



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL REVISION NO. E021 OF 2020

REPUBLICAPPLICANT

VERSUS

OMAR KIPKEMBOI CHERUIYOT1ST RESPONDENT

FRED NAMWAMI GUGA2ND RESPONDENT

GRACE ACHIENG OKEYO 3RD RESPONDENT

RAEL NAMASI LIKOYO4TH RESPONDENT

YOHANA SIDIJA.....5TH RESPONDENT

RULING ON REVISION

The application before me seeks the revision of the orders made by the learned trial magistrate on 10th September 2020.

1. On that date the trial court ordered the Prosecution to close its case.
2. The record of the proceedings shows that on 3rd September 2020 the prosecution sought an adjournment of the case. The reason for that application was that the Investigating Officer, who was the prosecution's last witness, had failed to attend court.
3. Having given due consideration to the application, the trial court granted the last adjournment to the prosecution. The case was then set down for further hearing on 10th September 2020.
4. However, on that date, the Investigating Officer was still not in court.
5. The failure of the witness to attend court prompted the prosecution to apply for the issuance of Warrants for his arrest.
6. In answer to the said application, the learned advocate for the accused persons pointed out that the court had previously granted the last adjournment to the prosecution.
7. In the said circumstances, the defence asked the court to order the prosecution to close its case.
8. In a considered Ruling, the learned trial magistrate noted that although the prosecution had tendered an explanation for the absence of the Investigating Officer, the court had to give effect to the orders which had been granted on 3rd September 2020. In other words, as the prosecution had earlier been granted the last adjournment, the trial court concluded that it was obliged to stick to the orders made on 3rd September 2020.
9. Accordingly, the trial court ordered the prosecution to close its case. It is that order which the prosecution has invited this court to set aside.
10. When canvassing the application for revision, Ms. M. Odumba, learned State Counsel, submitted that the impugned order was improper.
11. It was the Applicant's case that the trial court had exercised its discretion wrongly, illegally or improperly. That submission was premised on **Article 50 (2)** of the **Constitution of Kenya**.

12. In answer to the application for revision, Miss E. Atieno, the learned advocate for the accused persons, submitted that the trial court had acted fairly.
13. In her considered view, the prosecution had been granted sufficient opportunity to bring the Investigating Officer to court, to give his evidence.
14. I have given due consideration to the application. I note that this is a case which dates back to the year 2018. Therefore I do share the views expressed by the trial court, concerning the need to have concluded the trial.
15. As the learned trial magistrate noted;

“Litigation must come to an end.”

16. The trial court is obliged to conduct a fair trial. The person on trial is the accused. His right to have the trial begin and to conclude without unreasonable delay is enshrined in **Article 50 (1) (e)** of the **Constitution**.
17. In the circumstances, if the trial court had formed the considered opinion that no further adjournments could be granted after 10th September 2020, I find that the Applicant has failed to demonstrate to this court why the decision to stick to that decision was wrong, illegal or improper.
18. However, the records show that on 10th September 2020, one of the 3 accused persons was absent from court.
19. It therefore follows that if the prosecution had proceeded with the case on that date, that would have taken place in the absence of the 3rd accused.
20. Pursuant to **Article 50 (2) (f)** of the **Constitution**;

“Every accused person has the right to a fair trial, which includes the right –

.....

.....

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.”

21. There is absolutely no indication that the 3rd accused person had made it impossible for the trial to proceed. Therefore, if the trial was to proceed, it was imperative for the 3rd accused to be present.
22. In my considered opinion, the trial would have had to be adjourned because the 3rd accused was absent.
23. By ordering the prosecution to close its case in the absence of the 3rd accused, the trial court took a step in the proceedings when a vital party who ought to have been present, was absent.
24. An accused person cannot accuse the prosecution of delaying a trial, on a day when the said accused was absent from the court. I so hold because the accused is entitled to be present, when his trial was going on. The trial should not proceed in his absence, unless the court has made an express determination to the effect that the conduct of the said accused person in court, rendered it impossible for the trial to proceed.
25. In this case, the trial court had not made any finding which could have allowed the trial to proceed in the absence of the 3rd accused.
26. Therefore, whether or not the Investigating Officer was in court on 10th September 2020, the trial would have had to be adjourned due to the absence of the 3rd accused.
27. Accordingly, I find that the trial court erred when it ordered that the prosecution case was closed.
28. Therefore, I now order that the order which effected the close of the prosecution case be set aside forthwith.
29. As a consequence of this order, I direct that the proceedings on 17th September 2020 be expunged from the record.
30. The matter is returned to the trial court, which will now proceed to fix a date for the further hearing of the prosecution case.

DATED, SIGNED and DELIVERED at KISUMU

This 19th day of **November** 2020

FRED A. OCHIENG

JUDGE