REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala & Njoki, SCJJ)

APPLICATION NO.32 OF 2019

—BETWEEN—

HUSSEIN KHALID AND 16 OTHERS.....APPLICANTS

—AND—

THE ATTORNEY GENERAL.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS....3RD RESPONDENT

(Being an Application for Review of Supreme Court Judgment Dated and Delivered on the 18th Oct, 2019 in Supreme Court Petition No. 21 of 2017)

RULING OF THE COURT

[1]. The applicants' Notice of Motion is dated and filed on 1st November 2019. They seek in the main orders for review of this court's judgment delivered on 18th October 2019 in Petition No. 21 of 2017. It is filed pursuant to Articles 10(2c), 50(1), 159(2), 163(4a & 7) and 259 of the Constitution, Sections 3 and 21 of the Supreme Court Act, 2011, Rules 3 (2), 4, 5 and 20(4) the Supreme Court Rules, 2012. The application is supported by the sworn affidavit of Suyianka Lempaa, counsel for the applicants.

[2]. The grounds are that Petition No. 21 of 2017 was heard on the 10th July 2018. Judgement was reserved for delivery on notice. On 29th March 2019, Hon. Ojwang SCJ, a member of the bench that had heard the appeal was suspended. Directions were taken on 9th May 2019 before Hon. Lenaola SCJ.

[3]. A consent was recorded for the appeal to be heard by a new Bench de novo; parties to adopt their prior submissions with liberty to highlight and file supplementary list of authorities at least 14 days before the hearing date; the Registrar of the Supreme Court to supply the parties with transcripts of submissions made at the previous hearing at least 7 days before the hearing date; lower court record in Milimani Chief Magistrate Court Criminal Case No. 685/2013 (lower court proceedings) be availed in court at the next hearing date and that the matter be heard on priority basis and the judgment be delivered expeditiously.

[4]. On 15th October 2019, after restoration of Ojwang SCJ, judgement notice was served. Judgment was delivered on 18th October 2019. After perusing the judgment, there were clerical mistakes on the face of the record. First, the consent order of the parties was not set aside before delivery of the judgment. In Para 78 and 109 the Court was unable to refer to the record of the High Court and that of the lower Court to see how parties' rights under Article 49(1) (a) were addressed among other issues. This is the record they had sought to avail in their consent order through a Supplementary Record of Appeal.

A. LITIGATION SUMMARY

[5] The appellants were arrested on 14th May 2013 for participating in demonstrations outside parliament gates dubbed '*occupy parliament*'. The protest was against Members of Parliament's actions meant to scrap the Salaries and Remuneration Commission (SRC) to facilitate inflation of their salaries. The procession started peacefully at the Uhuru Parks' Freedom Corner with police escort, culminating to staging protests outside Parliament gates. They had with them pigs painted names of some members of Parliament and corruption of the initials of MP to '*MPigs*'.

[6]. They were detained in the Parliament Police Station until 7 pm; informed of the reasons for arrest and possible charges to be preferred against them; released on police bond and were required to return on 17th May 2013 to the

Police Station. On 20th May 2013, they were required to report at the Chief Magistrate's Court in Milimani for arraignment.

[7]. They requested for particulars to be availed before arraignment before the magistrate. They were each given a charge sheet containing three offences. According to them, the charges lacked sufficient detail to enable them to plead. They therefore objected to plea taking and demanded that the same awaits supply of evidence and better particulars. The court, however, overruled the objection and ordered them to take plea. They filed a Constitutional appeal against the ruling of the Magistrate Court in Nairobi High Court Petition No. 324 of 2013. In their grounds of appeal, they challenged the manner of their arrest, detention, charge, arraignment and plea taking and the charge as unconstitutional.

[8]. The petition was dismissed as unmerited by Lenaola J (as he then was). They appealed to the Court of Appeal in Civil Appeal No. 1 of 2015, on grounds of improper exercise of discretion, ignoring and or misapprehending the evidence on record, concluding that the trial had not commenced and failing to determine their rights under Article 24 of the Constitution. The Court of Appeal similarly dismissed the appeal as unmerited.

[9]. In the directions before the Deputy Registrar of this Court, parties were directed to file and exchange submissions. The applicants complied but none of the respondents has complied. On 12th August 2020 the 1st Respondent's counsel gave an undertaking to file their submissions by 17th August, 2020 which was not honoured. The application thus proceeds as unopposed.

THE APPLICANTS' WRITTEN SUBMISSIONS.

[10]. The Applicant's Submissions are dated and filed on the 25th November 2019. Their arguments are that judgment was delivered before de novo consent orders were carried out or vacated. This, in their view occasioned an error apparent on the face of the record by the Court as depicted in Paras 78, 85 and 109 of the judgment.

[11]. They argue that this case presents exceptional grounds warranting exercise of review discretion of the Court. Although judgements are meant to be final to end litigations as was stated in the case of ***Fredrick Outa v Jared Odoyo Okello & 3 Others (2017) eKLR,*** in this case, a review can be granted without offending the doctrine of finality in judgments as a public policy consideration which limits re-opening of concluded matters as was held in ***Spouses Jorge Navarra and Carmelita Navarra vs Yolanda Liongson G.R No. 217930***. Article 159(2) (c) of the Constitution and Rule 4(3) (b) of the Supreme Court Rules are cited as enabling recording consents.

