



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

CRIMINAL REVISION NO. 585 OF 2018

(FROM CM'S COURT CRIMINAL CASE NO. 1707 OF 2018, MOMBASA)

YINGKAIGUAN.....1ST APPLICANT

JORAM WANJAMA KAMAU.....2ND APPLICANT

HUMPHREY MWASHAVWA MZAME.....3RD APPLICANT

VERSUS

THE ANTI-COUNTERFEIT AGENCY.....RESPONDENT

RULING ON REVISION

1. The applicants being the accused persons in Mombasa Chief Magistrate's Court Criminal Case No. 1707 of 2018 through a Notice of Motion dated 7th December, 2018 sought the following orders:

(i) Spent;

(ii) A temporary order be issued, staying the orders and further proceedings in CM's Cr. Case No. 1707 of 2018 R-vs- Yingkaiguan & 2 others, pending the hearing and determination of this reference;

(iii) An order lifting the warrants of arrest issued on 28th November, 2018 or in the alternative that the same be held in abeyance pending the hearing and determination of this application and consequent reference;

(iv) An order requiring the Anti-Counterfeit (sic) to submit the investigation files to an independent prosecutor and in this case the Office of the Director of Public Prosecutions to re-assess the sufficiency of evidence as against the charge preferred as requested by the ODPP in a letter dated 30th November, 2018;

(v) An order directing the Office of the Director of Public Prosecutions to file the report/opinion within 30 days of the date of the receipt of the file;

(vi) An order requiring the Anti- Counterfeit Agency to file in court the copies of the Investigation file and a list of the available exhibits for inspection by the court; and

(vii) Upon compliance, the court to give direction on trial, quash the charge sheet or issue other orders as may appear prudent based on the finding in the report and exhibits as may be filed in court by the Anti-Counterfeit Agency and the ODPP.

2. The respondent filed a Notice of Preliminary Objection seeking to strike out the applicant's Notice of Motion and the entire revision with costs, on the following grounds-

(i) That this Honourable court in the exercise of its revisionary powers is bereft of jurisdiction to grant the prayers sought on the face of the said application;

(ii) The said application violates the express provisions of enabling statutes and is clearly illegal, contrary to public policy and public interest;

(iii) That the said application invites this Honourable court to usurp the powers of the trial court by delving into evidence, merit and trial related issues;

(iv) That the said application is premised on defective appreciation of the express provisions of Article 157 of the Constitution and the Office of the Director of Public Prosecutions Act and is liable only to be struck out;

(v) That the application is a gross abuse of the process of this court, frivolous, vexatious, nebulous and a waste of valuable judicial time and resources;

(vi) That the said application is a tactic to use this Honourable court as a tool to undermine the jurisdiction of the trial court, stifle the administration of justice and to assist the applicants to avoid prosecution for myriad of criminal acts pending before the trial court; and

(vii) That the purported supporting affidavit of Sheila N. Muthee is fatally defective, incurably incompetent and inadmissible.

Submissions

3. The matter came up for hearing of the Notice of Preliminary Objection on 29th January, 2019 when parties submitted orally in court. The respondent through its Learned Counsel Mr. Mukofu submitted that there are no proceedings that call for revision by this court and that the decision to charge the applicant was made by the Office of the Director of Public Prosecutions (ODPP).

4. Counsel for the respondent submitted that the applicants have not even been charged and no warrants of arrest have been issued against them. Further, no proceedings have been taken so far because after the charge sheet was registered, no action was taken. He therefore urged that this court not to exercise revisionary powers.

5. Mr. Mukofu submitted that the charges filed against the applicants were brought by the ODPP and that the prayer for orders to the effect that the files with the Anti-Counterfeit Agency be forwarded to the ODPP for perusal is an internal administrative procedure. He therefore urged this court not to interfere with the administrative duties of the Director of Public Prosecutions (DPP). He prayed for the application dated 7th December, 2018 to be dismissed.

6. The applicants through their Learned Counsel, Mr. Karina submitted that the proceedings in the lower court were instituted by the ODPP through the Anti-Counterfeit Agency, which fact is contained in the charge sheet.

7. He further submitted that Article 165(6) and (7) of the Constitution gives the court supervisory jurisdiction on subordinate courts and quasi-judicial bodies. He added that this court holds supervisory powers to can call for any record and proceedings and give any order that is fair to the administration of justice.

