REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL REVISION ON 179 OF 2015

REPUBLIC.....APPLICANT

VERSUS

JACKSON NDWIGA NJERU .....RESPONDENT

RULING

This application is for review vide a letter dated 23rd November, 2015 by the Director of Public Prosecution.

The grounds for review are that the trial magistrate misapplied the law by relying on section 89 (5) of the Criminal Procedure Code in discharging the accused person when the particulars of the offence the accused person was charged with creating an offence.

According to the applicant, the trial magistrate entertained matters of evidence as raised by the defence even before plea was taken and made a determination on the same by discharging the accused.

Powers of revision are donated to the High Court 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".***

The respondent was charged with the offence of preparing to commit felony contrary to Section 308 (2) of the Penal code.

The facts are that on the 2nd day of November , 2015, at Kwale township Golini Location- Kwale County within Coastal region not being at his place of abode had with him an article for use in the course of connection with theft hereby stealing motor vehicle registration No KBZ 251 X Subaru Forester.

The matter came up for plea on 9.11.2015 but Mr Nyange for the Respondent objected to the same being taken on grounds that the charge against the respondent was a serious abuse of court process as there were no statements or exhibits to support the same. Mr Nyange urged the trial court to acquit the Respondent under section 202 of the CPC and section 389 of the CPC.

Mr Nyange pointed out to court that the respondent was detained vide miscellaneous criminal case No 62 of 2015, at Kwale for terror related activities, which case was withdrawn and the instant case brought. He

submitted that the charge against the Respondent has nothing to do with terror related activities.

In response, the prosecution submitted that section 389 of the CPC talks of quashing a lower court's decision when a matter is for appeal while Section 202 of the CPC talks of acquitting an accused person due to lack of witnesses. The prosecution went on to state that the respondent's counsel could not have applied for the case to be dismissed for lack of evidence when the statements/evidence is usually supplied after plea has been taken. He termed the respondent's application for the case to be dismissed pre- mature.

The prosecution went onto state that they had statements for the arresting officer and that even though the miscellaneous application related to terror activities, there was no evidence to support this but the same disclosed there was preparation to commit a felony on the part of the respondent, hence, the instant case. He further stated that the Respondent was charged unlawfully and no violation of his right was inflicted on him.

Mr Nyange confirmed that the court had only been shown statements of the arresting officer but not the investigating officer, hence termed the trial a sham and submitted that the court should not be used to settle scores.

Mr Kamau, who was observing for the Kenya National Commission on Human Rights, reiterated Mr Nyange's submissions and said that as a commission they were interested in insuring that courts are not used to settle scores.

Having listened to the submissions by all counsels in respect to the application by the office of the Director of Public Prosecution to have the order by the trial magistrate discharging the Respondent by relying on section 89 (5) of the Criminal Procedure Code reviewed, I have also read through the record of proceedings in criminal case No 1194 of 2015 at Kwale, Republic –vrs- Jackson Ndwiga Njeru.

In considering this applications for review, a reading into the provisions relied on in arriving at a decisions to discharge the respondent is necessary.

Section 202 of the Criminal Procedure Code provides that

> ***"if, a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed on the summons for the hearing of the case or is brought before court under arrest, then if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereon acquit the accused , unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit".***

The provisions of this section relate to the non-appearance of complainant at hearing. The instant case had come to court for purposes of plea taking where section 207 of the Criminal Procedure Code should have been complied with.

Section 389 of the Criminal Procedure Code on the other hand provides for "power to issue directions of the nature of haseaus corpus. Clearly, this section does not provide for the orders the Respondent's counsel was seeking before the trial magistrate in the instant case.

Article 50 of the Constitution provides for fair hearing of any dispute.

The trial magistrate, in considering the application by the Respondent's counsel went on to discharge the respondent by invoking the provision of section 89 (5) of the Criminal Procedure Code. This was after reading through the particulars of the charge against the Respondent.

Section 89 (5) of the Criminal Procedure Code state that:

"When the magistrate is of the opinion that a complainant or formal charge made or presented under this section does not disclose an offence. The magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reason for the order".

In reaching his decision, the trial magistrate noted:

"Be that as it may, I note that the particulars of the offence are vague and do not disclose an offence. It is being alleged that the accused person was found in possession of a certain article for use in the course of connection with theft namely stealing of a motor vehicle registration No. KBZ 251X Subaru Forester" (Sic). We do not know what this article is and whether such an article can be used in connection with theft. For this reason, I decline to admit the charge therein and proceed to discharge the accused person therein under section 89 (5) of the Criminal Procedure Code"

The previous of section 308 (2) of the penal code clearly states that;

"Any person who, when not at his place of abode, has with his any article for use in the course of or in connection with any burglary, theft or cheating is guilty of felony, and where any person is charged with an offence under the sub- section proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use".

From these provisions, there is need to have the article suspected to be; "for use in the course of or in connection with any burglary theft a cheating ....."

Specifically named so as to prove the case against a person so charged.

In the instant case, the particulars of the charge refer to an article without naming it which render the said particulars vague and ambiguous. They do not disclose an offence because without naming the article, it would be had to tell whether or not it can be used in the course of or in connection with stealing of a motor vehicle.

It is true that in his ruling, the trial magistrate commented on the matters of evidence which were raised by the Respondent's counsel but he did not base his decision to discharge on this. He also did not rely on sections 202 and 389 both of the Criminal Procedure Code. His decision to discharge the respondent is informed by the provisions of section 89 (5) of the Criminal Procedure Code, which relate to a charge which does not discharge an offence from its particulars and this can even be done suo moto by the court.

In the circumstances, I find that the findings by the trial magistrate in criminal case No 1194 of 2015 Kwale were correct and legal. I proceed to uphold the same.

Dated and delivered this 14th day of September 2016.

D. CHEPKWONY

JUDGE

In the presence of:

M/s Mutua for state

Mr Kitonga holding brief for Nyange

C/clerk- Kiarie