REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL REVISION CASE NO. 242 OF 2018

PIUS MARTIN MURIITHI NDWIGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on an application for revision dated 5th October 2018. The application is based on the following grounds;

a. The accused/applicant is facing prosecution before the Senior Resident Magistrate's Court at Runyenjes in Criminal Case No. 289 of 2017.

b. In violation of the Applicant's right to fair trial as guaranteed by Article 50(2) of the Constitution of Kenya 2010, the trial court erred by allowing an application by the Prosecutions seeking to allow additional witnesses to testify long after conclusion of pre-trial and commencement of the trial through a ruling delivered on 29th August 2018.

c. Whereas the matter is scheduled for further hearing on 7th December 2018, unless this Honourable Court intervenes and sets aside/and/or reverses the impugned Order aforementioned, the applicant stands to suffer great prejudice in the following manner: -

i. The trial court by allowing the impugned application delved into the field of litigation and tilted the scales of justice in favour of the prosecution.

ii. The applicant and his defence will be subjected to trail by ambush and piece-meal litigation contrary to the provisions of Articles 50 (2), (c), (e) ,(j), 20, (3) ,(b) and 21 of the Constitution of Kenya 2010.

iii. The prosecution shall benefit from undue advantage over the applicant by being afforded the opportunity to call fresh witnesses after cross-examination of three key witnesses and thereby sealing any loopholes which were brought to the fore during said cross-examination.

iv. There exists a high risk of the intended witnesses amending or changing their recollection of events to suit Prosecution's narrative in the instant suit if they are allowed to testify at this stage of proceedings.

v. Indeed, the intended witnesses never recorded statements during the investigative stage before commencement of this suit which is over one year from now and as such it is highly probable that their recollection of events is tainted and/or highly questionable.

d. It is therefore necessary for this court to call for record of the Senior Principal Magistrate's Court at Runyenjes in Criminal Case No. 289 of 2017 and reverse the impugned order as the trial court misdirected itself on a point of law and facts in arriving at the same resulting in an order that is illegal, unfair and unjust.

B. Respondent's Response

2. The respondents filed a replying affidavit in response opposing the applicant's application.

3. The respondents deponed that the applicant had not set out the grounds of revision as required by law as there was nothing in the proceedings to suggest that the matter fell under legitimate reasons for revision.

4. Further, the respondents deponed that the prosecution was at liberty to call any number of witnesses before the close of their case provided their testimony was relevant and as such the order made by the trial court on the 29th August 2018 was correct, legal and proper.

5. The respondent further deponed that the allegation that they would benefit if the additional witnesses were heard was unfounded because the respondent had a duty to avail all witnesses who would assist the trial court arrive at just decision whether or not the applicant had a case to answer or not.

6. The respondent further deponed that the failure to avail the additional witnesses earlier was not deliberate and further that the two additional witnesses were crucial witnesses whose statements had already been recorded for disbursement to the applicant.

C. Applicant's Submission

7. Counsel for the applicant submitted that the trial court erred in relying on section 150 of the CPC as the section granted the court discretion to call and examine witnesses on its own motion. Counsel further submitted that this was against the case management rules and that this was an undue advantage to the prosecution. He relied on the case of **George Ngodhe Juma, Peter Okoth Alingo, Susan Muthoni Nyoike v Attorney General [2003] eKLR.**

8. Counsel for the applicant further submitted that the rights of the accused under article 50 (2) (j) were violated as he was not given the evidence in advance. He relied on the case of **Thomas Patrick Gilbert Cholmondely v Republic [2008] eKLR and the case of Fredrick Kirimi Mugiri v Republic [2016] eKLR.**

D. Respondent's Submission

9. The respondent submitted that there was nothing illegal, irregular or incorrect with the trial court's order of 29th August 2018 and that section 143 supported their argument that the prosecution could call any number of witnesses.

10. The respondent further submitted that the two additional witnesses allowed were crucial and would help the court to reach a just decision. Further to this the respondent submitted that the applicant had not explained how his rights were infringed.

11. Regarding what PW3 testified, the respondent submitted that it was a matter for the trial court to decide.

E. Analysis of Law

12. The issue arising herein is whether the trial court's order of 29th August 2018 was irregular, illegal, improper and consequently an affront to the applicant's constitutional right to a fair trial.

13. 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: -

> ***"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".***

14. What the High Court can do under its revision jurisdiction is stated under section 364 of the Criminal Procedure Code Cap 75, which states as follows: -

> ***"(1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –***
>
> > ***(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence: -***
> >
> > **(b)** ***in the case of any other order than an order of acquittal, alter or reverse the order.***
>
> ***(2) No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.***
>
> ***(3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.***

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

15. The Constitution of Kenya 2010 is highly valued for its articulation. Some such astute drafting includes but not limited to **Article 50** which provides for the fundamental right to a fair hearing. **Article 50 (2) (j)** *provides for the right of the accused person to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence while sub-article* ***(c)*** *provides for the right of the accused to have adequate time and facilities to prepare his defence.*

16. The right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence is expressly provided for in our constitution. In **Thomas Patrick Gilbert Cholmondely v Republic [2008] eKLR** (decided before the promulgation of the 2010 constitution and relied on by the applicant) the Court of Appeal stated categorically that:

"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under……. our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial; all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items." In arriving at this holding, the court cited common law duty as well as comparative decisions from various jurisdictions including the UK, Canada and Uganda.

