REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL REVISION NO 4 OF 2017

DIRECTOR OF PUBLIC PROSECUTIONS .....APPLICANT

VERSUS

UMMULKHEIR SADRI ABDALLA

KHADIJA ABUBAKAR ABDULKADIR .....RESPONDENTS

MARYAM SAID ABOUD

HALIMA ADAN ALI

RULING

Before me is an application for revision expressed to be brought under the provisions of section 362, 363, and 364 all of Criminal Procedure Code (Cap 75), Laws of Kenya seeking this court to call for and examine proceedings in criminal case No 2428 of 2016, in Mombasa, Republic Vrs Ummulkheir Sadri Abdalla and 3 others , for the purpose of satisfying itself on the correctness, legality or propriety of the ruling and order delivered on the 26th January, 2017

The Honourable Magistrate is said to have made the following findings which the learned Director of Public Prosecution believes had a direct bearing on the said ruling;

(i) that deciding to separate the trials in criminal case number 797 of 2015, in Mombasa and Criminal case No 242 of 2015, in Mombasa, into two cases amounts to double jeopardy.

(ii) that it is mischievous for the persecution to have separated the trials into two and purport to oppose the release of the accused persons on bond after failing to succeed in previous suit.

(iii) that the outcome of the investigation into and attack in Kotulo Mandera in June, 2016 against a passenger service sees which one of the potential witnesses works was not disclosed.

(iv) that in the other supposed new ground a member of public was caught taking photographs of the court room and police witnesses. The person slipped of their grip and his name in not known. In the circumstances one wonders on what basis they now connect him with the accused persons herein.

(v) having perused the findings (prison proceedings) and sentence as a result which is a severe warning, if indeed anything serious was found it should have been forwarded to the investigating officer for further action.

(vi) that the prosecutor had therefore not demonstrated compelling reasons.

The learned state counsel from the office of the Director of Public Prosecution then lists a raft of circumstances, a summary of which are as follows;

(a) whether the trial court failed to consider relevant matters

(b) the Honourable trial court failed to consider corroborative material;

(c) whether it is proper for the judicial officer to fail to consider evidence presented by way of affidavits, submissions and authorities cited and veer into hypothesis drawn by the court and not canvassed;

(d)whether it is a requirement that reasons must be fully investigated with and outcome presented to court

(e) whether the trial magistrate applied the standard of balance of probabilities in weighing the compelling reasons.

(f) whether he acted judicially in making a finding as to the exercise of prosecutional decisions to charge the accused persons in two different cases.

(g) whether court has jurisdiction to questions discretion by the prosecution on the manner of preferring charges.

(h) whether finding that preferring separate cases amounts to double jeopardy.

What the court is being asked to do is the determine whether;

(i) admission of the accused to bail is proper in the circumstances;

(ii) based on court's findings on competence, propriety, and legality of the charges, it should transfer the matter to a court of competence jurisdiction to try the same;

I have read through the proceedings in Criminal Case No 2428 of 2015 in the Chief Magistrate's court in Mombasa, and more particularly the disputed ruling. I have also made a note of the record of the case which reveals the jinxed path it is taking before the actual trial commences. I have then recapped the submissions of the learned counsel for the parties and the helpful authorities cited. I will set out the law that has set the threshold forming the "ratio decidendi" in this matter.

I have been referred to the following sections of the Law;

(i) Section 362 of the Criminal Procedure Code (Cap 75), Laws of Kenya 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 findings, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court".

The integral cumulative effects of the sections is to donate jurisdiction to the High court and cut its boundaries in carrying out its mandate under this special jurisdiction to supervise the holders of those offices. It is designed to focus eyes of the High court on the holder of the lower court, more to do with his or her competence as the listed matters form an integral part of dispensation of justice. It has nothing to do with contested mattes where a magistrate has exercised his or her jurisdiction judicially as these are matter left for an appeal.

(ii) Section 361 (7) of the Criminal Procedure Code (Cap 75 of laws of Kenya provides;

"For purposes of its sections an order made by the High court in the exercise of its revisionary any jurisdiction or an decision of the High court on a case stated shall be deemed to be a decision of the High court in its appellate jurisdiction"

The import here is clear – that there is no appeal where the court makes a decision on facts presented by way of case stated.

(iii) Section 363 of the Criminal Procedure code (Cap 75 of Laws of Kenya) is not relevant here as it gives jurisdiction to the subordinate court to supervise courts inferior to it. The drafters of this section had in mind courts such as the Chief magistrate's court which administers the entire court set up.

