REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL MISC NO. 161 OF 2018

PARPOIKA SARINKE.............APPLICANT

Versus

REPUBLIC............................RESPONDENT

RULING

This revision is directed against the order by the Learned Trial Magistrate cancelling bond terms of the applicant in Criminal Case No. 1583 of 2014 on grounds that he had failed to comply with a reconciliation order of the court.

Aggrieved by the said order of dismissal of bond terms the applicant filed a notice of motion under section 362 of the Criminal Procedure Code seeking this court intervention to call for the record with a view to examining it as to its legality, correctness and propriety or otherwise to ensure that there is no failure of justice.

The application is supported by an affidavit sworn by the applicant together with grounds on the face of the notice of motion. The state through Principal Prosecution Counsel did not oppose the motion.

Factual Matrix

The applicant was charged in Criminal Case No. 1583 of 2014 with two counts namely:

> (a) Obtaining Registration by false pretences contrary to section 320 of the Penal Code. The brief particular being that on 22/1/2007 at Kajiado Town within Kajiado County jointly with others not before court with intent to defraud wilfully procured for himself registration of Land title deed Number Kajiado/Osilare/1056 by falsely pretending that he was the rightful owner a fact he knows to be false.
>
> (b) Obtaining Registration by false pretences contrary to section 320 of the Penal Code on 26/10/2011 at Kajiado then jointly with others not before court with motive to defraud wilfully procured for himself registration of Land title deed Kajiado/Osilare/912 by falsely pretending that he was the rightful owner of the property a fact he knows was false. At the trial court he pleaded not guilty to both counts.

The prosecution as at 1/9/2016 had already summoned 7 witnesses who testified in support of the charge against the applicant. Following the transfer of Hon. E. Mbicha the proceedings were taken over by the new Presiding Magistrate Hon. Chesang on 1/3/2017. In this first appearance without the trial magistrate invoking section 200 of the Criminal Procedure Code she commenced the adjudication of the Criminal Case where both parties sought leave of the court to plea-bargain the issue under Article 159 2(D) of the Constitution and section 137A-O of the Criminal Procedure Code. The order of the court to that effect was a mention on 15/6/2017 to explore settlement.

The record shows that the defence counsel did not attend the proceedings and in the circumstances the accused appealed for an adjournment for reasons that his advocate was engaged at Mavoko Court. As the state did not also have any witnesses the trial court adjourned the case to the 27/9/2017. The next appearance was on 6/12/2017 where the defence counsel requested the court for directions to be taken given the fact that the matter was part-heard before another Magistrate currently on transfer.

> The impugned order subject matter of this motion arises over the proceedings dated 4/7/2018 and it reads as follows: *Before Hon. Chesang – RM*
>
> *Prosecutor: Thyaka*
>
> *Accused: Present*

Mr. Koin for the accused – I also seek witness statements and seek a hearing date. Today was a mention. We seek a date in early September as he has exams. That is all.

Prosecutor – The accused had requested for time to settle out of court. The same did not materialize. We seek a hearing date.

Court: I will address myself to the proceedings and the order made on 25/1/2018 in which the accused advocate was to bring completion document in order to settle the matter. The accused has not attempted to obey this order made on 25/1/2018. The accused has a right to hearing and will be given a hearing date. However, in order to ensure that the completion documents are brought to court in order that this matter is settled with finality I will cancel the accused bond/surety. The accused will remain in custody until a time this matter is determined or he provides completion documents to enable a retransfer to the complainants. This order is also made bearing in mind that the disobedience of the court order of 25/1/2018 is in itself contemptuous. Hearing on 12/9/2018.

Aggrieved by the said order the applicant preferred a revision to have it set aside and quashed.

Analysis and Resolution

The first question for consideration is whether this court has the jurisdiction to interfere with the order of the learned magistrate.

The supervisory jurisdiction of the High Court over subordinate courts and tribunals is wholly protected by the constitution under Article 165(6) and 7.

"(6) The High Court has supervisory jurisdiction over the subordinate courts over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or given any direction it considers appropriate to ensure the fair administration of justice."

As part of the characteristics of the court the fundamental objective is for the High Court to play a role of policing the subordinate courts to ensure they operate within the statutory limitation of their jurisdiction. In conjunction to Article 165(6) and (7) of the Constitution there is further section 362 as read together with section 364 of the Criminal Procedure Code which deals with the powers of revision and the procedure to regulate the process. The powers conferred upon the High Court under Article 165(6), (7) and section 362 of the Criminal Procedure Code are very wide but are discretionary in nature in a way that does not allow trespass to the jurisdiction of the subordinate courts.

Where therefore the exercise of discretion is to revise an order or proceedings of the subordinate court it's to be in exceptional cases where its established that a miscarriage of justice has been occasioned. This means that there must be a manifestation on the face of the record an error on point of law, abuse of the power vested in the court, orders issued without jurisdiction and the proceedings established are irregular, unjust, incorrect and improper in the circumstances of the case.

It is also trite that when the High Court exercises revisionary jurisdiction, it does so in a manner stipulated under section 354, 357 and 358 of the Criminal Procedure Code. The High Court jurisdiction on revision is only exercisable if the facts of the case has been brought within the scope of this section which read as follows:

"No finding, sentence or order of a Criminal Court shall be set aside merely on the ground that the inquiry or other proceedings in the court of which it was arrived at or passed took place in a wrong area, buttress it appears that the error has occasioned a failure of justice."

