REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. E101 OF 2021

PROF ROSA KO.....APPLICANT

VERSUS

THE REPUBLIC.....PROSECUTOR/1ST RESPONDENT

SAMUEL NDERITU WAKANYUA.....ACCUSED/2ND RESPONDENT

(Being a ruling against the acquittal judgement of Hon. Mwaniki Kamau, SRM, dated 25th March 2021, in the Chief Magistrate's Court at Kibera in Criminal Case No. 1340 of 2018, Republic v Samuel Nderitu Wakanyua)

RULING

The matter for determination is a notice of motion dated 29th March, 2021 by the applicant Prof. Rosa KO, seeking the following:

1) That the Court do exercise its revisionary powers under Section 364 of the Criminal Procedure Coode, to revise the orders of the Chief Magistrate's Court at Kibera in Republic versus Samuel Nderitu Wakanyua Kibera Criminal Case 1340 of 2018 in denying the victim/complainant an opportunity to participate in the defence hearing.

2) That the Court directs a re-trial of Republic versus Samuel Nderitu Wakanyua Kibera Criminal Case No 1340 of 2018 to afford the victim/complainant an opportunity to be heard.

3) That the Court to make any other orders it deems fit in the interest of justice.

The application is supported by a supporting affidavit dated 29th March 2021 and sworn by the applicant. The applicant depones that she was the complainant/victim in the case at Chief Magistrate's Court at Kibera in Republic versus Samuel Nderitu Wakanyua Kibera Criminal Case 1340 of 2018. She avers that during the trial she was denied an opportunity to participate in the defense hearing contrary to Section 9 of the Victim Protection Act, 2014. That consequently, her advocate and on record and herself were denied opportunity to cross-examine the defence witness or even put in a victim impact statement. She contends that the prosecution failed to properly cross-examine the defence witnesses ultimately leading to the acquittal of the accused. She urges this Court to exercise its revisionary powers and order for a re-trial and to grant her a right to fair trial under the Victims Protection Act, 2014.

The application was canvassed by way of written submissions. Begi's Law Offices and Chambers Advocates filed written submissions for the applicant dated 29th November, 2021. It is their submissions that the accused had been charged with the offence of assault contrary to 251 of the Penal Code. That during the proceedings in the trial Court, neither the complainant nor her advocate on record was notified of the date of the defence hearing. Further, due to the onset of COVID-19 courts were not operating in normalcy and as such, it was quite uncertain as to the dates in which the matter would be proceeding in court. It was submitted that the complainant's advocate took necessary steps to follow up with the court's registry but his efforts were futile. It is argued that it was only later that they came to realize that the defence hearing proceeded without notifying the victim's/complainant's advocate

and an acquittal order was issued.

It is the applicant's submissions that the revisionary jurisdiction of the High Court can be invoked where there are weighty acts or omissions in a matter where the legality and correctness of the sentence or order is questionable as provided under Section 362 of the Criminal Procedure Code. Further that under Section 9 of the Victim Protection Act, 2014 the Victim has a right to be present at their trial, either in person or through their representative and also be informed in advance of the evidence the prosecution and the defence intend to rely on, and to have reasonable access to that evidence. It is the applicant's case that she was not given an opportunity to participate in the defense hearing. Reliance is placed in the case of Joseph Lendrix Waswa v Republic [2020] e-KLR where the court stated that a victim can no longer be a passive observer in criminal proceedings and their involvement is crucial at various stages.

The applicant's advocate also cited Leonard Maina Mwangi vs Director of Public Prosecutions and 2 others [2017] e-KLR where the Court pointed out that cross-examination of witnesses by the counsel for the victims was the best avenue that a victim could use to bring out the evidence that may have been left out by the prosecution in examination in chief and which evidence was within the statement of the witness supplied to the defence and to the victim.

The applicant's argument is that during the trial, due process was not followed as it was necessary to involve the applicant at all stages including the defence hearing. The applicant urged the court to allow the application and grant the prayers sought.

Joy Adhiambo, counsel for the 1st respondent filed written submissions dated 23rd November, 2021. It is her submissions that the High Court cannot exercise revisionary jurisdiction in an order for acquittal as provided for under Section 364 of the Criminal Procedure Code. Reliance is placed in the case of Joseph Nduvi Mbuvi v Republic [2019] e-KLR and Kenneth Kirimi v Republic [2021] e-KLR.

