



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

High COURT CRIMINAL REVISION NO. 037 OF 2020

REPUBLICAPPLICANT

VERSUS

CHARLES MUSYMI MAITHYA1ST RESPONDENT

RICHARD MUTIE MUTUMA.....2ND RESPONDENT

FREDRICK KIOKO JULIUS.....3RD RESPONDENT

VINCENT MAUNDU PETER.....4TH RESPONDENT

RULING

1. The applicant has moved the court, vide a letter dated; 16th September 2020, pursuant to the provisions of; sections 362 and 364 of the Criminal Procedure Code (cap 75), Laws of Kenya, (herein “the Code”), seeking for revision of the orders made on; 7th September, 2020, by Hon. C.M Njagi (Senior Resident Magistrate), vide Criminal Case No 82 of 2019 at JKIA.
2. The applicant states that, on the material date, the prosecution made an application, seeking to be allowed to serve the defence with more documents, but the application was declined by the trial court, on the ground that, the court had made a similar order in the month of; May 2020, and therefore, all documents should have been supplied by then.
3. The applicant argues that, in declining to grant the order sought, the trial court failed to take into account the fact that, during the period of; COVID-19 Pandemic, the court’s activities were slowed down. Further, allowing the application will not prejudice the defence case, as they will be allowed adequate time, to consider the additional documents. To the contrary, if the application for review is not allowed, the applicant will not be able to furnish the court with adequate evidence to support its case, and as a consequence, it will suffer prejudice.
4. That, the only prosecution witness who had testified had not been cross examined. Additionally, the applicant was granted leave to amend the charge sheet, and indeed, amended it, therefore it is in the interest of justice, to allow the service of more documents to support the amendment. That, article 50 of the Constitution of Kenya (herein “the Constitution”), guarantees all the parties a fair hearing.
5. However, the application was opposed by the 1st, 2nd and 4th Respondents vide a replying affidavit dated; 21st October 2020, sworn by the “Respondents”. The affidavit is rather strange and unusual, as it has been deposed collectively, that, the applicant has brought the application in bad faith.
6. That, it has failed to make material disclosure to the effect that, the amendment in the charge sheet merely involved, withdrawing charges against the 3rd accused and treating him as a prosecution witness. Therefore, it does not call for additional documents. Furthermore, the applicant is merely seeking to fill in gaps arising from cross examination of its first witness.
7. That, the provisions of; article 50 of the Constitution cited, only accords the accused and not the prosecution a right to a fair hearing. The Respondents detailed out the chronology of the events in the trial court, and referred the court to the record thereof, in particular, the orders made by the court on 2nd May, 2020, allowing the applicant to file additional documents. It was argued that, the applicant has caused inordinate delay in the hearing of the matter in the lower court, and therefore, the court should allow the application for review.
8. The application was also opposed vide a replying affidavit dated, 26th November 2020, sworn by the 3rd Respondent; Fredrick Kioko. He too, averred that, the application has been made in bad faith. That, on 2nd March 2020, the applicant applied to file further documents whose request was allowed by the trial court, and it was directed to make an inventory and have it signed.

9. That, the documents were served and the inventory signed on 17th August 2020. The charge sheet was also amended. However, on 7th September 2020, the applicant sought for leave to file further documents, but the court declined to allow the same, hence, the application herein.

10. The 3rd Respondent argues that, the matter in the trial court has been pending for the last eighteen (18) months and despite the fact that, the applicant is calling a total of six (6) witnesses, excluding the expert witnesses, only one witness has testified. Thus, the applicant is guilty of unreasonable delay.

11. Further, article 50 of the Constitution provides that, an accused person should be accorded a fair trial, therefore, the case should be concluded within a reasonable time.

12. Be that as it were, it is noteworthy that, as the application for revision was pending hearing and determination, on 25th August 2021, the 1st, 2nd and 4th Respondents, filed a notice of motion application dated; 17th August 2021, seeking for the dismissal of the revision application for want of prosecution. The application was argued orally with the Respondent thereto, reiterating that, the COVID-19 Pandemic and unavailability of the lower court file, had caused the delay.

13. I have considered both applications, and based on the material before the court, and I find that, first and foremost, the affidavit sworn by the 1st, 2nd and 4th Respondents, opposing the revision application is fatally defective, and/or incompetent. An affidavit is a written statement from an individual, which is sworn to be true. It is an oath that what the individual is saying is the truth. It cannot therefore be sworn collectively by more than one person, “for not even the devil know-worthy the mind of a man”.

14. It also suffices to note that, the “deponents” do not aver to the “truth” or veracity of the contents of the replying affidavit nor the fact that, the averments therein are true to the best of their knowledge, indeed, Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010, which deals with affidavits states that:

“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

15. Pursuant to the aforesaid, the revision application stands unopposed by the 1st, 2nd and 4th Respondents. However, in the interest of justice, I will consider the matter on merit. As regards the application for dismissal of the revision application, I find that, the revision application was made on; 28th September, 2020. The application seeking its dismissal was made on 25th August 2021, a period of eleven months.

16. The court record indicates that, the matter was active in court, awaiting action by the parties and/or availability of the lower court file which was availed on; 24th February, 2022. Therefore, the applicant in the revision application are not to blame wholly. It is therefore, not in the interest of justice to dismiss the revision application and decline to allow the prayer seeking for the same, in the application dated, 17th August 2021.

