



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL REVISION NO. 180 OF 2019

DOUGLAS MWITIAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. On 13/8/2018, **Douglas Mwiti M’Muga (“the applicant”)** was arraigned before the Meru Chief Magistrate’s Court with two counts of obtaining money by false pretences contrary to **section 312 as read with 313 of the Penal Code**.
2. It was alleged that on 12/11/2013 and 20/11/2013 at Meru township in Imenti North sub-county, within Meru County, with the intent to defraud, the applicant obtained Kshs.350,000/- and Kshs.424,000/-, respectively from Roy Kimathi Murithi by falsely pretending that he was in a position to sell a parcel of land **Abothuguchi/Katheri/3822** a fact he knew to be false.
3. He denied the charge and the prosecution paraded 6 witnesses in support of their case. On 6/5/2019, the trial Court found that a *prima facie* case had been established. Accordingly, it placed the applicant on his defence. The applicant informed the Court that he will be giving sworn testimony and call 3 witnesses. The trial Court fixed the defence hearing for 26/6/2019.
4. On the said date, **Mrs. Kaume**, Learned Counsel for the applicant informed the Court that she was not ready and therefore applied for an adjournment. The Court adjourned the matter to 3/7/2019 for mention to give directions. On that date, Counsel for the defence applied that one of the exhibits that had been produced be taken to a document examiner for comparison. That the applicant was ready to give specimen signatures.
5. The trial Court acceded to the application and directed that the investigations officer do ensure that the sale agreement dated 12/11/2013 be taken for examination and fixed the defence hearing for 12/8/2019. On the said 12/8/2019, nothing seems to have happened and the matter was fixed for hearing on 16/9/2019. On that date, it transpired that the investigations officer had not taken the applicant’s specimen signatures and the trial Court directed that he attends Court on the following day to take the specimen signatures afore-stated.
6. The following day, 17/9/2019, the investigations officer attended Court as ordered and took the specimen signatures of the applicant in the presence of the prosecutor. The Court thereupon directed that the same be sent to the document examiner. The matter was fixed for mention on 9/10/2019 to confirm if the report was ready. On that day, the Court was informed that the report was ready and the Court directed that the prosecution do supply the same to the defence and the matter was fixed for defence hearing on **“30/10/19 and 14/10/19”**.
7. Come the 14/10/19, the applicant informed the Court that he was not ready to proceed as his advocate was not present. The Court adjourned the matter to 30/10/19 marking the same as the last adjournment. On the said 30/10/19, the defence case proceeded and the applicant and one other witness testified.
8. It is at that juncture that Counsel for the defence applied for adjournment to avail the last witness. She informed the Court that the said witness was not able to attend Court on that day as he was held up in Embu. That the defence had no control over the said witness and that the defence was willing to present that witness the following day. The prosecutor and **Mr. Kaimenyi**, advocate watching brief for the victim opposed the application.
9. In a short reasoned ruling, the trial Court held that there had been a total of four adjournments on the part of the defence. These were enumerated to be 20/6/19, 3/7/19, 12/8/19 and 14/10/19, respectively. It further held that any further adjournment would lead to the delay in justice. Accordingly, the trial Court declined to grant the adjournment and ordered the defence case closed and consequently fixed the judgment for 21/11/2019.
10. By a Motion on Notice dated 19/11/19 brought under **section 364 of the Criminal Procedure Code, (“CPC”)** the applicant approached this Court under a Certificate of urgency. He sought the review of the order of 30/10/19 and that the defence case be re-opened to allow the defence expert witness to testify.

11. The Motion was supported by an affidavit sworn by the applicant on 19/11/19. He stated that his witness was the document examiner who was held up in an Embu Court on 30/10/19 when the matter came up for hearing. That the witness had indicated that he would be available the following day, 1/11/19. That the said witness turned up the said 1/11/19 but found that the matter had been closed. He prayed that the prayers sought be granted to enable him have the expert report produced in his defence.

12. The Motion was opposed by the state through the Replying Affidavit of **Chelule Adams** sworn on 2/12/19. **Mr. Chelule** gave the history of the case and contended that the issue of expert witness was introduced as an afterthought as it was neither raised at the stage of case to answer or on the first day of the defence hearing. He noted that the matter had taken long as the applicant had first been arraigned in Court in 2013 but he had absconded. That the said case was withdrawn under **section 87(a) of the CPC** and the present case instituted once he was re-arrested. He urged that allowing the orders sought will further delay the matter.

13. I have considered the respective affidavits of the parties and their submissions. This is an application for revision under **section 362 of the CPC**. The jurisdiction of this Court under that provision is well known. It is for this Court to call for a lower Court file and satisfy itself as to the regularity of any order made or proceedings before that Court.

14. The order being challenged was made on 30/10/2019. The only grounds being raised are that the witness who was shut out is crucial to the defence. That the prosecution will suffer no prejudice. That the failure of the defence to avail the witness on the particular day was beyond the applicant's power.

15. There is no irregularity or illegality that has been alleged against the order impugned. Whether to adjourn a matter or not is in the discretion of the trial Court. **Section 205(1) of the CPC** provides:-

***“(1) The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present*”.**

16. In **Ngui v. R [1985] KLR 286**, the Court of Appeal stated at page 272:-

“We feel strongly, however that in all such cases lengthy adjournments should be avoided and that the trial should continue from day to day until completed ...”.

17. I have already set out above in detail, the events that led to the impugned order. The trial Court declined to grant the adjournment for reason that the defence had caused the case to be adjourned on four occasions, to wit, 20/6/19, 3/7/19, 12/8/19 and 14/10/19. That is not correct. The correct position is that, on 3/7/19 the matter had been listed for mention and no hearing had been set for that date. On 12/8/19, the record does not show that the matter came up for hearing but was mentioned on 29/8/19 and 2/19/19 when a hearing date for 16/9/19 was given. On 16/9/19, the Court found that it is the investigations officer who had not cooperated with the defence in securing the specimen signatures of the applicant and the defence cannot be blamed for the adjournment given on that day.