8. Counsel further submitted that the applicant's complaint is that the Anti-Counterfeit Agency abused the evidentiary burden and that the letter by the Kenya Bureau of Standards (KEBS) addressed to the KRA Chief Manager Ports Operations ordered the reshipment of the consignment within 30 days. He stated that after reshipment was done, the applicant had no evidence against the 1st applicant who was the consignee.

9. Mr. Karina pointed out that the 2nd applicant is the Director of Jowaka Super Links Limited and the 3rd applicant is its Port Clerk. He relied on the case of Patrick **Genius vs Coroner's Act**, Suit No. M.35 of 2002 where the court stated that the ODPP has to be

guided by settled Policy. He also referred to the case of **Communications Commission of Kenya vs ODPP & Another** [2018] eKLR where the court held that where the case does not pass the evidential test it must not go ahead, no matter how serious it might be.

10. Counsel further submitted that if the lower court case proceeds, the applicant will be put into untold hardship as they will be taken through a case where exhibits are no longer available. He submitted that the consignment was worth Kshs. 27 Million and the applicants will be called upon to deposit a huge amount for bond.

11. In response to the applicant's submissions, Mr. Mukofu submitted that the decision to charge the applicants is not a quasi-judicial power but is given to the DPP by statute.

12. He further submitted that Article 157 of the Constitution gives the DPP the mandate to charge, which power in this instance has been delegated to the Anti-Counterfeit Agency. For the said reason, a suspect should not be given leeway to choose the kind of evidence the prosecution should bring to the court or the charges to be preferred against him.

13. Mr. Mukofu argued that the jurisdiction of this court has not been properly invoked and the issue of the bond terms will be decided by the trial court. In his view, the authorities relied on by the Counsel for the applicants are not applicable in this case.

ANALYSIS AND DETERMINATION

The issue for determination is whether the application filed on 7th December, 2018 is rightfully before this court.

14. The question of jurisdiction of the High Court in superintending the subordinate courts and quasi-judicial tribunals has been considered widely by the courts since the promulgation of the current Constitution in the year 2010. Article 165 (6) thereof provides that the High Court shall have supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

15. In the case of **John Kipngeno Koech & 2 Others vs Nakuru County Assembly & Others** [2013] eKLR the Court held as follows:-

“Jurisdiction is the practical authority granted to a formally constituted body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is a scope, validity, legitimacy or authority to preside or adjudicate upon a matter.”

16. It is therefore clear from these principles that the High Court has jurisdiction to determine the implications occasioned by an impugned order. The provisions of Section 362 as read with Section 364 of the Criminal Procedure Code (CPC) actualize the provisions of Article 165 (6) and (7) of the Constitution of Kenya.

17. The High Court can be moved by an aggrieved party to exercise its powers on revision, by the lower court or by the High court itself, *suo moto*. The High Court then calls for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, propriety or correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the High Court to re-hear the case by evaluating and analyzing the evidence adduced before the lower court in totality in order to arrive at a decision based on merits.

18. The provisions of Sections 362 and 364 of the CPC do not provide for a time limit within which a party may seek the court to invoke its jurisdiction under the powers of revision and grant the relief sought. The power of revision conferred by the provisions of Section 362 as read with Section 364 of the CPC is left open for an applicant or any aggrieved party to move the High Court at an opportune time.

19. In considering similar provisions under the Indian Criminal Procedure Code and applicable statute on revisional powers, the Supreme Court in the case of **Sriraja Lakshmi Dyeing Works v Pangaswamy Chettair** [1980] 4SCC 259 said as follows:-

“The conference of revisional jurisdiction is generally for the purpose of keeping tribunals subordinate to the revising tribunal

within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. The question of the extent of appellate or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. The dominal ideal conveyed by the incorporation of the words to satisfy itself under section 25 read as which has similar provisions with our section 362 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya) emphasis mine is essential a power of superintendence. The scope of the revisional powers of the high court where the high court is required to be satisfied that the decision is according to law as to the legality and propriety of the order under revision, which is quite obviously a much wider jurisdiction. That jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also, though the revisional court is not a second court of appeal.”

20. It is clear from the above decision that when an applicant moves the High Court in form of a criminal revision, the applicant's sole prayer would be to revise orders that may appear inaccurate, incorrect or unjust. As can be seen from this analysis the function of the court under Section 362 as read with Section 364 of the CPC is to enable the court to scrutinize and examine the correctness of the proceedings of a subordinate court or tribunal so as to make a finding on correctness, legality or propriety.

