



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIM. REVISION NO. 54 OF 2017

ISAAC KARANU MBUGUA.....APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR

(Arising from Ruling and Order dated 18th August, 2017 in Limuru Criminal

Case No. 1057 of 2015 presided over by Hon. K. Njalale, Senior Principal Magistrate)

RULING

1. The Applicant was originally arraigned at the Limuru Senior Principal Magistrate's Court on 02/12/2015 facing two counts in **Limuru Criminal Case No. 1057 of 2015**. The first count was assault contrary to section 251 of the Penal Code. The particulars were that on the 4th day of November, 2015, at Matimbei location in Kiambu within Kiambu County, it was alleged that the Applicant intentionally and unlawfully assaulted Stephen Gathura Ngugi thereby occasioning him actual bodily harm.
2. The second count was malicious damage to property contrary to section 339(1) of the Penal Code. The allegations were that the Applicant wilfully and unlawfully damaged 1 shirt valued at Kshs. 1,000/- being the property of Stephen Gathura Ngugi. The allegations were that this offence was committed at the same place and time as the offence disclosed in the first count.
3. The Applicant pleaded not guilty to both counts. On 17/05/2016 the Prosecutor applied to substitute the charge sheet. The Application was opposed by the Defence Counsel but was ultimately allowed by the Learned Trial Magistrate.
4. The new charge sheet contained a single count of robbery with violence contrary to section 296(2) as read together with section 295 of the Penal Code. The particulars read as follows: "On the 4th day of November, 2015 at Matimbei location in Kiambu within Kiambu county robbed Stephen Gatura Ngugi of cash Kshs. 26,700/-, 1 Seiko Five watch valued at Kshs. 3,000/- and tore his shirt valued at Kshs. 1,000/- and immediately before or immediately after the time of such robbery struck the said Stephen Gatura Ngugi.
5. The case proceeded to hearing and the Prosecution called five witnesses. After considering submissions by the parties, the Learned Trial Magistrate found that the Applicant had a case to answer and placed him on his defence. The Applicant is dismayed by that decision and has sought a revision against the same. The Applicant has proffered an eye-popping twenty-grounds for his Application. I have reviewed all of them. I have also keenly read the two sets of submissions made by his counsel. I have also read the Grounds of Opposition and the submissions by the Office of the Director of Public Prosecutions.
6. At the core, the Applicant's request for revision is based on three grounds:
 - a. First, that it was a fundamental misdirection for the Learned Trial Magistrate to have allowed the substitution/amendment of the charge sheet from assault and malicious damage to property to robbery with violence.
 - b. Second, that it was a misdirection of law to place the Accused Person on his defence on the basis of the evidence that was placed before the Court.
 - c. Third, that the ruling by the Learned Trial Magistrate is illegal, defective and improperly written since "the Learned Trial Magistrate failed to diligently and properly evaluate the evidence or record..." and that she "plagiarised her ruling by just writing the facts of the case then copying and pasting paragraphs 6 and 7 of the **Criminal Murder Case NO. 7 of 2013: Republic v Dennis Muchira Muchiri [2016] eKLR.**"

7. I should begin by observing that our jurisprudential policy is that interlocutory revisions of this nature are only sparingly allowed by the High Court. This is to avoid hearing appeals in a piecemeal manner with the risk of producing conflicting and embarrassing outcomes as well as unduly delaying criminal trials. In *Mark Lloyd Steveson v R [2017] eKLR*, I stated the jurisprudential policy thus:

For clarification, it is important to state the trite position that the High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances. While difficult to determine with mathematical precision when the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown, grave injustice might otherwise result or where justice might not by other means be attained. As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below. Hence, the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with due regard to the salutary general rule that appeals are not entertained piecemeal. (Internal quotations omitted)

8. With this principle in mind, I will now consider the case for revision presented by the Applicant.

9. The first general ground argued by the Applicant is that it was improper for the Learned Trial Magistrate to permit the amendment of the charge sheet. The Applicant says that in allowing the amendment, the Learned Trial Magistrate allowed the Prosecution to act unlawfully and in abuse of their constitutional and statutory powers because the amendment was done in violation of the right to fair administrative action of the Applicant.

10. The Applicant's main argument in this regard is that it was an abuse of prosecutorial policy for the Prosecutor to apply to substitute the charge sheet in the circumstances of the case. The Applicant seems to argue that it was a plain give away of abuse that the Prosecution sought to rely on the same Witness Statements recorded earlier to support a much more serious charge of robbery with violence.

