REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL REVISION NO. 30 OF 2019

REPUBLIC.....APPLICANT

VERSUS

BERNARD MUTHIANI MULINGE.....RESPONDENT

(In respect of Machakos Chief Magistrate's Court Sexual Offence No. 18 of 2019 presided over by Hon. B.J. Bartoo, Senior Resident Magistrate)

RULING

1. This matter came to this court by way of a letter dated 2.10.2019 brought under Articles 22, 47(1), 50(1), 157(9) and (11), 159(1) and (2), 165(3), (6) and (7) of the Constitution, Sections 202, 362 and 364 of the Criminal Procedure Code, Section 4,5,6,10 and 11 of the Victim Protection Act and Sections 3,4,5,7 and 9 of the Fair Administrative Action Act. The letter was received in the registry on 3.10.2019.

2. The facts leading to this revision cause are thus; the subject criminal case is pending ruling before the trial court and that the respondent is the accused charged with an offence of defilement. The matter was reserved for further hearing on 24.9.2019 and when the matter was called over, the state prosecutor indicated to the court that the doctor was expected in court and he requested that the matter be called out after the call over. At 11.20 am it could not be confirmed that the doctor was within the court premises and the prosecutor requested that the file be called at 2pm. However around noon the prosecutor received a letter to the effect that the doctor would not be available. At 2 pm the state counsel applied for an adjournment on the basis of the mentioned letter and the court dismissed the letter and declined to grant the prosecution an adjournment and ordered the state to close its case. The applicant now seeks for a revision of the orders declining a grant of adjournment and closing of the prosecution case and that the prosecution's case be re-opened.

3. In opposition to the application was a replying affidavit deponed by Kilns' A. Muli on 8.10.2019. It was averred that there was undue delay in bringing the instant application as the criminal case had been reserved for ruling on 8.10.2019 and yet the application was filed on 3.10.2019. It was averred that on 24.9.2019 the matter was called at 9.30 am, 11.20 am and 2.30 pm and that the prosecution gave different reasons for not being able to proceed. It was averred that the matter was severally adjourned on 25.5.2019, 11.06.2019 and 2.7.20129 in order to avail the doctor and the investigating officer and that the 24.9.2019 was the 4th time and it was left to court to decide whether or not to grant an adjournment. It was averred that since there was no witness in court a decision was made to close the prosecution case and give a ruling date on whether there was a case to answer. It was averred that the subject has been in custody since 18.3.2019 when he took plea and he is entitled to justice. Counsel urged the court to dismiss the application and direct the trial court to proceed with its ruling on a case to answer.

4. The applicant through the prosecution counsel vide submissions filed on 16.10.2019 submitted that the dismissal of the letter from Kathiani Level 5 Hospital was not legal and not procedural. It was a finding not supported by evidence and it manifested a nonchalant approach in discharge of judicial functions. It was submitted that section 283 of the Criminal Procedure Code provided for postponement of trials when good cause was shown and it was the duty of this court to protect the victim's rights. Reliance was placed on the case of **Mohammed Abdulrahman v R (2018) eKLR** where the court held that a grant or refusal of adjournment is a

matter of discretion that must be aimed at achieving the cause of justice. It was submitted that fair trial entails the protecting of the interest of the accused and the victim and reliance was placed on the case of **R v Paul Mutuku (2018) eKLR.**

5. The enabling law for revision is Under **Article 165(6) and (7) of the Constitution** and **Section 362** as read together with Section **364 of the Criminal Procedure Code**. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the case. Reproduced as follows:

"362. ***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."***

364. (1)In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may

…….

b. in the case of any other order than an order of acquittal, alter or reverse the order.

(***2)****.No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;*

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

……***;***

(***5)****.When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."*

6. For the Applicant, it was submitted that he read travesty of justice in the way the prosecution was denied an adjournment and yet he confirmed that he had a letter to the effect that the doctor scheduled to testify was not available. It is argued that the application be allowed.

7. For the respondent it was argued that the matter was adjourned severally on previous occasions and on the material day, it was called out three times so as to accommodate the prosecution which was waiting for a witness who failed to turn up and hence it was in order for the trial court to deny the adjournment.

8. After carefully perusing the reasons advanced for and against the application and being cognizant that **Article 50 of the Constitution** provides that everyone is entitled to the right to be heard and that the same constitution also provides for a fair hearing, I am at cross roads because it is evident that both parties were heard. In the case of **Evans vs Bartlam [1937] AC 473 at 480,** the Court stated that *unless and until the court has pronounced a judgment upon the merits of the case or by consent of the parties, it is to have power to revoke the expression of its coercive power where that had only been obtained by failure to follow any of the rules of procedure.* In the same case, Girvan J observed *that there was no compelling reason to give a provisional view of a probable outcome* meaning that at this point it serves no purpose to interfere with a matter that is still at its formative stages yet the applicant still has a chance to appeal against the final decision.

9. In **Hitila Vs Uganda [1969] 1 E.A. 219**, the Court of Appeal of Uganda held that in exercising its power of revision the High Court could use its wide powers in any proceedings in which it appeared that an error material to the merits of the case or involving a miscarriage of justice had occurred. It was further held that the Court could do so in any proceedings where it appeared from any record that had been called for by the Court, or which had been reported for orders, or in any proceedings which had otherwise been brought to its notice.