21. Legality means lawfulness, strict adherence to law, correctness and propriety ordinarily having the same meaning. It can be deduced from this analysis that the jurisdiction on revision will be invoked where there is a decision by a subordinate court which has not been made the subject of appeal and that grounds of revision must exist against the decision being challenged from the subordinate court. Interference of the powers of the DPP by way of revision in this case can only be justified if the impugned decision is grossly erroneous.

22. In this instance, the applicants are yet to be charged in court. A proposal by the ODPP through the respondent has been made to charge them. I take cognizance of the role of the Director of Public Prosecutions as provided in Article 157(6) of the Constitution. His role *interalia* includes making decisions on whether sufficient facts exist upon which to charge suspects, arraignment of suspects in court to take plea or to apply for detention pending plea taking, participating in plea bargains, pretrial conferences, mentions, the main trial, and in the event of a conviction, participation in pre-sentencing hearings until the final orders of the court.

23. Mr. Karina filed a list of authorities on 19th December, 2018 in which he sought to rely on an extract from the treatise **Prosecutorial discretion and discrimination in the decision to charge**, 1982, by Amy P. Applegate, which states that it is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause.

24. In the present case, it was submitted by the applicants' Counsel that the investigation file had been called for by the DPP from the respondent which had resisted forwarding the said file and therefore this court was called upon to make an order directing the respondent to forward the file to the DPP to assess the sufficiency of the evidence and thereafter the DPP to file a report or opinion before this court within 30 days of the date of the filing.

25. It was further contended that the respondent had no exhibits to rely on to prosecute the case against the applicants for the reason that the consignment in issue had been reshipped. This court was therefore asked to make an order requiring the respondent to file in court copies of the investigation file and list of available exhibits for this court's inspection after which the court would give directions as to the trial, quash the charge sheet or issue other orders that would appear prudent based on the finding in the report and exhibits as may be filed by the respondent and the ODPP.

26. This court would be overreaching itself and acting out of jurisdiction if it was to grant the orders being sought. Firstly, the applicants have not taken plea in court yet. Secondly, the DPP has called for the investigation file from the respondent for perusal to satisfy himself if sufficient grounds exist for charging the applicants. Thirdly, the DPP is the one authorized by the law to appoint prosecutors. If the respondent's failure to submit the investigating file reeks of insubordination, it is within the purview of the DPP as the appointing authority to deal with the respondent in whichever way he deems necessary. This court declines the invitation to descend to the arena of the DPP to make an administrative decision on his behalf.

27. The applicants' Counsel relied on **Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales**. I take the applicability of the said guidelines which are tailor made for the New South Wales Prosecution Office with great caution as Kenya has its own home made National Prosecution Policy and one size does not fit all.

28. In the decision that was cited by the applicant's Counsel in **Communications Commission of Kenya vs ODPP & Another** (supra), the DPP had directed the Police not to charge the 2nd respondent therein for lack of sufficient evidence but the appellant strongly felt that the 2nd respondent should have been charged. It filed a Judicial Review application in the High Court seeking an order of certiorari to remove into the court and quash the DPP's decision. The appellant also sought orders of mandamus to compel the DPP to institute, maintain to their logical conclusion such criminal proceedings against the 2nd respondent. The foregoing case is distinguishable from the present one in that the DPP had considered the evidence available and made a decision not to charge.

29. In the present matter, the DPP called for the investigative file from the respondent herein with the aim of determining if its decision to charge the applicants is merited. As such the DPP is yet to determine if the evidential test meets the threshold required. My considered view with regard to this matter is that the applicants put the horse before the cart by prematurely filing their Notice of Motion application before this court.

30. In the circumstances, I am persuaded that the Notice of Preliminary Objection raised by the respondent herein has merit. It is hereby allowed. The net effect of the foregoing decision is that:-

(i) The Notice of Motion application dated 7th December, 2018 is hereby struck out as the applicants have not yet been charged before the lower Court;

(ii) The ODPP is mandated by Article 157 of the Constitution to institute and undertake criminal proceedings against an individual(s) which power has been delegated to the respondent in this case;

(iii) The presumption that the applicant if charged will be called upon to deposit a huge amount of bond is highly speculative and if turns out to be so, there are legal remedies available;

(iv) The non-availability of exhibits will be determined by the trial court in the event that the applicants are charged; and

(v) No order as to costs.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of February, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Karina for the applicants

Ms Ogweno holding brief for Mr. Mukofu for the respondent

Mr. Oliver Musundi - Court Assistant



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