



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE 99 OF 2019

REPUBLIC.....APPLICANT

VERSUS

JULIUS KYALO KILONZO..... 1ST RESPONDENT

BENEDICT MUTUA 2ND RESPONDENT

RULING

This case comes up before the court for the application of the **Republic (applicant)** dated 27.3.2019. The application principally seeks the following prayers:-

- i) THAT this court do call for the record and proceedings of the subordinate court in order to satisfy itself as to the correctness, legality and propriety of the orders issued by the subordinate court dated 26.3.2019.***
- ii) THAT the court do review the decision of the chief magistrates court, upholding the objection to produce parts of document marked as “MFI-67” and the forced closure o the prosecution’s case.***
- iii) THAT the court do revise and set aside the subordinate court’s orders of disallowing the production of “MFI-67” and the forced closure of the prosecution’s case dated 26.3.2019.
- iv) THAT this court do allow the prosecution to re-open its case and to call the investigating officers or any other remaining witnesses within a reasonable time before closure of the prosecution’s case.

The parties agreed to canvass this application by way of the affidavits filed by the applicant in support of the application and those of the Respondents. However, as at the time of writing this ruling, the Respondents had not complied and failed to file any replying affidavits. This has left the court with only the affidavits of the applicant. I have accordingly perused and considered the same.

As I understand it, the applicant’s application has 2 limbs. The first limb concerns the order of the lower court regarding the production of the exhibit marked MFI-67, which order the applicant is aggrieved of. The second limb regards the order of the lower court declining the prosecution application for adjournment and ordering the prosecution to close its case. I shall deal with the 2 limbs in that order.

On the first limb as enumerated above, it is worth noting that the ruling that the applicant seeks to have revised was an interlocutory ruling made by the learned chief magistrate in the cause of the trial. The same related to production of a document the prosecution intends to rely on.

The issue that begs to mind is whether it would be proper and just for this court to give its thoughts on the same at this stage. Article 160 of the constitution guarantees the constitutional independence of the Judiciary. Same states;-

Article 160(1)

“In exercise of Judiciary authority, the Judiciary as constituted by Article 161 I shall be subject only to this constitution and the law and shall not be subject to the control or direction of any person or authority.”

It must be asserted that the original jurisdiction to try the respondents for the offence charged lie with the magistrate’s court. It does not lie with the High Court. And in carrying out its jurisdiction, the magistrate’s court is constitutionally bound to independently consider the

evidence as presented before it before making its independent decision. This is the spirit and word in the above constitutional provision. The effect of this is that the subordinate court shall execute its mandate without the influence of a towering High court. And for good reason. Should the High Court extend its supervisory and or revisionary powers on virtually all decisions of the subordinate court, it would in fact be micro-managing the subordinate court and in the process, eroding the Judicial independence of the subordinate court. It would be as irregular as it would be unconstitutional.

I align myself with the findings of the Hon. Justice R. Mwangi, dealing with this issue in the case of *Republic Versus Perry Kusangara and others, HCCR application No. 4/2020*, that:-

“a balance has to be struck in the exercise of constitutional jurisdiction to ensure there is no appearance that its objective is to micro manage the trial court’s independence and conduct and management of its proceedings and the supervisory jurisdiction should not be used as a short cut for an appeal where circumstances for appeal clearly pertain and are more appropriate.”

The Court of Appeal in the case of *Thomas Patrick Gilbert Cholmondeley Versus Republic (2008) KLR*, has also long given directions herein. That the practice of filing of interlocutory applications midway trials must be frowned on and be discouraged as they have the effect of causing undue delay in the conclusion of the cases.

This is practically the case in our instant case, last heard on 25.3.2019 courtesy of this application. It is therefore my view that there is no merit in the prayer of the applicant on the issue of revision of the order on production of MFI-67, has any merit. I dismiss this limb of the application.

With respect to the 2nd limb of the application regarding the order refusing the application for adjournment made by the prosecution, I have considered the grounds for that application by the prosecution, i.e the fact that the witness was indisposed and unable to attend court. I have also considered the facts of the same as deposed to in the affidavit in support of this application. I have also perused the record of the proceedings. It shows that the investigating officer had been attending court. The Honourable Chief Magistrate ought to have considered these circumstances and ruled in favour of the prosecution. I say so because the defence stood to suffer no prejudice by this witness and any other remaining appearing to testify. This would have gone a long way in ensuring that the ends of justice are met in this matter.

In the circumstances, I find merit in prayer 5 of the application. I allow the same and order that the prosecution case in Nairobi Chief Magistrate’s court, Criminal Case No. 87/2011, be re-opened and the prosecution side be at liberty to call the investigating officers and any other remaining witnesses to testify and the case to proceed to its conclusion in the normal manner within reasonable time. Orders accordingly.

D. O. OGEMBO

JUDGE

27.7.2021.

Court:

Ruling read out in presence of Mr. Kiragu for the state, Mr. Malonza for 2nd Respondent and holding brief for Kayoko for the 3rd.

D. O. OGEMBO

JUDGE

27.7.2021.

Court:

Case to be mentioned before the trial court for further directions. Original file to be forwarded back to the trial court. Mention 1.9.2021 (City Court 1).