11. I have looked at the information available to the Learned Trial Magistrate at the time he made a decision on this point and considered the arguments of the Applicant. It is improper to say too much about the evidence at this point – but I find no reason to say that in the circumstances it was injudicious for the Learned Trial Magistrate to accept the substitution of charges. It is important to point out that it was at the beginning of the trial and no witnesses had yet testified and that the Applicant had plenty of time to prepare for his defence.

12. Turning to the second ground to seek appeal, the Applicant argues that it can easily be shown that not all ingredients of robbery with violence were present – and that therefore it was improper for the Learned Trial Magistrate to have ruled that a prima facie case had been established.

13. I do not think that that the Applicant is seriously arguing that the Prosecution did not present evidence to attempt to prove all the elements of robbery with violence. Instead, their argument is that the evidence was so weak, so contradictory and so woeful that the Learned Trial Magistrate should not have accepted it and put the Applicant on his defence.

14. The Applicant is correct that the test to be utilised by the Court at the "No Case to Answer" stage is the one famously stated in *Bhatt –vs- R [1957] EA 332*. What the Court is expected to determine at that stage is if there is sufficient evidence, which is reliable, to warrant the Court to ask to the Accused Person to answer to the charges or if the case should be stopped at this point.

15. The test was stated in the *R v Galbraith [1981] 1 WLR 1039* thus:

If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a [Court] properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability ...and where on one possible view of the facts there is evidence upon which a [Court] could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to [proceed for Defence hearing].... There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge.

16. All the Learned Trial Magistrate was expected to do was to confirm that the Prosecution had placed enough material to make the case at hand a fit case to require the Accused Person to respond to the evidence adduced. She was to make that determination without considering the "weightiness" of the evidence and taking the Prosecution case at its highest, and determine if a reasonable tribunal, properly directing its mind, would be entitled to convict in the absence of any explanation by the Accused Person when called upon to answer.

17. I am unable to come to the conclusion that the case at hand was so woeful; or so effeted with fundamental contradictions; or the evidence so discredited as a result of cross-examination or otherwise manifestly unreliable that no reasonable tribunal might safely convict on it. It must be remembered that the standard of proof required by law at this stage of the proceedings is not proof beyond reasonable doubt which only comes after the conclusion of the whole case.

18. Lastly, I will turn to the last grouped ground suggested by the Applicant. The claim is that, basically, the Ruling by the Honourable Magistrate is plagiarized from an earlier decision by a High Court Judge and that, as such, it does not reflect any judicial or conscientious evaluation of the facts as applied to the law.

19. The Applicant submitted the Ruling by Justice Limon in *Criminal Murder Case NO. 7 of 2013: Republic v Dennis Muchira Muchiri [2016] eKLR* which, he says, is proof that the Learned Trial Magistrate simply picked up the Ruling and replaced the facts in the first few paragraphs and left everything intact.

20. I have looked at the decision by Justice Limo. It is true that if this were a law exam or an academic endeavour requiring a showing of original thought and proper attribution of thoughts and ideas, the Ruling by the Learned Trial Magistrate might be impugned. However, as I alluded to above, a Magistrate at this stage in the proceedings is only required to consider whether the Prosecution has presented reasonable evidence of the matter in respect of which it has the burden of proof. The Court has, as a matter of law, to determine whether the evidence adduced has reached that standard of proof prescribed by law.

21. Most Courts tend to use highly stylized form or boiler plate language to make a finding of a case to answer. In conveying judicial findings on facts as applied to the law on questions such as this, originality in form is not necessarily highly prized. The most important consideration is whether the underlying decision is backed up by the facts and the law. As analysed above, I am unable to say that in this particular instance, the substantive decision by the Learned Trial Magistrate was not supported by the available evidence sufficiently to be overruled as a matter of law.

22. I am, therefore, of the view that the Applicant would be best served by mounting his defence before the Learned Trial Magistrate where most of the issues he has raised both before the Learned Trial Magistrate and this Court would be more appropriately raised to establish reasonable doubt in the Prosecution case. Of course the Applicant will still have an opportunity to appeal if aggrieved by the final decision.

23. The upshot is that the case is remitted back to the Trial Court for conclusion of the trial.

24. Orders accordingly.

Dated and delivered at Kiambu this 4th day of June, 2018.

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JOEL NGUGI

JUDGE