[12]. The Applicants further argue that it is trite law that a consent of parties is binding and can only be set aside if grounds for setting aside are fulfilled-see ***Hirani vs Kassam (1952) EA 131*** and ***Brooke Bond Liebig (T) ltd v Mallya (1975) EA 266***. A consent forms a contract between the parties laying basis for legitimate expectation. Reliance was placed on the cases of ***Attorney General & Uganda Land Commission vs James Mark Kamoga & James Kamala (2008) UGSC 4, Race Auto Supply Company Limited & Others vs Alhaja Foasat Akib (S.C 376/2001) [2006] NGSC 100*** and ***Asanyo & 3 Others Vs Attorney General (2018) eKLR***.

[13]. They contend that the court lacked jurisdiction to deliver the judgement once the consent was recorded. The judgment rendered is therefore null and void as the de novo hearing agreement and production of lower court record was not abided by. In support of that submission, they cited the US Supreme Court Decisions in the case of ***Eckel v MacNeal 628 N.E 2d 741 (1993) Illinois***, ***Klaugh v United States, 620F. Supp. 892 (D.S.C 1985)*** and Indian Supreme Court decision in ***State of Mysore vs Bandi Gowda & Anor (1957) CriLJ 455***. With those submissions they urge the application to be allowed.

ANALYSIS AND DETERMINATION

[14]. We have considered the application and the applicants' submissions. The only issue for determination is;

Whether the order s of review sought can issue in this case.

[15]. This Court has previously pronounced itself on the jurisdiction to review its decisions in the ***Outa case (Supra)*** where it stated the principles on review of a court's own decisions when;

(i) the Judgment, Ruling, or Order, is obtained, by fraud or deceit;
(ii) the Judgment, Ruling, or Order, is a nullity, such as, when the Court itself was not competent;

(iii) the Court was misled into giving Judgment, Ruling or Order, under a mistaken belief that the parties had consented thereto;

(iv) the Judgment or Ruling, was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision'.

[16]. This decision was arrived at after review of various Supreme Court decisions from different countries. The salient points were that the power of review is exercised sparingly because a trial has several implications once a judgment is delivered; litigation must come to an end; there is need for finality in court decisions; the Court is functus officio after delivery of decision sought to be reviewed; and that review should not substantially alter the decision sought to be reviewed. The review window is to be exercised sparing and only deserving cases have to be allowed. See **Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR, SC Application 8 of 2017.**

[17]. In the words of the Nigerian Supreme Court in the case of ***Citec International Estate Ltd. & Others v. Francis & Others (2014) LPELR-22314 (SC***); that was cited in the Outa case,

"***An application for review, is not meant to afford the losing party, an opportunity to re-litigate or re-open a matter merely because such party is unhappy with the outcome…"***

[18]. During the hearing of the appeal, each party present submitted before the Court on the salient points of their respective cases and judgment was reserved to be delivered on notice. After Ojwang SCJ was suspended, the directions taken afforded the parties liberty on the way forward. The applicants sought for re-hearing of the appeal de novo as is the practice concerning part-heard trials in this country. This practice is based on Section 200 of the Criminal Procedure Code (CPC) when dealing with criminal trials, the origin of the matter herein being anticipated criminal trial.

[19]. Under the de novo principle, once a judicial officer trying a matter ceases to exercise jurisdiction over a matter during pendency of trial, through transfer or other circumstances, his successor in jurisdiction gives the parties right to elect how to proceed. Either to proceed from where the hearing had reached or start de novo.

[20]. A Judicial officer who hears the case is the one preferred to decide on it, unless parties elect otherwise, so that the accused is not prejudiced by having a successor in jurisdiction, who never had the opportunity to appreciate the evidence of witnesses by observing their demeanor, credibility, emotions and the like, deciding based on record, where such aspects of evidence may not be recorded in a detailed manner as required under section 199 CPC. See Indian Supreme Court case of ***Nitinbhai Saevatilal Shah v. Manubhai Manjibhai Panchal, (2011) 9 SCC 638***.In this case, de novo hearing was viewed as one of the cardinal principles of Criminal trials guarding the rights of an accused person so that his case should be decided by the judicial officer who heard it.

[21]. In ***Abdi Adan Mohamed v Republic [2017] eKLR,*** the Court of Appeal opined that **Section 200** entrenches the accused person's rights to a fair trial as provided for today under **Article 50(1)** of the Constitution, and it applies to the High Court also in addition to Magistrates courts.

