Office of the Director of Public Prosecution (ODPP) v Musyimi (Criminal Revision E106 of 2024) [2024] KEHC 15680 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15680 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION E106 OF 2024

FROO OLEL, J

DECEMBER 9, 2024

IN THE MATTER OF APPLICATION FOR REVISON UNDER ARTICLE 165(6) & (7) OF THE CONSTITUTION OF KENYA AND SECTION 362 AND 364 OF THE CRIMINAL PROCEDURE CODE, CHAPTER 75 LAWS OF KENYA

AND

IN THE MATTER OF MAVOKO CHIEF MAGISTRAT'S COURT CRIMINAL CASE PRIVATE PROSECUTION CASE NUMBER E87 OF 2024; ALEX MUSYIMI VRS WILSON NDOONI & 2 OTHERS

AND

IN THE MATTER OF APPLICATION BY

BETWEEN

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION (ODPP) ..... APPLICANT

AND

ALEX MUSYIMI ..... RESPONDENT

RULING

A. Introduction

1. This review application is filed by the Applicant (ODPP) vide their letter dated 4th June 2024, wherein they stated that the respondent, Alex Musyimi filed a notice of motion Application dated 4th March 2024 inMavoko Chief Magistrate's court Criminal Case Number E87 of 2024, where he sought leave to institute and conduct private prosecution against Wilson Ndooni, Anna Mbeneka Musyoki & Sylvester Mutua Mbindu. Subsequently Mavoko Chief Magistrate's court Criminal Case Number E87 of 2024; Alex Mbindu Vrs Wilson Ndooni, Anne Mbeneka Musyoki & Sylvester Mutua Mbindu

was opened and on 11th April 2024, the trial Magistrate did issue warrants of arrest as against the respondents therein.

2. The Applicant herein faulted the issuance of the said warrants of arrest on the grounds that;

   a) The learned trial Magistrate erred in law by entertaining an application which was completely incompetent from the onset due to the respondent's failure to join the Applicant herein, yet it was their constitutional mandate, which was being challenged.

   b) The trial Magistrate erred in law by granting Ex parte orders before ensuring compliance with Section 28(2) of the office of the director of Public Prosecution Act.

   c) The learned trial magistrate erred in granting Ex parte orders that interfered with the Applicants mandate under Article 157(4) of the *constitution* without according the Applicant a fair hearing as provided for under Article 50 of the *constitution* of Kenya 2010.

   d) The learned trial Magistrate erred in law in issuing warrants of Arrest against Wilson Ndooni, Anna Mbeneka Musyoki & Sylvester Mutua Mbindu, before granting leave to the respondent to institute and conduct private prosecution as required under section 88(1) of the Criminal procedure Code.

   e) The learned trail Magistrate erred in law by directing the respondent to comply with the provisions of Section 28(2) of the *office of the Director of Public Prosecutions Act* and thereafter issuing warrants of Arrest against Wilson Ndooni, Anna Mbeneka Musyoki & Sylvester Mutua Mbindu, without giving the Director of Public Prosecution time to respond to the issue raised in the said Application

3. The applicant therefore urged the court to find that the proceedings before the trial Magistrate were conducted in violation and total disregard to Article 157(10) of the *constitution* of Kenya 2010 and Sections 6 and 28(2) of the Director of Public Prosecution *Act, No 2 of 2013*. They further urged the court to exercise its supervisory powers and set aside the orders issued on 11th April 2024 by Honorable R. Gitau (SRM).

4. The Respondent opposed this Application through his Replying Affidavit dated 23rd September 2024, where he deponed that on 6th March 2023, he lodged a complaint at Kyumbi Police station vide OB Number 25/6/3/2023 as against the "suspects" and despite investigation being concluded, no action had been taken as against the persons who assaulted him and maliciously damaged his property. He subsequently wrote various letters dated 11th September 2023 and 18th May 2024 to the Applicant's office at Machakos and Mavoko complaining about the delay in charging Wilson Ndooni, Anna Mbeneka Musyoki & Sylvester Mutua Mbindu, but received no response.