The second argument is in respect of section 9 of the Victim Protection Act, 2014 which grants the court powers to permit the victim's views and concerns to be presented at stages of the proceedings determined to be appropriate by the court. It is her submission that the victim impact statement is applicable where the accused has been convicted which is not the case herein. Therefore, it was not necessary as the accused was acquitted in the instant case.

It is the 1st respondent's submission that due process was followed during the trial process and it was not necessary to involve the applicant during the defence hearing. That the applicant testified and was cross-examined by defence counsel and later other witnesses testified on various dates. Further, that the matter went through the full trial and judgment was delivered which resulted in an acquittal. Counsel for the 1st respondent urged the Court to dismiss the application.

I have considered the pleadings and the submissions of the parties. I have also considered the applicable law.

I find the following to be the issues for determination.

1. Whether this court has jurisdiction to entertain and determine the application

2. Whether the applicant has made out a case for the prayers sought.

Issue 1

The first issue for determination is whether this Court has jurisdiction to entertain an application seeking revision of an order of acquittal. The power of this Court to revise any order issued by a subordinate Court in a criminal case is provided for under section 362 and 364 of the Criminal Procedure Code. Once it is brought to the attention of this court that an order issued is incorrect or illegal, this court is mandated to examine the record of the said subordinate court to determine the correctness, legality or propriety of the said order. In that regard section 362 of the Criminal Procedure Code provides as follows: "The High court may call for and examine the records 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."

In the same vein, Section 364 (1) (b) of the Criminal Procedure Code stipulates that: "In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."

In the instant application, the accused person was acquitted by the court after having gone through the full trial process. Section 364(1) (b) aforesaid excludes an order of acquittal from being revised by the High Court. It is a maxim of law that jurisdiction is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it.

Furthermore, section 364 (4) of the Criminal Procedure Code (Cap 75) Laws of Kenya mandatorily denies the High Court the jurisdiction from converting an order of acquittal into one of conviction.

The issues raised by the applicant herein as the basis of applying for revision are issues that should have been raised in an appeal against the order of acquittal.

For a long time, orders of acquittal were not subject to appeal. It was thought that an appeal against an acquittal would expose an accused to harassment and vexation with all its attendant travel and monetary expenses in travelling to the court house which may be situate several kilometres away. The lack of appeal protected the freedom and liberty of the acquitted person. It was gradually realized that the provision against an appeal against an acquittal was necessary to protect the public interest. It was therefore provided for but was only limited to appeals against an acquittal on points of law only. See Republic v Wachira (1975) EA 262. This remained the position for a long time until the Security Laws (Amendment) Act No. 19 of 2014 which introduced section 348A of the Criminal Procedure Code. This amendment effected far reaching amendments that now conferred upon the public prosecutor (the Director of Public Prosecutions) on behalf of the Republic, a right of appeal to the High Court against an acquittal by the magistrate court on both fact and law. Similarly, it also conferred upon the Republic a right of appeal against an acquittal by the High Court to the Court of Appeal.

It is clear that the foregoing legislative changes did not confer jurisdiction upon the High Court to revise an order of acquittal.

I therefore find that this court lacks jurisdiction to revise the order of acquittal that was recorded in respect of the accused person.

The victim if she desired to have the order of acquittal quashed should have approached the office of the Director of Public Prosecutions to consider filing an appeal against an acquittal under section 348A of the Criminal Procedure Code. The victim still retains the right to resort to her civil law remedies, notwithstanding the order of acquittal.

Issue 2

I have already found that I have no jurisdiction to entertain and determine the application. It therefore follows that it is moot or academic to consider the merits of the application. See Attorney General v Ally Kleist Sykes (1957) EA 257

Consequently, I find that the application is incompetent and is hereby struck out.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MARCH 2022.

J M BWONWONG'A

JUDGE

IN THE PRESENCE OF-

MR. KINYUA COURT ASSISTANT

DR ABENGA FOR THE VICTIM/APPLICANT

MS JOY FOR THE RESPONDENT