



**Republic v Chief Magistrate’s Court; Ndungu & 3 others (Interested Parties)
(Criminal Revision E197 of 2022) [2023] KEHC 3579 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E197 OF 2022
PM MULWA, J
APRIL 26, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF MAGISTRATE’S COURT RESPONDENT

AND

PAUL CHEGE NDUNGU INTERESTED PARTY

KENNEDY MUTHOKA KIIO INTERESTED PARTY

KEZIA WAIRIMU KAMAU INTERESTED PARTY

IRENE WANGUI THAIRU INTERESTED PARTY

RULING

1. By a certificate of urgency filed by the state Counsel Mr. Gacharia Muriithi, the matter was placed before the court vide the Notice of Motion dated June 30, 2022, seeking orders that:
 - a. Spent
 - b. Spent
 - c. To revise the Ruling by the Honourable Magistrate Hon. Manuela Kinyanjui issued on May 5, 2022 denying the last adjournment and order that the prosecution’s case be reinstated for the forensic auditor, the system vendor and the previous Sacco Manager to testify.
 - d. Any other such orders deemed fit and fair.
 - e. Costs of the application



2. The application is premised on the grounds that on May 5, 2022, the trial magistrate failed to grant the prosecution the last adjournment and forced the prosecution to close its case after three (3) prosecution witnesses failed to attend court and testify. The matter is of public interest and a colossal sum was lost to the 2nd to 5th Respondent.
3. The application is supported by the affidavit of Peter Kinuthia Mugacha the chairman of Joinas Sacco (the complainant) who deposed that the prosecution has diligently prosecuted the matter and managed to call six (6) witnesses. The two last adjournments by the prosecution were occasioned by the difficulty in procuring expert witnesses. The mistake of the investigating officer should not be revisited on the complainant. If the remaining expert witnesses are not allowed to testify the case is bound to fail and the 2nd to 5th Respondent set free despite stealing (by servant) a colossal sum. The delay in prosecuting the matter has been occasioned by the fact that the matter has been heard by four (4) judicial officers.
4. The application is opposed by the 1st to 4th Interested Parties.

2nd Interested Party's Response

5. By the affidavit sworn on October 10, 2022, Kennedy Muthoka Kii deposed that unjustified delay in court proceeding can have a significant impact on the parties and reflects adversely on the judicial system. The applicant has failed to demonstrate why the decision of the trial magistrate was wrong, illegal or improper, the accused persons have a right under Article 50(1) to have their matter concluded without undue delay, while the state has an affirmative duty to provide expeditious criminal justice system. He further deposes that the 6 years' delay has been prejudicial to him as he cannot secure employment.
6. He urged the court to dismiss the application as the same is an abuse of the court process, the prosecution occasioned the delay in prosecuting the matter.

1st and 4th Interested Parties Responses

7. By the affidavits sworn by Paul Chege Ndungu on July 7, 2022 and by Irene Wangui Thairu on July 6, 2022, they deposed that the application is devoid of merit, misplaced and full of false hoods, the prosecution voluntarily closed its case after failing to procure its witnesses. The prosecution has deliberately delayed the conclusion of the matter. That justice delayed is justice denied and it would be unfair to the accused to litigate over one issue over a period of more than 6 years. The trial court has not made its verdict and the prosecution is pre-empting issues. The application is an abuse of the court process and the same should be dismissed.
8. The application was canvassed by way of written submission, with only the prosecution counsel filing submissions as the accused persons wished to rely on the affidavits filed.

Applicant's submissions

9. By the submissions dated February 28, 2023, Counsel submits the court's supervisory jurisdiction is enshrined in article 165 (6) & (7) of the [Constitution](#) of Kenya 2010. He urged the court to exercise its jurisdiction under Section 362 and 364 of the [Criminal Procedure code](#) and grant the orders sought.
10. Counsel submits the case was closed prematurely and the remaining witnesses are crucial to the case. The decision by the prosecution to close the case was made arbitrary as the prosecution counsel and the advocate watching brief for the complainant were not working in tandem. The decision to close the prosecution case was based on the pressure placed on the prosecution to proceed.



11. The adjournments by the prosecution were. on reasonable grounds. The respondents will suffer no prejudice if the orders are granted, as they will be allowed to cross examine the witnesses. Counsel urged the court to review the orders of the subordinate court and reopen the prosecution case.

