Alfred v Republic (Revision Case E093 of 2024)
[2024] KEHC 9419 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9419 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

REVISION CASE E093 OF 2024

HM NYAGA, J

JULY 31, 2024

BETWEEN

MARTIN WAFULA ALFRED ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. This file has been brought to this Court for Revision under the Prisons Decongestion Programme.

2. The Applicant was charged before the Chief Magistrate's Court at Nakuru with the Offence of Stealing Contrary to Section 268 (1) as read with Section 275 of the *Penal Code*. In the alternative, he was charged with handling stolen property contrary to Section 322 (1) and (2) of the *Penal Code*. The particulars of the charges are set out in the charge sheet.

3. Article 165(6) and (7) of the *Constitution* confers upon this Court supervisory jurisdiction over subordinate courts and empowers this Court to make any order to give any direction it considers appropriate to ensure fair administration of justice. The said provisions are couched in the following terms:

> "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
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> (7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

4. In implementation of the said article, section 362 of the *Criminal Procedure Code* 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."

5. Section 367 of the *Criminal Procedure Code* then provides as hereunder:

> " When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith."

6. In view of the above, it is patent that the powers of revision under section 362 of the *Criminal Procedure Code* are invoked to enable this Court satisfy 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 subordinate court.

7. Therefore, if the Subordinate Court's decision is wanting in its correctness, legality or propriety or the proceedings are irregular, this Court will no doubt step in and correct the same.

8. In *Joseph Nduvi Mbuvi vs Republic* [2019] eKLR G.V. Odunga J (as he then was) while interpreting the provisions of Section 363 of the Criminal Procedure Code opined as follows:-

> " A strict reading of section 362 of the *Criminal Procedure Code*, however, does not expressly limit the High Court's revisionary jurisdiction to final adjudication of the proceedings. The section talks of "any criminal proceedings". "Any criminal proceedings" in my view includes interlocutory proceedings. Suppose a subordinate court would be minded to make an absurd decision of commencing a criminal trial by directing the accused to give evidence before the prosecution, I do not see why the High Court cannot call the proceedings in question to satisfy itself as to the correctness, regularity or legality of such order. 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 on-going, 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."

9. Being a revision, I called for the lower court record as required by the law.

10. The Lower Court record shows that the accused appeared before Hon. E. Juma (C.M.) on 6th September, 2023 where he pleaded guilty, he was subsequently convicted and sentenced to a fine of Kshs.50,000/= in default one year imprisonment on 13th September, 2023.

11. Although the charge sheet contains a principal charge and an alternative charge, the Lower Court record does not show what charge was read to the accused (Applicant) and to what he subsequently pleaded guilty to.

12. The law is that where there is a Principal Charge and an alternative charge, or more than one count, then it must be clearly stipulated what charge is read to an accused person.

13. If the charges an accused person faces constitute a principal charge and an alternative to it, and he/she pleads not guilty to the principal charge, then the alternative charge ought to be read out to the accused. If he pleads guilty to the principal count then the alternative count ought to be dispensed with. This is t avoid a situation where an accused is deemed to plead guilty to both the principal and alternative charge. This position was clearly set out in *James Mwangi Kimangu vs Republic* (2020) eKLR where it was held that: -

> " ....I find the learned magistrate's action to have been a gross misapprehension of the law; this is so because, irrespective of the principal count which this secondary count was alternative to, it was not open to him to convict the appellant on both the principal count and the count alternative to it. The reason is simply that both the principal and the alternative count would ordinarily be founded on the same act or omission and an offence, as known in law, would constitute the impugned act or omission by the accused (see section 4 of the Penal Code on the definition of 'offence'). Convicting an accused on the principal and alternative count would effectively amount to punishing him twice for the same offence. Speaking of this question in *Seifu s/o Bakari v Republic* [1960] EA 338 at page 339 the Court of Appeal for East Africa held that:
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> "Where charges against an accused are in the alternative, the proper course, upon conviction of the appellant on one count, is for the court to refrain from entering a verdict or finding on the other count."

14. Having looked at the lower court record, I have come to the firm conclusion that it is not clear as to which charge the Applicant pleaded guilty to.

15. The plea on the lower court record is thus equivocal and cannot be a basis for a proper conviction.

16. The importance of an equivocal plea of guilty cannot be overstated.

17. In *Mose vs Republic* (2002) I EA 163, the Court of Appeal dealt with the issue and it held that: -

> " The procedure for calling upon an accused to plead required that the accused admit to all the ingredients of the offence charged before a plea of guilt could be entered against him. The words "it is true" standing on their own did not constitute an unequivocal plea of guilt. It was desirable that every constituent ingredient of the charge be explained to the accused so that he should be required to admit or deny every constituent."

18. Similarly, in *George Wambugu Thumbu vs Republic* (2019) eKLR it was held that: -

> " It is time that when an accused person responds 'it is true' to a charge read to him or her, to be asked what exactly he is saying is true to."

19. Having found that there is no clarity as to what charge the Applicant pleaded guilty to, the correct cause is to set aside the conviction and the subsequent sentence, which I hereby do.

20. What then is the next cause to take?

21. The Court has an option to have the Applicant take plea afresh or to set him at liberty. In *Ahmed Sumar vs Republic* 1964 (EA) the Court of Appeal offered guidance on the matter and stated as follows: -

> " ...in general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purposes of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered;....."

22. The same Court in *Samuel Wahini Ngugi vs Republic* (2012 eKLR held that: -

> " The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of *Ahmed Sumar v R* (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:
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> 'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered...In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person."

23. The latter decision was echoed in the case of *Lolimo Ekimat vs R,* Criminal Appeal No. 151 of 2004(unreported) where the court stated as follows:

> " ...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it."

24. In *Muiruri vs Republic* (2003), KLR, 552 and *Mwangi vs Republic* (1983) KLR 522 and *Fatehali Maji vs Republic* (1966) EA, 343 the view expressed was that: -

> " Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."

20. Makhandia J. (as he then was) in the case of *Issa Abdi Mohammed vs Republic* [2006] eKLR opined that: -

> " An order for retrial would have been most appropriate in the circumstances of this case. To do so however, in the circumstances of this case would cause irreparable prejudice to the appellant since the prosecution may have become wiser and would wish to plug the

loopholes already alluded to in this judgment. In the result there is only one channel left to this court and that is to allow the appeal, quash the conviction and set aside the sentence. The appellant may be set at liberty forthwith unless otherwise held on a lawful warrant."

25. Therefore, guided by the authorities cited, I have considered the matter. The Applicant herein has already served 10 months of the sentence. I am of the view that a retrial would be highly prejudicial to him.

26. Consequently, I quash the conviction and sentence and order that the Applicant be set at liberty unless lawfully held.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF JULY 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

No appearance for applicant

No appearance for the State.

Copy of ruling to be sent to both.