(iv) Section 364 (1) provides as follows;

"In the case of a proceedings in a subordinate court the record of which has been called for or which has been returned for orders or which otherwise comes to its knowledge, the High court may-

(a).....

(b).....

(c).....

(c) In the proceedings under section 203 or 296 of the penal code, the prevention of Terrorism Act, 2012..... where the subordinate court has granted bail to an accused person, and the Director of Pubic Prosecution as indicated his intention to apply for review of the order of court, the order of the subordinate court shall be stayed for a period not exceeding fourteen days pending the filing of the application for revision".

This section gives the Director of Public Prosecution an automatic stay of not more than fourteen days in certain cases or circumstances.

A court therefore has the power to grant anything between one (1) to fourteen (14) days.

In evaluating the performance of a subordinate court, the High court of Kenya has been given the tools to apply in a dispute raised against an order, finding or decision by a presiding magistrate.

The real dispute in the instant case is premised on the fact that the honourable magistrate ;

(a) flouted procedure

(b) Ignored the law by granting the accused persons (Respondents) bail when he should not have done so, and;

(c) Flagrantly ignored the provisions of section 135 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya) and hence his decision to reject separate cases arising over the same facts and circumstances which were was unlawful, un procedural and improper and ought to be reversed.

I will begin with bringing out the provisions of section 135 of the Criminal Procedure code (Cap 75 of the Laws of Kenya) which the trial magistrate applied in rejecting a separate trial of the instant case.

Section 135 of the Criminal procedure Code provides as follows;

"Any offences , whether felonies or misdemeanors , may be charged together in the same charge or information if the offences charged are founded on the same facts, or form one or part of a series of offences of the same or a similar character"

Section 135 (2) of the Criminal procedure code provides'

"Where more than one offence is charged in charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called on court"

Section 135 (3) of the Criminal Procedure Code provides;

"Where, before trial or at any stage of a trial, the court is of the opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or that for any other reason it is reasonable to direct that the person be charged in a charge or information the court may order a separate trial of any count or counts of that charge or information".

Section 136 of the Criminal procedure code states as follows;

"The following persons may be joined in one charge or information and maybe tried together;

(a) Persons accused of the same offence committed in the course of the same transaction ;

(b) Persons accused of an offence and persons accused of abetment or an attempt to commit the offence;

(c) Persons accused of more offence that one of the same kind (that is to say offences punishable by the same amount of punishment under the same section of the Penal code or any other Act or Law) committed by them jointly within a period of 12 months.

(d) Person accused of different offences committed in the cause of the same transaction.

(e) Persons accused of offences under chapter XXVI of the Penal code (which deals with theft) and part XXX (which deals with false pretences) and these who receive and retain possession. attempting to commit either of the last offences.

(f) Persons accused of offences relating to counterfeit claims under chapter XXXVI of the Penal Code and persons accused of another offence under that chapter relating to the same coin or abetment or attempting to commit any such offence.

Under Article 25 of the Constitution of Kenya, 2010 the right to a fair trial is guaranteed and the constitution decrees the right in the following terms;

"Despite any other provision in this Constitution, the following rights shall not be limited-

(a) freedom from torture and cruel, inhuman or degrading treatment of punishment.

(b) Freedom from slavery or servitude;

(c) The right of fair trial; and

(d) The right to an order of labeas corpus"

In applying the law to the complaint, the learned magistrate made the following observations on the issue of separating the charges, in his ruling and I quote and extract thereof;

> "I have perused the said court file and noted that all the accused persons therein are the same accused persons herein. In this other matter, they are charged with seven counts contrary to sections 6,24,25 and 29 of the Prevention of Terrorism Act, 2012. All these offences were allegedly committed on 27th 3.2015, the same day as the offences herein. What this means is that all the offences in both suits were committed at the same time. Procedurally the accused persons were supposed to be charged in one suit....so that in the event of a conviction, the sentence imposed to run concurrently. By deciding to separate the trials into two in my view amounts to double jeopardy"

It is this pronouncement which did provoke these revision proceedings in applying sections 362 and the elaborate section 135 of the Criminal Procedure Code; it is clear which cases maybe brought in the same charge or information. Of importance is section 135 (3) which on close scrutiny gives this right to the court so that once a court is seized of a matter, it takes over the process, so that it is only it, and not the office of the Director of Public Prosecution or the prosecution who decide whether to charge separately or not. What this means is that what the magistrate observed and explained as his reasons for a joint charge in the case, though not what one deduced from the section, was perfectly legal and referred to a procedurally proper manner the prosecution should have done.