[22]. Another principle in the de novo hearing is that it should not be taken as an opportunity to fill in gaps noted during the hearing by bringing a new set of

evidence for the repeat trial. This is because a de novo hearing is a continuation of a trial and not a second trial. This was held in Indian Supreme Court case of ***Ajay Kumar Ghoshal etc. Vs. State of Bihar & ANR. [Criminal Appeal Nos. 119-122 Of 2017***

> "***A 'de novo trial' or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice."***

[23]. Also, in ***Mohd. Hussain @ Julfikar Ali vs. State (Govt. of NCT of Delhi) (2012) 9 SCC 408,*** it was held**,**

> ***"A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when in the opinion of the appellate court such course becomes indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice."***

[24]. The applicants fault this Court for rendering its judgment after return of Ojwang SCJ without setting aside the consent orders for de novo hearing the parties had recorded which allowed them to file a supplementary record to include in the Courts record the Magistrates courts record. We note that during hearing of the appeal before the five judge bench, the applicant's counsel was specifically asked why he had not availed the Magistrates Court record despite orders from the Registrar directing that and his reasons was that the court file was not available

[25]. The applicants' complaint against the Court's decision is that it turned on the very same documents they intended to avail through a supplementary Record. They aver that if they had been allowed to avail them as per the consent

order, the Court would have been afforded an opportunity to consider their contents and maybe arrive at a different decision. This line of argument we understand the Applicants to mean the supplementary record was intended to mend a crucial gap they noted during the hearing to be a likely tipping point of the case if it were to be decided on the strength of the concluded hearing awaiting judgement.

[26]. Introduction of new evidence after hearing is concluded is against the principles of de novo hearing whether it is ordered in review or in revision jurisdiction of a court. It mutes the trial continuation intention signaling a second trial. We are alive to the fact that in some instances additional evidence may be tendered but in very exceptional circumstances. We have to make it clear that we are, in this case, addressing a plea for de novo hearing after all parties have been heard and closed their case awaiting judgement, and after entry of judgment as opposed to when a hearing is ongoing before closure of defence case.

[27]. This is because unless hearing is concluded and judgment reserved, new evidence can be availed in course of a criminal trial, as long as the defence is afforded time to defend their case as we stated in ***Hussein Khalid& 16 Others vs The Attorney General & 2 Others, SC Petition 21 of 2018;***

> ***"[92] ...the 2nd and 3rd Respondents are not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial. The duty of the prosecutor is to bring the new information and evidence to the attention of the accused and for the court to give the accused the opportunity to interrogate the new evidence and adequate time to prepare his defence (See George Taitumu v Chief Magistrates Court, Kibera & 2 others [2014] eKLR).***"

[28]. Our jurisprudence resonates with this holding. The Court of Appeal in the case of ***Kiplagat Kotut v Rose Jebor Kipng'ok [2018] eKLR*** was asked

to review its judgement where there occurred variance between the benched judges in the Coram and the judges signing the final judgement. In ordering rehearing the appeal afresh, it was observed that there was need to render substantial justice even though the error was inadvertence and could have been corrected easily by just having the right judges sign the judgment since they were all based in the same station. We just upheld this decision in Supreme Court Application No. 34 of 2019, ***Rose Jebor Kipng'ok vs Kiplagat Kotut.***

[29]. This was held to be one of the exceptional circumstances when a review power can be exercised in the residual jurisdiction of the court. This case is however, distinguishable from the one we are dealing with because one of the judges signing the judgment was the same, who with others heard the appeal, only that parties had agreed that the concluded hearing to be set aside when the status of the initial bench changed temporarily.

[30]. Turning to the legal status of the consent as recorded in light of restoration of Ojwang SCJ to his office, we note that the jurisdictional basis of the consent as earlier stated was Section 200 of the CPC which seeks to secure the rights of parties in a trial once a Judicial Officer hearing a case ceases to exercise jurisdiction over the matter. Even though it is a Criminal Law principle it has been applied across the board in most of the hearings in furtherance of the constitutional right of fair hearing.

[31]. Upon return of Ojwang SCJ to the original bench after he was cleared, his jurisdiction in the appeal was restored as before with lifting of suspension. He was the very same judge who sat in the hearing of the appeal, the very same judge who participated in the writing of the judgement, noting judgment had been reserved for delivery on notice. This meant that the notice would be issued once the bench which heard the matter was ready to deliver its judgment.

[32]. His return to the bench, by operation of law under Section 200 CPC had the effect of nullifying/voiding the consent of the parties so entered. This is because his return signaled restoration of the status existing prior to the consent

entered by the parties, meaning judgment would be delivered as earlier directed. The consent therefore crumbled and stood vacated by operation of law even without further order vacating it.

[33]. This is buttressed by holding in the case of ***Nitinbhai Saevatilal (supra)*** where it was held in respect of parties' consent affecting court's jurisdiction;

> ***"It is well settled that no amount of consent by the parties can confer jurisdiction where there exists none, on a Court of law nor can they divest a Court of jurisdiction which it possesses under the law."***

[34]. For these reasons we find that this application lacks merit and we make the following orders;

> ***(a) The Applicants' application dated 1st November 2019 is hereby dismissed.***
>
> ***(b) There is no order as to costs.***

DATED and **DELIVERED** at **NAIROBI** this **4th day** of September, **2020**

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D. K. MARAGA	**P. M. MWILU**
CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT	**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**
.....	.....
M. K. IBRAHIM	**S. C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA