



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL REVISION NO. 136 OF 2016

MOHAMED ALI ABDALLAH.....COMPLAINANT/APPLICANT

VERSUS

MARY NJERI MOHAMED.....RESPONDENT(THE ORIGINAL ACCUSED)

RULING

1. This is an application by the complainant to have the order of acquittal of 11th November 2015 of the Chief Magistrate at Embu revised, in which the respondent was acquitted of two counts of forgery in count 1 and 2 contrary to section 350 (1) of the Penal Code (Cap 63) Laws of Kenya. Similarly, she was acquitted in the 3rd count on a charge of obtaining registration by false pretences contrary to section 320 of the Penal Code.
2. Counsel for the complainant raised a preliminary objection regarding the appearance of Ms Ndorongo for the respondent in these revisional proceedings. According to him, the respondent has no right to be represented by counsel in these proceedings. It is counsel's submission that in matters of revision, respondent has no right to be represented by counsel. According to counsel for the complainant, in matters of revision it is a matter between the High Court and the Lower Court. He further submitted that it is not a matter between the complainant and the respondent. Furthermore, he submitted that once the judgement of acquittal was pronounced and the respondent was acquitted, her counsel became *functus officio*.
3. It is also his submissions that the respondent is not a party at this point in these revisional proceedings and therefore cannot seek to be represented. He has also submitted that the learned trial magistrate who acquitted the respondent person is also not a party to these proceedings. Finally, he has submitted that the record of the trial court became a court record and that the High Court is only called upon to review the said record under Article 165 of the 2010 Constitution of Kenya and under section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya.
4. Ms Ndorongo for the respondent in her written submissions urged the court to find in her favour that the respondent has a right to be represented by counsel of her own choice. It also her submission that the preliminary objection raised by the complainant is vague and is unsupported by any law. She further submitted that the preliminary objection raised by the complainant is to the effect that the respondent should not be represented by an advocate or should not be heard at all. She further submitted that in terms of section 362 of the Criminal Procedure Code(Cap 75) Laws of Kenya, this court does not need to be addressed by either of the parties in these revisional proceedings. Additionally, she submits that if this court in exercise of its discretion invites parties to address it, none of the parties can be shut out. In this regard, she has submitted that since the court allowed the complainant to address the court, the respondent through her counsel ought to be accorded a similar opportunity in the interest of justice and in accordance with the constitution.

5. I find that that there is no law that bars respondent or her counsel from being heard in revision, once she has been allowed to do so by the court. I allowed counsel for the applicant/complainant to address the court in revision. To deny a similar opportunity to be accorded to counsel for the respondent will amount to unauthorized discrimination. It is important to note that even before the enactment of the 1963 Independence Constitution both the complainant and the accused person were allowed to be represented by counsel in revisional proceedings. This is clear from the case of ***Khushi Mohamed s/o Rukan Din and another v. Sulemani Haji and Another (1946-47) volume XXII (parts 1 and II) KLR 54***. In that case the court revised an order that had adjourned a criminal case pending the result of a civil case and proceeded to rule that it was contrary to judicial principle, which is that a civil case should give way to a criminal case. Furthermore, I find that ***Republic v. Abeid (1990) eKLR*** to be a persuasive authority in which the court stressed that it had wide discretion to allow any party to address the court. That case in turn cited with approval ***R v Ajit Singh (1957) EA 822*** in which the court allowed counsel for the Crown and counsel for the accused to address the court. In the circumstances the preliminary objection of counsel for the complainant is hereby overruled and dismissed. Counsel for the respondent is hereby allowed to address the court in these revisional proceedings.

6. I therefore rule that the objection of counsel for the complainant in respect of representation on the part of the respondent is hereby overruled and dismissed.