Analysis and Determination

12. I have perused the lower court file, the application, replying affidavits and the submissions filed. The issue for determination is whether this court should exercise its revisionary jurisdiction as enshrined under section 362 and 364 of the Criminal procedure code
13. Section 362 of the CPC provides;

“The High Court may call for and examine the record for 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.”
14. The genesis of the issue herein is that the 2nd to the 5th Respondent were charged in count I with the offence of stealing by servant contrary to section 281 of the Penal Code and in count II with fraudulent false accounting contrary to section 330 of the Penal Code. The accused took plea on June 3, 2016 where they denied the charges and a plea of not guilty was recorded.
15. From the chronology of the proceedings on May 6, 2016 when the matter was first scheduled for hearing the prosecution adjourned and sort to consolidate the files, the matter was mentioned severally and a date for hearing fixed on November 24, 2016, again the matter did not proceed at the instant of the prosecution who sought to amend the charge sheet and thereafter avail a forensic audit report to the defence.
16. On March 27, 2017 Pw1 proceeded and the matter was adjourned to August 31, 2019, on that date hearing did not take place as counsel for 4th accused was unwell, on October 17, 2017 hearing did not proceed as the prosecution had effected late service of the exhibits. On October 27, 2017 matter was adjourned at the instance of the court. On February 6, 2018 Pw2 testified. On May 15, 2018 the matter was adjourned at the instance of the prosecution having just served varying documents to the defence.
17. On August 7, 2018 counsel for the 1st accused was bereaved. The matter proceeded on November 6, 2018 and March 25, 2019. On September 7, 2021 the prosecution was not ready and the matter was adjourned. Further on January 19, 2022 the prosecution adjourned the matter.
18. As at May 5, 2022, the prosecution had called 6 witnesses. On that day the prosecution counsel did not have any witness in court despite having been previously granted a last adjournment by the court. The learned trial magistrate then, Hon. Manuela had set time to mention the matter severally on January 26, 2022, February 23, 2022, March 3, 2022, March 17, 2022 and April 20, 2022 just to ensure that the parties were ready to proceed for hearing on May 5, 2022.
19. The trial court went ahead to further indulge the complainant’s advocate to secure witnesses, to no avail. The prosecution counsel informed the court that after having consulted he wished to close the prosecution case. It was at this point that the court directed parties to file submissions on no case to answer, the prosecution having closed its case.
20. The state aggrieved by the order of the court filed the current application seeking to have this court revise the order of the trial court of May 5, 2022.



21. The trial court declined to allow the prosecution application for adjournment and the prosecution opted to close its case. The primary consideration for a court in deciding whether or not to grant an adjournment is whether there are good and reasonable grounds for seeking the adjournment, minding the circumstances of each case.
22. The prosecution was fully aware that the matter was to proceed on May 5, 2022 and ought to have exercised due care to ensure that there was no unreasonable delay in dispensing justice as enshrined in Article 50 (2) (e) of the Constitution which provides that an accused has a right; “to have the trial begin and concluded without unreasonable delay.”
23. The prosecution should strive to safeguard the rights of an accused person and ensure a fair hearing. This cannot be achieved if the prosecution is allowed to keep delaying the trial without justifiable reasons.
24. The prosecution contends the decisions to close its case was made arbitrary and not in consultation with the complainant’s counsel. From the trial court record the prosecution stated “we have consulted widely and we have reached to a common agreement. We wish to close our case” it was at that point that the trial magistrate marked the prosecution case closed.
25. I note that on that day the complainant was represented by Ms Kibebo who had urged the court to allow her at least 2 hours to procure the witnesses. Time was granted but she failed to do so. The prosecution therefore cannot be allowed to depart from its own position.
26. In the case of Ferdinand Ndung’u Waititu baba Yao & 22 others v Republic (2019) eKLR the court held;

“That before an appellate court interferes with the decision of the lower court, it must be satisfied that the lower court must have acted on a wrong principle in arriving at an incorrect, illegal or improper decision or order.”
27. Further in Republic v Muhammed Abdallah Swazuri and 16 others (2019) eKLR the court stated that;

“Although clothed with these immense powers, the High Court is also subject to the observance of certain legal parameters which guides the process of revision. In other words, before discharging such function, the High Court must be satisfied that the subordinate court acted on a wrong principle in arriving at an incorrect or improper decision or order.”
28. There is no dispute the matter which is subject for review begun in April 2016 when the accused persons were arraigned for plea. It has been in the court corridors for more than 6 years, with only 6 witnesses having testified. During the cause of the trial the prosecution kept adjourning the matter and failed to procure witnesses whenever called upon.
29. From the above chronology of events, I do not find that the learned trial magistrate’s decision to close the prosecution case at the request of the prosecution amounted to an illegality or impropriety or irregular.
30. The learned trial magistrate exercised her discretion which I will not interfere with. The conduct of the prosecution in the trial court is to say the least wanting. The prosecution should have a duty to ensure expeditious dispensation of justice, and should aid the court in dispensing justice to all parties without unreasonable delay. This court will not aid the indolent.



31. The accused also have a right to fair trial, and the prosecution cannot be allowed to hold them captive with numerous adjournments. Litigation must come to end and the application herein fails.

32.

Final Orders

The Notice of Motion Application dated June 30, 2022 lacks in merit and the same is dismissed with no orders as to costs.

RULING IS DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU THIS 26TH DAY OF APRIL, 2023

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P.M. MULWA

JUDGE

In the presence of:

Kinyua/Duale – Court Assistants

Mr. Muriuki (State Counsel) - for Applicant

Mr. Juma – w/b for Complainant

*/A - for Respondent

Mr. Gachoka - for 1st & 4th Interested Parties

Mr. Oloo - for 2nd Interested Party

