



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL REVISION NO.13 OF 2019

(From original conviction and sentence in CM Cr. No.572 of 2019 by Hon. A. Ajwang (RM))

REPUBLIC.....APPLICANT

VERSUS

EDWIN KIPKORIR.....RESPONDENT

RULING

1. This is a request by the State for review of the orders of the trial magistrate in Kericho CM Criminal Case No. 572 of 2019 made on 24th May 2019 in which the magistrate disallowed the prosecution oral request to amend the charge sheet.

2. The request for revision was brought to this court vide a letter from the Director of Public Prosecution's office dated 9th September 2019 citing Article 165 (6) and (7) of the Constitution of Kenya 2010, as well as section 362, 364 and 365 of the Criminal Procedure Act (cap.75).

3. This court, though it is entitled to proceed and make a decision in revision without giving audience to any party under section 365 of the Criminal Procedure Code, nonetheless asked the representative of the Director of Public Prosecutions to address the court on the request. Consequently, Mr. Ayodo, Assistant Director of Public Prosecutions informed the court that their complaint was that though under section 214 (1) of the Criminal Procedure Act, the Director of Public Prosecutions has power to amend a charge sheet at any stage of trial, the trial court erroneously disallowed the prosecution request herein.

4. Having considered the matter, I note that Indeed, this court under section 362 and 364 of the Criminal Procedure Act has powers to review orders made by a Magistrate's Court in criminal proceedings. The present request will however, not succeed for the following two reasons.

5. The first reason is that the trial court did not close the request of amendment of charge made by the Director of Public Prosecutions but ordered them to file and serve a formal application. In this regard, the closing paragraph of the trial court's ruling states as follows:-

“The prosecution should be able to explain the anomaly as to invoke the court's discretion to allow for amendment and this can only be done if grounds to the said application are laid out before the court. Accordingly this court finds that the application before it was improperly made and in the interests of justice directs the office of the Director of Public Prosecutions to make a proper application with discernible grounds or do a formal application and serve on the defence and have it canvassed in court. Mention in court on 12/6/2019 to confirm if the application will have been made and thereafter, appropriate orders and directions be made.”

6. It follows thus from the above that no final decision was made by the trial court on the application for amendment of the charge sheet. The court merely asked the Director of Public Prosecution to make an application with clear grounds. The request for review is thus premature, as it is asking this court to conduct the actual proceedings pending in the trial court, rather than reviewing the final orders of the trial court.

7. The second reason why the request for review of the trial court's orders cannot succeed is that the Director of Public Prosecutions has a right of appeal against decisions of the trial court in rejecting a charge or a new charge. In this regard section 348A of the Criminal Procedure Act (cap.75) provides as follows:-

“348A when an accused person has been acquitted by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge has been made, the Attorney General (now Director of Public prosecutions) may appeal to the High court from the acquittal or order on a matter of law.”

8. Since in my view, the Director of Public Prosecution has a right of appeal to this court if a fresh charge or amended charge is dismissed or

rejected, section 364 (5) of the Criminal Procedure Code, denies him the right to bring revision proceedings. Section 364 (5) of the Criminal Procedure Code in particular provides as follows:-

“364 (5) when an appeal lies from a finding, sentence or other 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.”

9. Consequently, and for the above two reasons, I have to dismiss this request for revision which I hereby do. If the Director of Public Prosecutions wishes to file a formal application to amend the charge as ordered by the trial court, I grant them 14 days from today to do so.

Dated and delivered at Kericho this 9th day of December 2019.

George Dulu

JUDGE