REPUBLIC OF KENYA

IN THE HIGH COURT OF KENTA

AT KAKAMEGA

CRIMINAL REVISION NO. 2 OF 2018

BONIFACE GUBIMILU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The proceedings herein were initiated vide a document that was lodged herein, under certificate of urgency, on 7th February 2018, headed "Grounds for Criminal Revision," with respect to proceedings pending in Hamisi SRMCCRC No. 439 of 2017, and specifically with respect to documents that were placed on the record by the investigating officer, who testified as PW10, and evidence given by PW3, Catherine Vihenda, said to be the wife of the accused in the matter.

2. With regard to production of documents, it is averred, in the document initiating these proceedings, that the advocate on record for the accused, had objected before production, but the trial court indicated that it would deal with the matter when it got to that stage, which he understood to mean that his objection had been sustained, but the documents were nevertheless produced despite the objection. When the advocate raised the issue at cross-examination, the court ruled that the objection was not raised at the right time. It is argued that the accused person was put on his defence on the basis of documents that were wrongly put on record. It is complained that the trial was rushed and documents improperly placed on record. There is also an issue about other persons being involved, who were not brought to court, in respect of which it is argued that there was discrimination in bringing the accused to trial, and that the same was unconstitutional. Regarding the spouse of the accused, it is argued that she was forced by the prosecution to testify, something that she confessed during cross-examination.

3. The background to the revision proceedings is that the accused, in Hamisi SRMCCRC No. 439 of 2017, faces a charge of robbery with violence, contrary to section 295, as read with 296 (2), of the Penal Code, Cap 63, Laws of Kenya. He had pleaded not guilty to the charge, and the matter proceeded to hearing. PC Joshua Mwania testified as PW10, on 6th December 2017. He produced five items in court, which were marked as exhibits. During cross-examination, the advocate for the applicant made an application for stay of the proceedings, saying that he wished to object to production of the documents, stating that the production was discriminatory and that the proceedings were unconstitutional. The application was resisted by the prosecutor, who submitted that the advocate for the applicant had not objected to the production of the documents at the time they were being produced, at examination-in-chief, and that he could not object to the documents after they had already been produced. She further submitted that the issue of discrimination was not proved nor supported by any evidence. Catherine Vihenda gave evidence as PW3, on 2nd October 2017. During cross-examination, she stated that she had been told that she had to give evidence within her knowledge.

4. In exercising the powers of revision, the High Court seized of the matter is not sitting on appeal from the decision of the trial court, but only invoking its supervisory jurisdiction, in cases where there are glaring acts or omissions on the part of the trial court leading to a miscarriage of justice. In *George Aladwa Omwera vs. R* [2016] eKLR**,** the powers of the High Court, on revision, were set out as follows:

"In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.

23. In Veerappa Pillai vs. Remaan Ltd the Supreme Court of India has this to say:

"The supervisory powers are obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made…."

24. The above principle is applicable to the exercise of revision jurisdiction of the court wherein the court too cannot sit in appeal and re-appreciate the evidence. It is only exercised to correct the manifest error in the order of the subordinate courts but should not be exercised in a manner that turns the Revisonal court into appeal. The jurisdiction cannot be exercised mainly because the lower court has taken a wrong view of the law or misapprehended the evidence tendered. See Pathummaa & Anor vs. Muhammed 1986 (2) SCC 585 where it was stated that in revision jurisdiction the High Court would not be justified in substituting its own view for that of the magistrate on question of facts."

5. In *Republic vs. Anthony Thuo Karimi* [2016] eKLR, the court observed:

"The basic object behind the powers of revision is to empower the high court to exercise the powers of an appellate court to prevent failure of justice in cases where the code does not provide for appeal. The power however is to be exercised only in exceptional cases where there has been a miscarriage of justice owing to: - a defect in the procedure or a manifest error on the point of law, excess of jurisdiction, abuse of power, where decision upon which the trial court relied has since been reversed or overruled when the revision appeal is being heard.

The revisional powers though are quite wide, have been circumscribed by certain limitations. Such as (a) in such cases where an appeal lies but there is no appeal brought in, originally no proceeding by way of revision shall be entertained at the instance of the party who would have appealed. [6] (b) The revisional powers are not exercisable in relation to any interlocutory order passed in any appeal, inquiry and trial. (c) The court exercising revisional powers is not authorized to convert a finding of acquittal into one of conviction into one of convection. [7].

The revisional powers of a High Court are very wide. Such powers are intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by an inferior criminal court and even as to the regularity of any proceeding of any inferior court. The object of conferring such powers on the High Court is to clothe the highest court in a state with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. Section 364 (1) (a) confers on the High Court all the powers of the appellate court as mentioned in Sections 354, 357 and 358.

The revisional powers are entirely discretionary. There is no vested right of revision in the same sense in which there is vested right of appeal. These sections do not create any right in the litigant, but only conserve the powers of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that subordinate criminal courts do not exceed their jurisdiction, or abuse the powers vested in them by the Code."

6. Let me now turn my attention to the issues raised. I will start with the issue of production of documents. The applicant contends that the documents produced by PW10, the investigating officer, were not produced by their makers and that the same was discriminatory. He seeks to have the same expunged from the records.