10. This means that revision is not a call to superintend the subordinate courts but to address an error material to the merits of the

case.

11. Was there an error material to the merits of the case" The Alaska Supreme Court **In re Curda, 49 P. 3d 255, 261** held as follows:

"***All Judges make legal errors. Sometimes this is because legal principles are unclear. Other times the principles are clear, but whether they apply to a particular situation may not be. Whether a Judge has made a legal error is frequently a question on which disinterested, legally trained people can reasonably disagree. And whether legal error has been committed is always a question that is determined after the fact, free from the exigencies present when the particular decision in question was made.***

Further, Judges must be able to rule in accordance with the law which they believe applies to the case before them, free from extraneous considerations of punishment or reward. (emphasis added). This is the central value of judicial independence. That value is threatened when a judge confronted with a choice of how to rule-and judges are confronted with scores of such choices every day-must ask not "which is the best choice under the law as I understand it," but "which is the choice least likely to result in judicial discipline""

12. In addition, under the doctrine of the separation of powers, the ability of judges to exercise discretion is an aspect of judicial independence.

13. Judicial independence is provided for under Article 160(1) and (5) of the Constitution. It provides as follows;

(1) ***In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.***

(5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

14. **Australia Apple & Pear Marketing Board v. Tonking (1942) 66 CLR 77** at page 83, cited in **Words & Phrases Legally Defined Vol 2: D-J at page 496**, stated that:

"***The term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by a competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."***

15. **Black's Law Dictionary, 9th Ed at page 28** defines a judicial act as 'an act involving the exercise of judicial power.' Judicial power or authority on the other hand, is defined by the same dictionary at page 924 as follows:

"***The authority vested in courts and judges to hear and decide cases and to make binding judgments on them; the power to construe and apply the law when controversies arise over what has been done or not done under it."***

16. Judicial independence is not a privilege of the individual Judicial Officer. It is the responsibility imposed on each officer to enable him or her to adjudicate a dispute honestly and impartially on basis of the law and the evidence, without external pressure or influence and without fear of interference from any one. The core of the principle of judicial independence is the complete liberty of the judicial officer to hear and decide cases that come before the courts and no outsider be it government, individual or even another judicial officer should interfere with the way in which an officer conducts and makes a decision. **R vs Beauregard, SC of Canada, (1987) LRC (Constn) 180 at 188 per chief Dickson**."

17. Judicial independence ought to be distinguished from judicial immunity. In **Sirros v. Moore, [1974] 3 All ER 776, 781-782**, Lord Denning expounded on the meaning of immunity as follows:

"…***it has been accepted in our law that no action is maintainable against a Judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that***

the Judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all charitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a court or appeal or to apply for harbeas corpus, or a writ of error or certiorari, or take some such step to reverse his ruling. Of course, if the Judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."

18. Because the judiciary is designed to be independent, judicial officers must have discretion in order for the legal system to function properly. Discretion refers to the power or right given to an individual to make decisions or act according to her/his own judgment. Judicial discretion is therefore the power of a judicial officer to make legal decisions based on his or her opinion but within general legal guidelines.

19. **In Black's Law Dictionary 5th Edition**, "judicial and legal discretion" is defined as "discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained." Judicial discretion does not therefore provide a license for a judge to merely act as he or she chooses.

20. Ideally, judicial decisions will involve minimal discretion as judges apply proven facts to the established law, and a case could be given to any judge and the results would be the same. However, legal issues are not always clearly defined as black and white, right and wrong. It is not possible to create laws for every possible issue that could come up in a given case. Therefore, judicial officers must make many discretionary decisions within each case that influence the outcome of the case or the legal recourse of the parties.

21. From the evidence availed before me, I find that the judicial officer appropriately exercised judicial discretion in arriving at her decision. I do not find the same irregular nor was there a miscarriage of justice as the matter is at its formative stage and the applicant has appropriate remedies within the court hierarchy to challenge the final decision made by the judicial officer rather than seemingly hurdling the progress made towards the determination of the matter. I am not able to see any error committed by the judicial officer that is material to the merits of the case. The trial magistrate duly exercised her discretion according to the circumstances of the case and it seems she was not satisfied by the reasons advanced by the learned prosecutor for an adjournment. At best the appropriate move could have been by way of an appeal but not review.

22. A Reading of the Pleadings of the applicant shows that the applicant seeks a review of the orders declining a grant of adjournment and closing of the prosecution case and sought that the prosecution case be re-opened. As analysed earlier, such a directive at this stage would interfere with the authority of the judicial officer to act without fear and as such it is pragmatic to allow the matter to proceed and challenge the final decision if the applicant is aggrieved by the same. In this regard, I find no merit in the revision sought by the applicant and decline to grant the review orders sought. The result is that the review application is dismissed. The criminal matter shall proceed before the Honourable Magistrate in the trial court as scheduled in accordance with this ruling. The interim orders that were granted are hereby vacated.

Orders accordingly.

Dated and delivered at Machakos this 15th day of January,2020.

D. K. Kemei

Judge