5. Aggrieved by the neglect and indolence of the Applicant, he opted to lodge his application dated 4th March 2024 but filed on 14th March 2024 seeking leave to conduct private prosecution of the matter complained of. Court file being Mavoko Chief Magistrate's court Criminal Case Number E87 of 2024; Alex Mbindu Vrs Wilson Ndooni, Anne Mbeneka Musyoki & Sylvester Mutua Mbindu was opened and on the 1st mention he was directed to serve summons upon the accused persons and the applicant, which he did, and on 4th April 2024, the Applicants counsel requested more time to familiarize himself with the file.

6. The matter was adjourned to 11th April 2024 when the matter was mentioned again, by which time no response had been filed and the Applicant's counsel advised him to serve their Nairobi office. On 16th April 2024, he did effect service upon the Applicants office in Nairobi, but was advised that it was a

matter to be dealt with by the regional office at Machakos and his previous service of the application at the ODPP office in Mavoko was sufficient.

7. The orders issued were therefore valid as the Applicant was granted a chance to respond to his Application but failed to do so. This review Application was vexatious, brought in bad faith, and was not made in the interest of Justice as the Applicant's aim was to further delay the pending matter before the lower court and/or prematurely terminate it.

8. It was the respondent's contention that there was no obligation to enjoin the applicant in private prosecution instituted and the trial Magistrate order compelling the attendance of the three accused persons did not in any way interfere with the respondent's prosecution mandate. If the Applicant was aggrieved with order issued, they should have appealed instead of seeking to review of the orders issued.

9. The Applicant had shown their hand/impartiality by failing to prosecute the "accused persons" and thus it was in the interest of justice in this matter, that the private prosecution be allowed to proceed.

B. Submissions

10. The Applicant through prosecution counsel Mr D. Man'gare did orally submit that their Application was premised on Article 165(3) of the *constitution* of Kenya 2010, Section 362 & 364 of the Criminal Procedure Code. The applicant had sought to privately prosecute the "three accused persons named before the trial court" but failed to join the ODDP or the National Police Service as parties thereto. The trial court had erred in issuing warrants of arrest against the said "proposed accused persons "without following due process and without granting the Respondent leave to institute "private prosecution".

11. The Applicant further faulted the trial Magistrate for failing to note the provisions of Section 88 of the Criminal Procedure Act and Section 28 of the Office of the Director of Public Prosecution Act gave leeway to any person to institute or commence "private prosecution", through the office of the ODPP, but such a person had to meet the criteria set out therein. The respondent herein had not met the criteria set out under the aforestated provisions of law and further the trial court had erred in prematurely issuing warrant of arrest as against the "accused persons named therein" without hearing the said application on merit. Reliance was placed in Floriculture International Ltd & Others Hcc Misc Application No 114 of 1997, Kimani Vrs Kihara 1983 Eklr & Gouriet Vrs Union of Post office Works 1977(3) All England Reports.

12. The final issue raised by the Applicant was that no leave was granted to the respondent to institute "Private prosecution" and therefore it was premature for the trial Magistrate to issue summons and warrants of arrest as against the "proposed accused persons".

13. The respondent on the other hand submitted that their Application was not incompetent as Section 88(1) of the Criminal Procedure Code, authorized the trial Magistrate to grant him leave to institute private persecution .The Applicant had been served and failed to act as mandated under Article 157(10) of the *constitution* of Kenya Section 6 & 28(2) of the office of the Public Prosecution Act, and therefore it was in the interest of Justice to allow his " private prosecution case" to proceed in order to allow his assailants to face justice.

14. The Application as present was vexatious, brought in bad faith and constituted an abuse of the process of court as the respondent had met the criteria for grant of leave to commence private prosecution. The respondent also urged the court to note that the Applicant had the intention of terminating the private prosecution and/or delay prosecution of the criminal case instituted. This application was therefore mala fides and allowing it would cause injustice and hardship to the respondent. Reliance was placed

on Deynes Muriithi & 4 others Vrs Law Society of Kneya & Another (2016) eKLR, where it was held that the court had inherent jurisdiction to forestall an instance of injustice.

15. Finally on issuance of warrants of arrest against the suspects before granting leave to respond to institute private prosecution, the respondent averred that the suspects had ignored summons to attend court, despite being served on 2nd April 2024. The warrants of arrest were thus issued as a matter of necessity to ensure that the said "suspects" attended court so that his application for leave could be heard.

16. The Respondent, urged the court to find that this Application was not merited and prayed that the same be dismissed with costs.

