REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.775 OF 2018

EDWARD KIPROP LANGAT.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Edward Kiprop Lagat was aggrieved by the decision of the trial court in **JKIA SPM's Court Criminal Case No.87 of 2017 Republic -vs- Edward Kiprop Lagat** rendered on 25th June 2018 which placed him on his defence. According to the Applicant, that decision was made without the trial court taking into consideration the weighty submission on no case to answer that he had made before the court. In particular, the Applicant argued that he had raised matters of the law which ought to have made the trial court reach the verdict that the Applicant had no case to answer. The Applicant stated that the manner in which the prosecution witnesses procured the evidence was not in accordance with the law and therefore the charges brought against the Applicant ought not to have stood. The Applicant cited a raft of decided cases in support of his contention that he ought not to have been placed on his defence but rather should have been acquitted.

Prior to the hearing of the application, Mr. Mwamuye, learned counsel for the Applicant and Ms. Sigei learned prosecuting counsel filed their respective written submission. This court has had the benefit of reading the said submission. It has also considered the oral submission made before court. The issue for determination by this court is whether the Applicant placed material before this court that would persuade this court to grant the orders sought in the application. The Applicant invoked this court's jurisdiction under **Section 362** of the **Criminal Procedure Code** that provides that:

> ***"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."***

In **Republic –vs- James Kiarie Mutungei [2017] eKLR** Nyakundi J held thus:

> ***"The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits... In considering similar provisions under the Indian Criminal Procedure Code and applicable statute on revisional powers, the Supreme Court in the case of Sriraja Lakshmi Dyeing Works v Pangaswamy Chettair [1980] 4SCC 259 said as follows:***
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> ***"The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. The question of the extent of appellant or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words to satisfy itself under section 25 read as which has similar provisions with our section 362 of the criminal Procedure Code (Cap 75 of the Laws of Kenya) (emphasis mine) is essential a power of superintendence. The scope of the revisional powers of the high court where the high court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, which is quite obviously as much wider jurisdiction. That jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional court is not a second court of appeal (emphasis supplied.)"***

In the present application, it was clear to this court that a decision on whether or not the trial court erred in law in putting the Applicant on his defence cannot be determined without this court examining the merits of the evidence adduced before the trial court by the prosecution witnesses. That is a role that this court has no jurisdiction to consider this stage of the proceedings. It appears to the court that the Applicant is asking it to evaluate the evidence adduced by the prosecution witnesses and determine whether the trial court properly exercised its discretion in ruling that the Applicant ought to be placed on his defence. On review of decided cases on this issue, it is evident to this court that an issue which may attract this court's jurisdiction under **Section 362** and **364** of the **Criminal Procedure Code**, is an issue of a

restricted nature that does not delve into the factual merits or otherwise of the case before the trial court.

In the present application, it was the Applicant's application that the trial court had ignored his submission especially the decided cases that he had cited in support of his submission on no case to answer. It was apparent to the court that the Applicant wrongly invoked the jurisdiction of this court because the issues he seeks to be addressed in the application cannot be determined without this court considering the factual merits of the prosecution's case. The fact that the Applicant has been placed on his defence does not prevent him from placing the same arguments before the trial court in his final submission. The fact that the Applicant has been placed on his defence does not mean or imply that he will be convicted. If the Applicant is convinced that the prosecution's case is not worth an answer, he is at liberty to exercise the options available to him which includes saying nothing in his defence.

The issues that he has raised in this application will be properly addressed at the right forum i.e. if the Applicant is convicted, he may file an appeal to this court which shall consider the merits of the facts and the applicable law. It is only an appellate court that can consider the totality of the evidence adduced before the trial court and render an appropriate decision. When an accused is placed on his defence, it does not infringe his constitutional right to fair trial unless it is established that there was absolutely no evidence that would have enabled a court, properly applying its mind to the facts of the case, to place such an accused person on his defence.

For the foregoing reasons, it is clear that the Applicant's application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF SEPTEMBER 2018

L. KIMARU

JUDGE