By the prosecution insisting on separate trial it is violating the Constitution and statute, hence being illegal and is hereby rejected.

To maintain two separate trials over the same transaction which occurred the same day and hour by the same persons, amounts to an unfair trial and will fly in the face of Article 25(c) of the Constitution.

The court of appeal in the case of GEORGE OTIENO AKULA and THREE OTHERS VRS REPUBLIC (2013) e KLR, CR APPEAL No. 406 OF 2009 at KISUMU, reversed the prosecution's decision to charge accused persons separately and restated the reason to complying with section 135 of the Criminal Procedure Code.

This alone would have disposed of the revision herein, but I find need to re-emphasis the question relating to bail or bond in the matter.

As regards the complaint that the accused persons are not entitled to bond, I am instructed by sections361 (7) and 123 to 124 all of the Criminal Procedure Code.

From the wording of the Constitution, the granting of bail is as of right subject to proof of compelling reason on circumstances which may lead to denial of the same.. (See Article 49 (1) (h) of the Constitution).

The state was aware that the accused persons (Respondents) had been granted bail in one matter and was contesting it knowing very well it had lost and the only thing left for them was complying with the courts' order to release the respondents on bond.

The mischief the learned magistrate was curing is the prejudice the accused persons (Respondents) would be caused in their defence and the way they were being denied (by the prosecution) enjoyment of the bond that they had already been granted. The learned magistrate was prompted to make the following remarks;

> " As I have stated herein the accused persons have already been granted bond in a suit where they are jointly charged with offences which were already committed at the same place and time as offences herein. It is mischievous for the prosecution to have separated the trials into two and purport to oppose the release of the accused persons on bail after failing to succeed in the previous suits".

He even went on to analyze the fact which the prosecution was relying upon.

I also wish to state that I had my own bite on this issue of bond for the accused persons (Respondents) when the matter came to me on revision in Criminal Revision No. 169 o 2015, whereby I confirmed the bond terms that had been granted to the accused persons (Respondents) by the trial magistrate then and added more terms to secure a trial on 22.10.2015.

The second time the matter came up before me was to enforce contempt proceedings against the Prison Authorities when it was alleged that they had refused to release the accused persons (Respondents) despite the court's order releasing them on bond. I granted my bond orders on 9th December, 2015 and reaffirmed the release of the accused persons (Respondents) on bond.

Given this chequered history, one would be tempted or forced to believe that the prosecution is jinxing the case so that the trial is not held.

Under Article 157 (11) of the Constitution, 200, the Director of Public Prosecution is required to guard public interest, the interest of the administration of Justice and the need to prevent and avoid abuse of the legal process.

It cannot be said that two years down the line, no trial has commenced in the instant case and the accused person who were granted bond are still held in custody despite a myriad of orders to have them so released.

The society is interested in the outcome of a case because many things depend on it.

The continued incarceration of the accused persons (Respondents) in custody without trying them eats into the taxpayers money in a country which is faced with many other crises such as starving and thirsty citizens, striking workers due to poor remunerations, etcetra.

There is also the likelihood of investors fearing or freaking because one would not be sure of their neighbour when travelling to and in this country.

The society would want to see and believe the Anti Terrorism Prevention Unit is working and their money well spent, and not merely used to stage Hollywood -like movies that attract media publicity, and there after no step taken.

In fact, what at is witnessed of these cases is the tug of war between the prosecution and the courts. They should to avoid this. The accused persons (Respondents) are then condemned and suffer in the hands of delayed justice, which is frowned upon by our Constitution under the Bill of Rights, and the International Conventional Human rights.

The bottom line of all these is that, the application for revision by the Director of Public Prosecution is un meritorious.

I find that the Honourable magistrate properly appreciated the law and there is nothing illegal, improper , incorrect or in breach of the due process to warrant this court to interfere with his ruling and order delivered on 26th January 2017.

And, to end this tag of war that I have observed between the prosecution on one hand, the court on the other and pulling of the accused persons (Respondents) in different directions, I make the following orders;

1. the Criminal Revision dated 27th January, 2017 be and is hereby dismissed;

2. the bond or bail terms proposed by the trial magistrate for the accused persons (Respondents) be and are hereby confirmed;

3. the case to proceed to case conference before the trial magistrate on a date to be fixed by the

said trial magistrate, within 14 days from today.

4. hearing to proceed on a day to day basis until the case is finalized.

It is so ordered.

Ruling delivered, signed and dated this 22nd day of February, 2017.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr Jami Yamina for the state/Applicant

Mr Mwadzogo for the Respondents

Respondents – Present

C/clerk- Kiarie