



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. APPLICATION NO. 114 OF 2018

IN THE MATTER OF TIGANIA SRMC CR. NO.290 OF 2014

SEBASTIAN MIRITI..... APPLICANT

VERSUS

THE SRM TIGANIA LAW COURT.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2ND RESPONDENT

RULING

1. Before me is a Motion on notice dated 17th September, 2018, where the applicant has moved the Court under **Sections 311, 362 and 364 of the Criminal Procedure Code (Cap 75)**. The applicant that Court to call for and examine the criminal proceedings in **Tigania SRMC CRIMINAL CASE NO. 290 OF 2014** with a view of revising the orders made on 7th September, 2018 and all other subsequent proceedings.

2. The grounds upon which the Motion is grounded are set out in the body of the Motion and in the affidavit sworn by the Applicant's advocate on 17th September, 2018. The deponent stated that his client, the applicant, was denied the right to enter his defence during the trial. That as a result, the learned trial Magistrate entered judgment against the applicant on 14th September, 2018.

3. The application was opposed vide a replying affidavit of the Senior Principal Prosecution Counsel, Mr. Haron Gitonga sworn on behalf of the 2nd Respondent on 15th October, 2018. He deponed that the applicant's advocate was present when the prosecution closed its case and was well aware that the matter was coming up for ruling on a case to answer on 7th September, 2018. That the court acted without any impropriety and the application is unfounded in law as **Section 364 of the Criminal Procedure Code** only applies where a person has been convicted and sentenced.

4. In a supplementary affidavit, the applicant's advocate averred that he was not in Court when the ruling on a case to answer was delivered. That the trial court was obligated to accord the applicant a fair hearing/trial. That the trial magistrate failed to comply with the mandatory procedure provided under **Section 311 of the Criminal Procedure Code**.

5. I have carefully considered the affidavits and the law. The respective Counsels were to file written submissions which they had not as at the time of writing this ruling. The issues for determination are: **Whether the Court has jurisdiction to revise the ruling and proceedings of the trial Court at this stage; whether the learned trial magistrate was in contravention of Section 311 of the Criminal Procedure Code in denying the Applicant a chance to defend himself.**

6. On the first issue, the 2nd respondent avers that this application has been brought under the wrong provisions and that revision cannot be done before sentencing. The powers of the High court in revision are contained in **Section 362 through to 366 of the Criminal Procedure Code (Cap.75)**. **Section 362** specifically provides as follows: -

"362. 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".

7. From the foregoing, there is nothing to show that this court's jurisdiction on revision is limited to instances where there has been conviction. The power of revision can be exercised at any stage of the proceedings provided some order which has a bearing on the trial has been made. Accordingly, the first objection by the state fails.

8. A reading of the relevant provisions of the Criminal Procedure Code will show that the High Court has wide powers in its revisionary

jurisdiction. However, there are also some limiting factors to those powers. Firstly, in the exercise of its revisionary power, the High Court cannot reverse or alter an order of acquittal. Secondly, it ***cannot make an order that is to the prejudice of the accused person unless he has had an opportunity of being heard either personally or by an advocate.*** Thirdly, when an appeal arises from such sentence finding or order of the magistrate's court, and no appeal is brought, revision proceedings cannot be sustained ***at the insistence of the party who could have appealed.*** (See: **Republic v Mohamed Rage Shide [2016] eKLR**).

9. In the present case, the applicant's advocate insist that the applicant was not heard. This court called for and perused the original record. The court confirmed that after the ruling on a case to answer, the applicant addressed the Court. He told the trial court that he had no evidence to call after ***section 211 of the CPC*** had been explained to him.

10. In my view, that was sufficient for the trial court to proceed as it did. However, considering that there had been an advocate on record who had been conducting the matter for the applicant, it was incumbent upon the trial court to, either wait for that advocate to appear or adjourn the matter to give time for that advocate to appear. In proceeding as it did, the applicant may have been prejudiced as he may not have known how his advocate may have planned to proceed.

11. In this regard, I allow the application. I set aside the orders and all subsequent proceedings and direct that the applicant be produced before the trial court on 29th November, 2018 for directions defence hearing. Since the trial court had cancelled his bond, the orders made on 17th September, 2018 admitting the applicant to bond are hereby set aside. He should apply before the trial court for whatever orders he may desire at the hearing.

DATED and DELIVERED at Meru this 20th day of November, 2018.

A. MABEYA

JUDGE