



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 151 OF 2018

ROBERT MUGO KIGORO.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT

R U L I N G

1. This is an application dated 14/06/2018 seeking for orders that Siakago Criminal Case No. 288 of 2015 at Siakago be called for examination as to the constitutionality, legality and correctness and propriety of the ruling of Hon. Omwange SRM delivered on 22/11/2017 for failing to give certain orders sought by the applicant.
2. It also prayed that the said ruling be quashed and that the necessary orders be made by this court. The applicant also seeks orders for transfer of Siakago Criminal Case No 288 of 2015 to another court.
3. The lower court file Siakago Criminal Case No. 288 of 2015 was called for by this court for examination. The court availed typed proceedings of the case. The application was fixed for hearing on 18/09/2018 in the presence of the counsel for the parties. Mr. Mbogo held brief for Mr. Gachuba on record for the applicant while Ms. Mati was for the respondent.
4. On the hearing date one Mr. Muriithi held Mr. Gachuba's brief in the morning hours. He requested for the file to be kept aside until 11.00 a.m. when Mr. Gachuba was to be in court for he was travelling from Nairobi. At 11.30 a.m. the file was called out but the counsel was absent.
5. The court then proceeded with taking directions that the parties rely on their respective pleadings including affidavits which would be relied on by the court for preparing the ruling.
6. I have perused the ruling of Hon. Omwange which is the subject of this application. Before dealing with the ruling, I will briefly state the background facts of the matter.
7. The applicant was facing a charge of obtaining money by false pretences in the Siakago case. It was alleged that "on 21/10/2014 he obtained Kshs. 100,000/= from one Francis Ngari Makindu by falsely pretending that he was in a position to sell him land L.R. No. Embu/Kithunthiri/2704, a fact he knew to be false". He pleaded not guilty to the charge and the trial commenced before Hon. Omwange Senior Principal Magistrate on 23/08/2017. PW1 and PW2 were fully heard and cross-examined by the defence.
8. The applicant's counsel applied for an order to issue to the Land Control Board to issue the defence with the minutes of the meeting held on 31/10/2014 in respect of agenda item No. 77. He also invoked Section 150 of the Land Control Board to testify in respect of the minutes. And similarly, summons to issue for Njuguna advocate to testify on his attestation of signatures of the parties in the agreement.
9. The magistrate delivered his ruling on 23/11/2017 and declined to grant the orders. It is this ruling that gave rise to this application for revision.
10. The grounds supporting this revision application are that the applicant did not commit the offence as charged and that the witnesses mentioned that the witnesses mentioned are very crucial to the trial.
11. It is further stated that the applicant has a right to a fair trial and access to justice which is an unlimited right. The applicant further states that he is likely to suffer injustice if the orders sought herein are not granted.
12. The application was opposed by the respondent on grounds that the applicant has failed to show any grounds for revision of the trial magistrate's ruling.

13. Further that the applicant does not fault the trial magistrate. His application does not meet the threshold of the Constitution or statute law. The application to call the clerk of the Land Control Board was listed as premature. The respondent further stated that the applicant has not demonstrated how the magistrate violated various name articles of the Constitution in his ruling.

14. I have perused the ruling of the trial magistrate delivered on 22/11/2017. It states that in part: -

*Even though the application is not objected to, it will be prejudicial to the Board to issue an order against them before they are heard before exhausting the avenues available to procure the said documents. With regard to calling of the witnesses to testify in this case under **Section 150 of the Criminal Procedure Code**, this court has only heard 2 witnesses and is yet to hear the full Prosecution case. Indeed, I am unable to come to a finding that the evidence of the alleged witness is necessary for the dispensation of justice in this case. In light of which I find the allocation before the court to be premature and is not allowed.*

15. The reason given in the ruling were twofold: -

(a) As for the order for the clerk of the Land Control Board to produce the minutes of the meeting, the trial magistrate said it would be prejudicial since the Board had not been given a hearing.

(b) As for the witnesses the clerk and Mr. Njuguna advocate, the magistrate said he did not find them necessary for dispensation of justice and that the trial was still in its early stages.

16. This application is brought under Section 362 of the Criminal Procedure Code which provides: -

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.

17. Article 165(6) empowers this court to exercise supervisory powers over subordinate courts by call for the record and examining it with a view of correcting an order found to be issued contrary to the law or procedure.

18. In an application for revision, the applicant must satisfy the court that any order made or sentence passed was irregular, illegal, incorrect or is riddled with impropriety.

19. On perusal of the grounds relied on by the applicant, I am of the view that he does not fault the trial magistrate for incorrectness, impropriety, irregularity or illegality. Instead, the applicant contends that the magistrate ought to have granted his application to call witnesses he wanted and to produce the minutes of the Board which he thinks are crucial to his case. He also complains that he was denied the right to a fair hearing by the dismissal of his application.

20. In my view, the trial was just beginning when this application was made. Indeed, only PW1 had been heard as the ruling of the application was pending.

21. The procedure in criminal cases is to hear the prosecution case first. After it closes, the defence case will be heard in the event that the accused is found to have a case to answer.

22. The duty to call the prosecution witnesses is solely on the prosecution. Under Section 143 of the Criminal Procedure Code, the prosecution has the power to determine the number of witnesses it may require to prove its case.

23. On the other hand, the defence has power to organize and conduct its case including calling any witness it deems fit. If it is difficult to procure a witness or if the witness is unwilling to testify, the defence may apply to the court for witness summons. Except issuing of summons, the court has no power to compel a defence witness to attend court to testify.

24. At that early stage of the trial, the defence had no business asking the court to call witnesses to testify in the case of the prosecution. The defence was bound to wait for its chance to call its witnesses during the defence case. In my considered view, the application by the counsel at that stage was misconceived and uncalled for.

25. The question is whether the application before the trial court and the subsequent events were designed to delay trial which would have been concluded within a reasonable period. It is now almost one year down the line since the trial magistrate ruled on the application.

26. It is noted with concern that this revision application was not filed immediately after the magistrate's ruling. It was filed on 22/06/2018 which was about seven (7) months after the magistrate delivered his ruling. If the applicant was genuinely aggrieved by the magistrate's ruling, he would have applied for revision without undue delay.

27. In conclusion, I find no fault on the part of the magistrate in the ruling delivered on 22/11/2017.

28. It then follows that this application does not satisfy the threshold of Section 362 of the Criminal Procedure Code and it is hereby disallowed.

29. The original file Siakago Criminal Case No. 288 of 2015 will be sent to the trial magistrate to proceed with the trial.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Njage for Gachuba for Applicant

Ms. Mati for Respondent

Applicant present