18. From the foregoing, it is clear that the defence was only responsible for the adjournments of 20/6/19 and 14/10/19, respectively. The latter adjournment was given as the last adjournment but when the matter came up for hearing on 30/10/19, the defence paraded at least 2 witnesses.

19. Once a last adjournment is given and a party is able to produce a witness at the next hearing date, that is a clear evidence of the party's commitment to proceed with a trial. My view is that if on that date not all witnesses turn up, the Court should exercise its discretion in favour of such party if there is no obvious evidence of overbearing.

20. In the present case, it is clear that the trial Court misdirected itself when it blamed the defence for the adjournments of 3/7/19 and 12/8/19, respectively. On 3/7/19, there was no adjournment as the matter had been listed for mention only. On 12/8/19, the matter did not come up for hearing. That cannot be blamed upon the defence.

21. On 16/9/19, the defence applied for adjournment because the prosecution had failed to co-operate in having the subject document in dispute examined by the document examiner. The trial Court found that because the investigations officer, who is a witness for the prosecution, had failed to procure the specimen signatures of the applicant, the hearing could not proceed. It is for that reason that the Court issued summons against him to appear in Court the following day, which he did and the specimen signatures taken.

22. From the foregoing, it is clear that the only adjournment which the defence could be blamed for is the one for 20/6/19 which was without basis.

23. As regards the adjournment sought of 30/10/19, the defence was on a final adjournment. The defence paraded two witnesses who duly testified and were cross-examined. In my view, the Court should have considered that since the defence had brought two of its 3 witnesses on that day, there was no intention on its part to unduly elongate the trial.

24. It would seem however, that it is the Counsel for the defence who is to blame. She did not disclose the personality of the witness who was unable to attend Court on that day. Had she told the Court, as she told this Court, that it was an expert witness, a document examiner for that matter, who was held up in a Court of Law in Embu and would be available the following day, the trial Court would not have been insensitive to the applicant's application for adjournment.

25. It is common knowledge that document examiners are a rare species in this jurisdiction and that many are the times that adjournments are granted to procure their attendance. They are all over the country in various courts and it is sometimes difficult to secure their attendance expeditiously.

26. In this regard, I will fault the Counsel for the defence for not having disclosed this fact to the trial Court. It is not enough to inform a Court, as in this case that; ***“The other witness was not able to attend Court today. He was held at Embu. I am praying for another date. His availability is not within our control”***. It is unreasonable to expect a Court to know the actual problem that the subject witness was facing so as not to attend Court. Court business is serious business.

27. Since the Learned Magistrate was not informed that the subject witness was a document examiner and was attending a sister Court in Embu, she cannot be faulted for declining the adjournment and for ordering the closure of the defence case.

28. However, this Court has found that the trial Court misdirected itself on the number of adjournments that were occasioned by the defence as being four instead of one. Further it is clear that the trial Court was unaware that the subject witness was a document examiner who was attending another Court in Embu and who by the nature of their business are in different Courts at different times with the possibility of clashing dates. For the foregoing reasons, this Court is inclined to interfere with the trial Court’s exercise of discretion.

29. However, before concluding this ruling I wish to make an observation on the conduct of the applicant as **Mr. Chelule** was so forceful about it. It would seem that the applicant has been overbearing in his conduct of this matter as following:-

a) while he knew about the subject agreement from the date of his charging, he never applied that the same be availed to him for purposes of being subjected for on his defence to apply for the document to be subjected as such;

b) he neither applied for the said agreement on the day of the ruling on case to answer on 6/5/19 nor on the first day of defence hearing on 26/6/19, He waited until 3/7/19 when the matter had been fixed for directions as to the defence hearing to apply for it;

c) after the trial Court closed his case on 30/10/19 and fixed the judgment for 21/11/19, he never lodged the current application immediately, he waited until the second last day, 19/11/19 to lodge the current application, barely a day to the judgment day. There was a clear intention to frustrate the delivery of that judgment.

d) although Onginjo J directed that the application be served for hearing *inter partes* on 27/11/19, the applicant never served the application until 26/11/19 4.30 pm, one day before the hearing to serve the same. That gave the prosecution no chance at all to respond to the application. By so doing, he succeeded in frustrating the delivery of the said judgment.

30. I have alluded to the foregoing to show that Courts are usually alive to the way the parties conduct themselves in any proceeding. In appropriate circumstances, sanctions are to be imposed. The lesser I say about it the better.

31. The end result is that since judgment has not yet been delivered, the order that commends itself to this Court is to allow the application.

32. Accordingly, the application is allowed on the following terms:-

a) the reading of the judgment in the **Meru CM’s Cr. Case No 1173 of 2018** is hereby suspended until the following directions are complied with.

b) the order made on 30/11/19 closing the defence case in **Meru CM Cr. Case No. 1173 of 2018** is hereby reviewed and set aside.

c) the case is hereby ordered re-opened and the defence be allowed to call its expert witness to attend on a date to be fixed by the trial Court to testify.

d) the prosecution be permitted not only to cross-examine the defence’s said witness, but to call any evidence in rebuttal as the defence wrongly failed to put to the prosecution witnesses, the evidence of its said expert witness.

33. The original record for the trial Court be returned to the trial Court forthwith for directions on 29/1/2020.

It is so ordered.

A. MABEYA

JUDGE

DATED and **DELIVERED** at Meru this 23rd day of January, 2020.

A. ONG’INJO

JUDGE