C. Analysis of Law

17. The powers of the High court in revision are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows: -

> " 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".

18. What the High Court can do under its revision jurisdiction is stated under Section 364 of the Criminal Procedure Code Cap 75, which states as follows: -

> " (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 –
>
> (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;
>
> (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 prejudiced of an accused person unless he had had an opportunity of being heard either personally or through 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.
>
> (3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence
>
> (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

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

19. It is trite that the court's jurisdiction on revision is limited to correcting a manifest error in the proceedings of the trial court so as to ensure the fair administration of justice. The court does not delve into the merits of the decision as it would do when exercising its appellate jurisdiction and it cannot be justified in substituting its own views on matters of fact or evidence before the trial court. In the case of Joseph Nduvi v Republic [2019] eKLR the court stated: -

> " In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

20. In the case of George Aladwa Omwera v Republic [2016] eKLR (supra), the Court observed that:-

> " 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."

21. In Veerappa Pillai V Remaan Ltd the Supreme court of India had this to say:-

> " The supervisory powers is 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.

22. Finally, in the case of Otieno Clifford Richard Vrs Republic, High court at Nairobi (Nairobi law courts) Misc Civil Suit No. 720 of 2005, (Nyamu, Emukule and Wendoh, JJ) observed that;

> " Section 85 to Section 88 of the Criminal Precdure Code deals with "Appointment of Public Prosecutors and conduct of prosecutions". On the other hand Section 89 to Section 90 of the Crimina Procedure Code deal with the " institution of proceedings and making of complaint". We think that in the case of private prosecution application must first be made

under Section 88(1) of the Criminal Procedure code for the Magistrate trying the case to grant or refuse to grant permission to the plaintiff to conduct private prosecution.

" It is after permission has been granted for private prosecution to be conducted that Section 89 and Section 90 of the Criminal Procedure code can be brought into effect and the criminal proceedings instituted. We believe that the principles set out in the KAHARA CASE at page 89 are good law and provide guidance to a subordinate court when determining the question whether to allow a private prosecution since it spells out certain issues which must be addressed by the court when considering the application for permission to privately prosecute before granting it."

23. First and foremost it should be noted that, the respondents application dated 4th march 2024, has not been determined on merit by the trial court and most issues and submissions raised herein are pre maturely raised before this court since no determination has been made by the trial court.

24. The respondent's application dated 4th March 2024 seeking to be granted leave to commence and conduct private prosecution against his alleged assailants had not been heard as at 11th April 2024, and it was plainly wrong for the trial court to issue warrants of arrest as against the said "prospective accused persons". If parties had been served and no response had been filed, the trial court should have proceeded to determine the said Application on merits and thereafter granted and/or refused to grant leave to the respondent to prosecute this matter.

25. Under the current jurisprudential trend, the right to fair administrative action and/or right to be heard is now constitutionally entrenched. The parameters for according this right to a deserving party have also been crystallized by case law.See Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013]eKLR; Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003; in which it was variously held, inter alia, that:

> " the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.

26. The trial Magistrate order issued on 11th April 2024, issuing warrants of arrest as against Wilson Ndooni, Anne Mbeneka Musyoki & Sylvester Mutua Mbindu was therefore irregularly issued, and was void abinition. The applicant has made out a proper basis pursuant to Section 364(2) of the Criminal procedure code, to have the said warrants of arrest set aside, Exdibito Justicea

Disposition

27. The review Application dated 4th June 2024, has merit. The orders of the trial Magistrate Honourable R. Gitau (SRM) made on 11th April 2024, issuing warrants of arrest as against Wilson Ndooni, Anne Mbeneka Musyoki & Sylvester Mutua Mbindu, In Mavoko Chief Magistrate Court Criminal case No E87 of 2024 is hereby set aside.

28. Mavoko Chief Magistrate court Criminal Case No E087 of 2024, will be placed before the Chief Magistrate -Mavoko Law courts on 14th January, 2025 for directions as to disposal on Merit of the respondents Application dated 4th June 2024, by a different trial Magistrate.

29. Each party to bear their own costs of this Application.

30. It is hereby so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 9TH DAY OF DECEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 9th day of December, 2024.

In the presence of;

Mr. Mang'are/Ms. Otulo for Applicant

Respondent – Absent

Susan/Sam - Court Assistants