7. The court in *Njuguna Mwangi & another vs. Republic* [2018] eKLR, said as follows on production and admission of documents:

"14. What is the effect of admitting an exhibit by the trial court after overruling an objection raised by the defence or prosecution challenging such admission" Production and admission of exhibits in the course of a trial is governed by laid down procedural and legal requirements whether in criminal or civil proceedings. Ordinarily, objections do arise when a party attempts to produce a document or materials relied on to prove one's case depending on the circumstances and attendant legal provisions governing such production. Depending on the nature of evidence and exhibit sought to be produced, courts quite often do make interlocutory rulings allowing or disallowing production of such exhibits.

15. In a situation such as the instant case which is challenging the admission of certain exhibits for failure to comply with certain legal requirements or standards before production and admission, it is perfectly within the purview or discretion of the trial court to determine the element of admissibility based on the relevant law. The consequence of such admission improper or otherwise, would attract a ground of appeal by either party upon conclusion of the case depending on whether there is a conviction or not. That is why the Luke Ouma Ochieng vs. R (supra) case is not relevant to this case as it was referring to a situation of an accused person who had already been convicted based on production of exhibits that had been objected to at the trial stage. The admissibility of exhibits objected to should be challenged or raised after conclusion of the trial at the appeal stage and not at the admission stage or in the middle of a trial.

16. The production and admission of the said exhibits does not amount to condemnation of the accused person. It is not automatic that the Applicants will be adversely affected by being convicted. In case of a conviction based on those exhibits, the Applicants shall have a remedy by way of an appeal. The power to admit exhibits or not is purely a matter of interpretation of the law by a trial court. It will be prejudicial to the trial and the eventual outcome of the case which is ongoing if this court were to make a finding that the admission was wrong. A court handling an application of this nature must act with extreme caution and restraint not to unnecessarily invoke revisionary powers thereby interfering with the trial court's proceedings thus prematurely jeopardising the appeal process. Courts are not infallible as mistakes may occur but there are properly prescribed remedies e.g. appeals where appropriate.

17. It would be a bad precedent for the High Court to intervene and annul each order made by a trial court in admitting each exhibit against the wish of the defence or prosecution. To allow such a scenario under revisionary powers would amount to anarchy in litigation thus entertaining several mini appeals in the middle of a trial of a case in the guise of exercising revisionary powers thus micromanaging and clogging the legal system by extension unreasonably delaying the expeditious disposal of cases and administration of justice.

18. Practically, it is inconceivable that every ruling on admission or non-admission of exhibit(s) by a trial court would automatically attract or generate a ground of revision. The grounds cited herein do not fall within the confines of an error envisaged under Section 362 of the CPC to call for revision. The Applicants have not been prejudiced by the admission of exhibits at this stage. The case is yet to be finalised. They will have a basis on appeal at the conclusion of the case in the event they are found guilty."

8. From the above, it should be clear that the issue of production and admission of documents by the trial court is purely an issue of discretion, and for this court to revise the same would amount to sitting on appeal. On the decision of the trial court while there is no appeal before me. On that basis I shall not interfere with the decision of the trial court with regard to the documents that PW10 produced and which the court admitted in evidence.

9. Furthermore, from the record of the trial court, it would appear that the advocate for the accused did not object to the production of the documents at examination-in-chief. The record gives no indication at all of his objection, contrary to what is averred in the revision documents lodged in court. The issue was raised, for the first time, after the advocate had cross-examined PW10. Indeed, the prosecutor mentioned that the advocate for the defence was objecting at the wrong time, since the documents had already been produced. The court gave the advocate for the defence leave to file a revision application at the High Court. The issue was raised after the documents had already been produced, and I do not see any irregularity or impropriety with the manner the court the court handled the matter.

10. On the issue that the accused had been alleged to have had committed the offence with another person, who had been identified, but who was not arrested and arraigned in court jointly with the accused, it is argued that the action of charging the accused and not the other person amounted to discrimination, which was unconstitutional. Decisions as to who gets to be charged is at the discretion of the prosecution, based on the material at their disposal. It is a matter in respect of which this court cannot direct the prosecution

on. The issue of the other suspect was not before the trial court, and the trial court made no decision on who was to be charged. That is an issue that cannot be a basis for revision, in the circumstances. If the accused felt strongly about the matter, then he should have filed a constitutional petition to challenge the decision to prosecute him and leave out the other suspects, where the prosecution would have had an opportunity to respond appropriately to any issues raised.

11. Next I turn to the matter of the evidence of PW3, Catherine Vihenda, the applicant invites me to determine admissibility of the evidence of PW3, on the basis that it was evidence of a spouse. According to section 130 of the Evidence Act, the spouse of an accused person is not a compellable witness, in the sense that he or she cannot be compelled to give evidence against their spouse. That would mean that a person cannot be made to testify against their spouse, if they preferred not to. The record of 2nd October 2017, when PW3 testified, indicates that Mr. Sore, advocate, was present, acting *pro bono* for the accused. He did not object to PW3 testifying, on grounds that she was a spouse of the accused. The issue was not raised, and the witness testified, and, therefore, it can be presumed that she testified willingly, or that she was not compelled to. It was during cross-examination, that Mr. Sore asked a question to who she said that she had been told that she had to give evidence within her knowledge. Yet, Mr. Sore had not objected, as he should have done, when she was presented as a witness, for it is at that stage that the court would have assessed whether or not she had been compelled to give evidence. As it is, that matter cannot be revisited on revision.

12. Overall, I am not persuaded that there are reasonable grounds for me to interfere with the decision of the trial court, with respect to the two issues that were before it. Let the trial court records be returned to the trial court for completion of the trial. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF DECEMBER 2020.

W MUSYOKA

JUDGE