Wasilwa v Republic (Criminal Revision E002 of 2023)
[2024] KEHC 6223 (KLR) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6223 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E002 OF 2023

JRA WANANDA, J

MAY 31, 2024

BETWEEN

GEOFFREY WEKESA WASILWA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Applicant is charged in Eldoret Chief Magistrate's' Criminal Case No. E314 of 2022 with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The trial is part-heard before Hon. Odenyo, SRM and 4 witnesses have testified so far.

2. The particulars of the charge are that on 18/02/2022, at Huruma Grounds in Turbo sub-county within Uasin Gishu County, jointly with others not before Court robbed the complainant of her Safaricom Neon mobile phone and cash Kshs 100/- all valued at Kshs 9,600/- and immediately before the time of such robbery injured the said complainant.

3. The Application has now, *vide* the undated Notice of Motion filed on 16/01/2023, moved to this Court requesting it to invoke its supervisory powers of Revision under Article 165(6) and (7) of the *Constitution* and Section 362 of the *Criminal Procedure Code* and direct that the trial Court allows him to recall the witnesses for further cross-examination. The State has responded to the Application *vide* the Replying Affidavit sworn by Senior Prosecution Counsel, Emma Okok and filed on 25/01/2024.

4. To enable me appreciate the Applicant's complaints, I called for the trial Court file and stayed the trial before the lower Court. The file was duly forwarded and I have carefully scrutinized it. I also granted the parties liberty to file written Submissions but neither of them filed any.

Determination

5. The jurisdiction of the High Court with regard to the powers of Revision is supervisory and is provided under the Constitution in Article 165 (6) and (7) in the following terms:

> " 6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

6. Section 362 of the *Criminal Procedure Code*, then provides as follows:

> " Revision
>
> 362. Power of High Court to call for records
>
> 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. The operative phrase in considering Applications for revision is therefore "correctness, legality or propriety" of any finding, sentence or order made by the lower Court.

8. The purpose and nature of the revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of *Joseph Nduvi Mbuvi vs Republic* [2019] eKLR in which he observed as follows:

> " In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

9. The issue that arises for determination in this matter is therefore "whether this Court should exercise its revisionary jurisdiction and direct the trial Court to recall witnesses for cross-examination".

10. The proceedings of the trial Court have been aptly captured in the Replying Affidavit aforesaid and I have verified the same to be correct. In summary, the Applicant took plea on 25/02/2022 and pleaded not guilty. The trial then commenced on 21/06/2022 on which date PW1 and PW2 testified and the Applicant cross-examined both. On 31/10/2022 when the case came up for further hearing, the

Applicant applied for recall of PW1 and PW2 for further cross-examination. The trial Magistrate declined the request on the ground that the Applicant had not given any reasons for the same. Indeed, the record shows that the Applicant did not give any reasons for the request. Aggrieved by the denial, the Applicant walked away from Court and returned to the cells. In the circumstances, the trial Court allowed PW3 to testify in the absence of the Applicant, which did. On 14/11/2022 when the case came up for further hearing, the Applicant was in Court and fully participated in the proceedings of the day, including cross-examining PW4. The Applicant then informed the Court that wished to enter into plea-bargaining discussions with the Prosecution.

11. However, when the case came up in Court on 5/12/2022, the Applicant informed the Court that he had changed his mind regarding the plea-bargain intention. The Prosecution then closed its case. On 17/01/2022 the trial Court placed the Applicant on his defence. It is at this juncture that the Applicant moved to this Court.

12. In respect to instances where accused persons are given the opportunity to cross-examine but fail to take advantage thereof, the Court of Appeal, in the case of *Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji* Civil Application No. Nai. 179 of 1998, held that:

> "Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it."

13. In view of the proceedings as I have set out above, it is clear that the ground of insufficient time to cross-examine does not arise in this case. The complaint is clearly an afterthought and an attempt to delay the trial. I agree with the State that the Applicant has failed to demonstrate that his rights have in any way been violated. He was given all the opportunity to participate in the trial and cross-examine all the witnesses. He has not alleged that he was not supplied with the Prosecution witness statements and documents to enable adequately cross-examine the witnesses. As already stated, from the record, it is also evident that he did not give any reasons for seeking for recall of the witnesses. In the circumstances, I cannot find any improper exercise of discretion by the trial Court. The Applicant's conduct of walking away from the Court and boycotting the trial on 31/10/2022 was, besides being ill-advised, also an act of gross defiance of the Court and conduct that is unbecoming and which I severely reprimand.

14. It should always be recalled that the reversionary power of the High Court is not meant to be invoked to micro-manage the subordinate Courts. In respect to this caution, in the same case of *Joseph Nduvi Mbuvi vs Republic* (*supra*), Odunga J stated further as follows:

> "14. It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated

with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. ....."

15. For the foregoing reasons, I decline the invitation to order for re-opening of the prosecution case or direct for recall of the witnesses. Accordingly, the Application fails and is dismissed. The lower Court file is hereby directed to forthwith be returned to the lower Court for resumption of the trial.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF MAY 2024

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Applicant in person

Mugun for the State