17. To revert back to the revision application, I find that, the parties did not file any submission thereto and neither did they canvass the application orally. I have therefore considered the application in the light of the materials placed before the court. I note that, the Respondents were arraigned before the trial court for plea on; 12th June 2019. The court record indicates that, the first witness was heard on; 18th December, 2019 and concluded his evidence. The matter was stood over to 3rd February, 2020.

18. On that date, it was adjourned on the prosecution application, and stood over to; 21st and then 24th February 2020, when the prosecution applied to have the 3rd accused treated as a prosecution witness. The hearing was then set for; 2nd March 2020. On that date, the prosecution sought to be allowed to serve further documents, although it was ready with one witness. The defence opposed the application to serve additional documents. However, after hearing both parties, the court vide a ruling delivered on 13th May 2020, allowed the prosecution to serve further documents. Apparently, the process of service of the documents proceeded on, until or about 13th July, 2020.

19. Subsequently, the 3rd accused’s counsel, applied to recall PW1 for further cross examination. The prosecution confirmed the witness was available and hearing of the matter was set for; 27th July 2020. On that date, the counsel appearing for 1st and 4th Respondents sought for an adjournment, to obtain a copy of the amended charge sheet. That, although the prosecution was ready to proceed, it conceded to the application for adjournment. The case was adjourned to 17th August 2020. On that date, the learned trial Magistrate was reported indisposed and hearing stood over to; 7th September 2020.

20. On the aforesaid date, the substituted charge sheet was read to each accused and they maintained a plea of not guilty. It is at this stage that, the prosecution sought to introduce further documentary evidence and the defence objected. The trial court upheld the objection, hence the revision application herein. It is clear from the chronology of the afore-detailed events, that, the matter in the lower court has been pending since 2019. That by all standards, this period is quite long, for a matter to remain for reasons that can be avoided.

21. Be that as it were, it is noteworthy that, as much as the prosecution have contributed heavily to the adjournments, the other parties too, have occasionally sought for and been granted an adjournment, with the trial court being indisposed once. However, that is not a reason to justify any delay, from either party and in particular the prosecution, which has the primary role to prosecute the matter.

22. Furthermore, the provisions of; articles 50 and 159 (2) of the Constitution speaks to the expeditious hearing of matters in courts, if a fair trial has to be achieved. The provisions of; article 50(j) stipulates that, the accused has a right to be informed in advance of the evidence the

prosecution intends to rely on, and be accorded reasonable access thereto, and adequate time and facilities to prepare the defence

23. The key question is; what is meant by; “advance”? As rightfully observed by the trial court in its ruling, on 13th May 2020, the duty of disclosure is a continuous one throughout the trial. The word “advance” does not mean before or the beginning of the trial. In that regard, the prosecution can adduce additional evidence as long as the prosecution case has not been concluded.

24. However, article 159 (2) (b) states that, in exercising Judicial authority, the court shall be guided by the principles inter alia that; “justice shall not be delayed. In the same vein, article 50(2) (e) of the Constitution stipulates that; every accused person has the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay. Therefore, pursuant to these provisions, the court should not allow applications that halt the wheel of justice.

25. Thus the prosecution should not be allowed to produce evidence in piecemeal as much as disclosure process is continuing. That conduct is not decent or tidy. It destabilizes the court and defence. The defence is kept on the fence. It becomes a trial by ambush. Furthermore, the trial becomes uncertain and unpredictable. That is the very reason why pre-trial process was introduced in the court process. In that regard, I find that, the prosecution conduct in the trial court is thus least impressive.

26. Having said so, it is noteworthy that, the prosecution is an agent of necessity in a criminal trial. The real complainant is the victim. For justice to be done and be seen to be done, the scale of justice must balance. The provisions of; Article 50 (9) of the Constitution, integrates the rights and welfare of victims as part of the fair trial process. The preamble to the Act subject states that; it is:-

“An Act of Parliament to give effect to Article 50 (9) of the Constitution; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes”

27. It therefore follows that, any decision made should always consider the plight of the complainant “victim”. In the instant matter, I find that:

- a. Only one witness has testified, therefore the case is not yet advanced. In fact, the defence have applied for recall of PW 1 for further cross examination
- b. The prosecution applied for and were allowed to substitute or amend the charge sheet, whatever worthy the amendment may be, it may be important to revisit its evidence in support hereof
- c. The failure to allow the additional evidence may prejudice the prosecution, yet any prejudice to the defence can be cured by being allowed time to consider the additional documents

28. As a result of the aforesaid, the scale of justice tilts towards allowing the revision application. However, the prosecution must provide all the evidence to be relied on. The trial court should set the time frame for the same, if any other additional evidence has to be served. The order of the court issued on 13th May 2020, did not address the same under order 1 and 4 thereof. In any event, the prosecution must serve the additional documents referred to herein, within five (5) days from the date of this order.

29. The case is quite old and be heard on priority basis to reduce any inconvenience, burdens on costs, and other resource incurred by the accused. The lower court file be returned to the trial court forthwith and a mention date be served.

It is so ordered.

DATED, DELIVERED VIRTUALLY, AND SIGNED ON THIS 8TH DAY OF MARCH, 2022

GRACE L NZIOKA

JUDGE

In the presence of;

Ms Chege for the applicant

Mr Kipkemoi for the Respondent

Edwin Ombuna – Court Assistant