The rationale behind such a protectionist policy is to enable courts and or tribunal involved in adjudication of disputes as articulated in Article 50(1) of the constitution to retain independence in the case management protocols to achieve a just outcome.

From the above analysis the High Court can call for the record for purposes of examining the propriety of the proceedings or order either through an application or *suo moto*. The question is whether or not in the circumstances of the case the trial Magistrate was entitled to cancel the accused bond, remand her in prison custody of his case. The Constitution throughout Article 27, 28, 47, 48 and 50 provides and uses phrases like Equality before the law, inherent human dignity and to have that right respected. Right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, access to justice and right to a fair hearing. The state shall not deprive anyone of this rights without due process of law. On the other hand, Article 29 prohibits the deprivation of the right to personal liberty except according to a procedure established by law.

Pursuant to Article 10(2) of the Constitution there are expressed provisions on values and principles of governance which bide every state officer which include:

" (a)***Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.***

(a) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(b) Good governance, integrity, transparency and accountability; and

(c) Sustainable development"

Further section 4(3) of the fair administrative act embodies the following: ***Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***

(a) Prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) An opportunity to be heard and make representation in that regard

(c) Notice of a right to review or internal appeal against an administrative decision, where applicable

(d) ………………………………………………………………..

(e) ……………………………………………………………..

(f) ………………………………………………………………

(g) …………………………………………………………………."

The above legal provision found its way to the Court of Appeal in the case of **Onyango Oloo v AG 1980-1986 EA 456** where the court held and stated interalia: ***"that the principle of natural justice applies when ordinary people would naturally expect those making decisions which affect others to act fairly."***

Wade & Forsyth defined due process on judicial power in the following language: ***"The mere fact that the power affects rights or interests is what makes it 'judicial' and so subject to the procedures required by natural justice. In other words, a power which affects rights must be exercised 'judicially', i.e. fairly, and the fact that the power is administrative does not make it any less 'judicial' for this purpose."***

The essential element in this plethora of constitutional rights is the doctrine of due process of the law. It is fundamental that in Criminal justice adjudication the accused should not be condemned without notice and an opportunity to be heard by the court, body or tribunal. As emphasized in the case of **Pension v Ohio 1988US 488:** ***"Our adversarial system of justice is premised on the well tested principle that truth as well as fairness is best discovered by powerful statements on both sides of the question".***

In my view at the heart of the right to a fair hearing is a model comprising the following elements: **(a) participatory proceedings (b) An unbiased umpire (c) Prior process proceeding before the adverse action (d) And rights to due process and fairness attach to all stages (See Stephan Landsman, So what?) possible implications of the vanishing trial phenomenon L.J Empirical Legal Studies 975, 976 (2004).**

In this case when we apply the above threshold test on Criminal due process to the facts of this case one can see clearly that the trial court deprived the accused his liberty without giving him an opportunity to be heard on the application for cancellation of bond. While the accused may have failed to honour the directions of the court as to mediation of the dispute out of court it was useful for him to be given an opportunity to state his defence on the matter. During the review of the primary record I find that the Learned Trial Magistrate erred in law in holding that the accused had not attempted to obey the order made on 25/1/2018 and proceeded to cancel his bond by remanding him in custody.

Due process means that laws must be applied fairly and equally to all people irrespective of their status in society. The primary duty of a Judicial Officer is to protect the individual rights and protect fundamental justice for the accused in the course of administering justice.

I take the view that the right to a fair trial was violated when the trial Magistrate did not summon the applicant and hear his side of the story before passing judgement on cancellation of bond. It is also of interest that there was variance on the submissions made by the defence counsel Mr. Koin and the Prosecution Counsel on the matter in issue at the time. The issue on cancellation of bond of the accused never featured in any of the submissions by both counsels. However, in unprecedented move the Learned Trial Magistrate ceased to be a neutral ampire by descending to the conflict of the disputants and concluded that the accused was in contempt of court.

I agree with the defence counsel in this revision that the trial magistrate violated the right to equal treatment especially for not calling upon legal counsel to submit on the issue of cancellation of bond before a final decision was made. I am of the conceded view that the proceedings before the lower court comprise of such irregularities resulting in the applicant not having a satisfactory trial and did occasion a failure of justice not curable under section 382 of the Criminal Procedure Code. The order if allowed to stand would occasion a failure of justice or cause irreparable harm to the accused person. Consequently, I allow the notice of motion by quashing the order in the following terms:

(a) That the accused be released from prison custody and his earlier bond with a surety of Ksh. 750,000 be reinstated forthwith.

(c) That the proceedings before the said court be transferred to another court with competent jurisdiction to hear the matter.

(d) That the Chief Magistrate do comply with the order of allocating the case to another Judicial Officer for hearing and

determination.

Dated, delivered and signed in open court at Kajiado on 11th July, 2018.

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R. NYAKUNDI

JUDGE

Representation:

· Mr. Koin for the accused

· Mr. Meroka for the DPP

· Accused person attended in person