17. Article 50(2)(j) correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 2(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.

18. In **R v Ward [1993] 2 ALL ER 557** the Court of Appeal in England was unanimous that: -

"The prosecution's duty at common law is to disclose to the defence all relevant material, i.e. evidence which tended either to weaken the prosecution case or to strengthen the defence, required the police to disclose to the prosecution all witness statements and the prosecution to supply copies of such witness statements to the defence or to allow them to inspect the statements and make copies unless there were good reasons for not doing so. Furthermore, the prosecution were under a duty, which continued during the pre-trial period and throughout the trial to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure. Pursuant to that duty the prosecution were required to make available the records of all relevant experiments and tests carried out by expert witnesses. [*Emphasis Mine****]***

19. As pointed out earlier, although the **Cholmondeley case** (supra) was decided under the former Constitution, principles of disclosure it elucidates are well entrenched in the Constitution of Kenya 2010 as stipulated under Article 50(2)(j) cited above.

20. The case of **R v Ward** (supra), is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial in all cases. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, "to have adequate facilities to prepare a defense."

21. This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in **R v Stinchcombe {1992} LRC (Cri) 68** where the Supreme Court of Canada observed, ***"The obligation to disclose was a continuing one and was to be updated when additional information was received."***

22. The next issue for determination is whether the learned Magistrate erred by allowing the application by the prosecution to call additional witnesses. **Section 150 of the CPC** provides that:

"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

Section 146(4) of the Evidence Act states:

"The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

23. A reading of Section 150 of the CPC shows that it empowers the court to, at any stage of the trial, summon a new witness or recall a witness already examined for re-examination. Where the court determines that the evidence of the new witness or the witness to be recalled is essential to the just decision of the case, the court is under a duty to summon the witness. In exercising the power, the court should ensure the protections afforded to the parties in the proviso are adhered to.

24. In **Kulukana Otim v R [1963] EA 257**, cited by Justice Ngugi in **Stephen Mburu Kinyua v Republic [2016] eKLR**, the Court of Appeal of Uganda, in considering Section 146 of the Ugandan Criminal Procedure Code, which is similar to our Section 150 of the CPC, stated that:

> ***"It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself…."***

25. Justice Ngugi went ahead and held, and I concur with him, that it was necessary for the court to form an opinion that it would be essential to the just decision of the case to call or recall a witness. This is what the learned judge said:

> ***"This is important because it would appear that the second part is triggered when the Court itself forms the opinion that the evidence to be called is essential to the just decision of the case. Section 150 implies that once a Trial Court comes to that conclusion, the duty to call that witness is triggered. This is not the situation we have here. The Trial Court did not make any assessment or finding that the evidence of the three witnesses it permitted to be called were essential to the just determination of the case. Instead, the Trial Court acquiesced to the Prosecution request to call the three witnesses. We must therefore conclude that the Trial Court acted pursuant to the first discretionary part of section 150 of the CPC."***

26. In the case at hand, the trial court acquiesced to the prosecution appeal to call two additional witnesses. It is noteworthy that the prosecution had not closed its case. Further, the trial magistrate noted that the prosecution would be mandated to avail all relevant documents of the intended witnesses to the applicant. This is the continuing obligation referred to in **R v Stinchcombe** (supra).

27. The gist of Article 50(2) is to ensure that an accused person is granted a fair trial by availing to him "in advance" relevant material that the prosecution intends to rely on during the trial. It is not in dispute that the statements of the two witnesses were recorded during the investigations of the case. The term "in advance" does not strictly mean that all the statements must be provided before the trial begins.

28. The purpose of the provision is to give an accused person sufficient time to prepare for his defence. Provided the relevant material is a vailed and the accused given adequate time to peruse and prepare, Article 50(2) will not be said to be infringed.

29. In the present case, the applicant was not denied time that would be considered inadequate to prepare. In fact, the magistrate said:

> ***"The prosecution shall issue the witness statements of the intended witness within a reasonable time so that the defence will have adequate time to peruse them as they prepare for the defence".***

30. This is a demonstration that the trial magistrate was well aware of his constitutional duty to ensure that a fair trial was achieved.

31. I am of the considered view that the decision of the trial magistrate was correct and made in the interests of justice of balancing the rights of the applicant and that of the victim.

32. I find that the said decision was not irregular, illegal or improper and for that reason the provisions of Section 362 of the Criminal Procedure Code is not applicable herein. The applicant has failed to so demonstrate.

33. The application lacks merit and it is hereby dismissed.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF DECEMBER, 2018.

F.N. MUCHEMI

JUDGE

In the presence of: -

Ms. Nandwa for the Respondent

Ms. Muriuki for Kinuthia for Applicant

Applicant present