7. Ms Ndorongo in turn raised a preliminary objection in respect of the right of the complainant and his counsel to apply for revision. According to her, they lack *locus standi* because section 2 (1) of the Office of the Director of Public Prosecutions Act No 2 of 2013 defines prosecution as one which is under the jurisdiction of the Director of Public Prosecutions in respect of any offence including extradition proceedings, any appeal, revision or other proceeding related thereto. I find that these provisions are in relation to the definition of what is meant by a prosecution and has nothing to do with the powers of the DPP in matters of revision. I have considered the issue of *locus standi* which was raised by counsel for the accused person in urging the court to rule that the complainant has no legal right to apply for revision.

8. In the light of the provisions of ***section 362 of the Criminal Procedure Code*** I find that any person may apply for revision. I also find the High Court may on its own motion revise any order or finding, once its attention has been drawn to it by the print, electronic and social media. I find that this objection in so far as it challenges the right of the complainant to apply for revision is not proper in law and I hereby reject it. It is within the discretion of the High Court to hear any party or person in revision. The right to do so is not restricted by the 2010 Constitution or the provisions of the Criminal Procedure Code. It is in that regard that I find as persuasive the decision of the High Court in ***Republic v. Abeid, supra***. This objection is without merit and I hereby dismiss it.

9. Furthermore, Ms Ndorongo submitted that revisional proceedings are within the preserve of the jurisdiction of the DPP. She did not cite any law whether statutory or case law in support of this submission. I am also not aware of any such law. It is upon any of the parties to the criminal proceedings or an interested party to apply for revision. The High Court may then exercise its discretion to revise any order or decline to do so. In doing so, it may invite any of those parties to address it. It is equally at liberty to revise the order or finding complained of in the absence of the parties. It is not therefore correct to submit that revisional proceedings fall squarely within the preserve of the jurisdiction of the DPP.

10. Furthermore, Ms Ndorongo submitted that the complainant or his counsel have not demonstrated to this court that the DPP has failed to institute revisional proceedings. She also submitted that the complainant cannot usurp the prosecutorial powers of the DPP without his permission. In this regard, I find that the complainant was entitled to apply for revision of the order of acquittal. In doing so, the complainant did not need the permission of the DPP.

11. In addition to the foregoing, Ms Ndorongo also submitted that the complainant or his counsel did not seek the mandatory permission of the DPP to conduct these proceedings as provided for under ***section 88 (1), (2) and (3) of the Criminal Procedure Code***. The provisions of that section are in relation to what is popularly known as the institution of private prosecutions. Those provisions require an intending private prosecutor to seek permission of the magisterial court to conduct the private prosecution. It should also be

pointed out an intending private prosecutor does not need the permission of the DPP to institute criminal proceedings.

12. It is therefore clear from the foregoing that the provisions of section 88 of the Criminal Procedure Code are inapplicable in the instant application. It therefore follows that the complainant or his counsel did not require the permission of the DPP to apply for revision of the order of acquittal in the instant application.

13. Furthermore, counsel has submitted that the order sought to be revised is one of an acquittal. She further submits that if it is revised, it will be prejudicial to the accused. Furthermore, under **sections 364 (1) (b) and (4) of the Criminal Procedure Code**, this court is not allowed to convert a finding of acquittal into one of conviction. I find this is an issue that is to be canvassed in the main revisional proceedings.

14. I therefore overrule her objections by allowing counsel for the complainant to proceed with the revision on its merits. Similarly, I also allow counsel for the respondent to proceed with the revision on its merits. The DPP as *amicus curiae* did not address the court in respect of the two objections.

15. The parties are hereby invited to make submissions as to whether the High Court has jurisdiction to revise an order of acquittal.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **4th** day of **JANUARY 2017**.

In the presence of both Mr Kamunya for the complainant/applicant, Mr Kariuki holding brief for Ms Ndongoro for the respondent and Ms Mati holding brief for Ms Mbae for the *Amicus Curiae*, the DPP.

Court clerk Njue

J.M. BWONWONGA

JUDGE

04.01.17