedings before that 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 pointers in relation to the provisions of Section 362 of the code and Article 165 (7) of the constitution should be construed and interpreted in a manner which no appeal lies and when such a subordinate court or tribunal is said:

i. To have exercised a jurisdiction not vested in it by law.

ii. To have failed to exercise a jurisdiction so vested

iii. To have acted to the exercise in its jurisdiction illegally, incorrectly, irregularly or improperly and the substance of it occasioned prejudice or a failure of justice.

In determining the question of jurisdiction of a subordinate court as stipulated under Section 362 the principles in **Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147**, are of relevance in this application where **Lord Reid** said:

“But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision or on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.”

It is true the driving license may have been a subject exhibit of the trial but the same was yet to be produced and admitted in evidence. By virtue of the application under Section 362 of the Criminal Procedure Code the prosecution calls into question the legality and validity of the order passed on 6.8.2019 releasing the driving license to the accused person which was not part of the record.

Having heard the submissions by Learned counsel for the state and further on perusal of the record, what this court must answer is whether the Learned Magistrate committed an error of jurisdiction.

In the context of Article 50 the trial should be fair to both the defendant and the prosecutor and the victim of the offence as a whole. Procedural fairness is a cannon principle underpinning the right to equality before the law. The doctrine of equality of arms demands that each party be accorded an opportunity to be heard.

As indicated by the prosecution, the trial of the case was still limited to pretrial issues and directions. There is need for caution for the Learned trial Magistrate not to intrude on the functions of the prosecutor who should decide the weight of the evidence in their possession. Whether the driving license was an exhibit tendered through any of the prosecution witnesses in regard to the provisions of the Evidence Act is not clear from the record. What the trial Magistrate did was to exercise his discretion wrongly and made an order on the release of exhibits which was not subject matter of the trial nor was it submitted as evidence before his court. It does not seem to me permissible to argue that because some exhibit is a tool of trade an order for its release be made without considering the prejudice it might occasion to the prosecution who are seized of the exhibit yet to be admitted as evidence by the trial court.

I consider therefore the act by the Learned Magistrate to be in excess of his legal jurisdiction. It seems to me that the Learned trial Magistrate was being asked to release a driving license that was in custody of the investigating officer. Ordinarily on documentary evidence or exhibits for that jurisdiction of the court can only be invoked, when such documents and material have been received and admitted by the trial court and photograph or a copy thereof furnished for the record and use in consideration of the final Judgment.

In the instant case, had the trial moved through the streams of the court system comprising of initial appearance, assignment, trial, Judgment or conviction or acquittal, an application for disposal of exhibits is usually made by the complainant or state prosecution to have it released to the rightful owner.

The hearing of a case is regulated under Section 208 (1) of the Criminal Procedure Code. It demands of the prosecution to tender evidence to discharge the burden of proof under Section 107 (1) of the Evidence Act. During the pending of the trial the prosecution under the Evidence Act may produce evidence in support of the charge against the accused person in the following format:

(1).Witness testimonies and statements. Documentary evidence, photographic impressions of the scene or objects, vessels, material in issue, physical objects, digital/electronic evidence, maps, charts etc.

In this revision such documentary evidence like the driving license was subject to the requirement that the prosecution provide the trial court with evidence on admissibility and reliability of the item in support of the charge against the accused.

Proof of the existence of dangerous driving is generally a matter of inference to be drawn from certain acts of omission by the accused done pursuant to the commission of the offence. The central feature of the offence is whether the accused was validly licensed to drive the subject motor vehicle which caused the accident. Thus the mere fact that the driving license is a tool of trade of the accused is not sufficient cause to have it released prematurely to him before the commencement of the trial.

What must be proved involves an act or omission which is prohibited under Section 46 of the Traffic Act. I bear in mind that the release of the driving license had not ripened for the Learned trial Magistrate to exercise discretion on the issue of exhibits.

In the light of the above considerations, accordingly I find that the Magistrate fell in error in releasing an exhibit which the court's jurisdiction was not seized of nor admitted as documentary evidence under the provisions of our code and the Evidence Act.

The order is therefore set aside and fresh application to be considered in the course of the trial.

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

R. NYAKUNDI

JUDGE