



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 851 OF 2018

REPUBLIC.....APPLICANT

VERSUS

TIMOTHY KARUNGU KARANJA.....1ST RESPONDENT

ALEX CHEGE WAITUKA.....2ND RESPONDENT

RULING

1. By a letter dated 17th October, 2018, the Applicant, through prosecution Counsel Ms. Susan Kuruga sought a revision of an order made in Milimani Chief Magistrate's Court Criminal Case No. 1187 of 2012 on 9th October, 2018 closing the prosecution's case before taking the evidence of one crucial witness. The Applicant also requested this court to examine the trial court's record so as to satisfy itself on the legality and propriety of the said order as well as the regularity of the proceedings giving rise thereto. This court is urged to invoke its revisionary powers under **Section 362 and 364** of the **Criminal Procedure Code** and order for re-opening of the prosecution's case so as to allow the said witness namely **Bishop Anthony Muheria Ngugi** to testify..

2. The case for the Applicant is that when the case came up for hearing on 9th October, 2018, the prosecution sought an adjournment to allow the said crucial witness to testify since he was out of the country for a Youth Synod in Rome Italy. A copy of the witness' passport was annexed to the letter seeking the revision. That by the time the summons requiring the witness to attend court on the said date were served at the Kenya Conference of Catholic Bishops, he had already travelled abroad. Further, that the witness had never been served with any other summons to attend court for hearing before and had no prior knowledge that the case had been scheduled for 8th and 9th October, 2018.

3. It was asserted that the learned magistrate declined to grant the adjournment sought by the prosecution on the said date and made an order marking the prosecution's case as closed. Thereafter, he directed parties to file and serve submissions on no case to answer and fixed the case for mention on 29th October, 2018. The prosecution is aggrieved by the said order because the witness' evidence is so crucial to the prosecution's case as it relates to counts 11 to 13 of the charge sheet which are directly linked to the Diocese of Kitui where the witness was the Bishop in charge.

Submissions

4. The application was canvassed before me on 6th May, 2019 with the learned State Counsel, Mr. Momanyi representing the Applicant and Mr. Gichigo appearing for the 1st Respondent as well as holding brief for Ms. Njoki Gachuhi for the 2nd Respondent. In support of this Application, the Applicant relied on **Article 50 (1)** of the **Constitution** and submitted that the trial magistrate was not fair and demonstrated open bias and partiality in handling the matter. The Applicant also relied on **Article 157(11)** of the **Constitution** and submitted that the law mandates the Director of Public Prosecution to prevent abuse of the legal process which the trial magistrate did by denying the prosecution an opportunity to avail a crucial witness. Further, the Applicant argued that no prejudice will be occasioned to the Respondents if the case is reopened and the witness is allowed to testify. Counsel concluded by urging the court to reopen the prosecution's case in the interests of justice.

5. On the part of the Respondents, it was submitted that it was never brought to the attention of the trial court that the said witness would be out of the country on the said date. As such, the trial court was perfectly within its mandate in exercising its unfettered discretion to decline to grant the adjournment sought and ordering for the close of the prosecution's case. It was also argued that the accused persons have a right to expeditious disposal of the trial which has been ongoing since 2012. In the Respondent's view therefore, there are no sufficient grounds to warrant revision of the order made on 9th October, 2018.

6. I have examined the record of the trial court and noted that when the matter came up for hearing on 5th June, 2018, the trial court was informed that there were three witnesses remaining but they had not been bonded to attend court as the investigating officer had misdiarized

the date. In view of that, the prosecution was granted the last adjournment and the hearing deferred to 27th June, 2018. However, the hearing did not proceed as scheduled on this date as the trial magistrate was attending a colloquium. Further, on 9th September, 2018, the hearing failed to proceed as a Ms. Linda informed the court that the resident prosecutor of the court was indisposed. The case was therefore adjourned to 7th October, 2018.

7. However, when the matter came up on that day, the prosecutor informed the court that the date had been taken in her absence and not relayed to the investigating officer to bond witnesses. For that reason, the hearing was adjourned to 8th and 9th October, 2018 and the prosecutor directed to issue summons to the remaining three witnesses. On 8th October, 2018, an adjournment was granted at the behest of the prosecutor as she informed the trial court that the witnesses who had been bonded would only be available the next day. Come 9th October, 2018, two witnesses PW8 and PW9 testified. Thereafter, the prosecutor intimated to the trial court that the witness in question was out of the country and therefore sought an adjournment to avail him upon his return on 28th October, 2018. The defence objected on account that prosecution had been granted a last adjournment.

8. In overruling the prosecution, the court noted that the prosecution had been granted a last adjournment and failed to bring it to its attention that one of the remaining witnesses would be out of the country. The court also faulted the prosecutor for failing to propose other convenient dates at the time when the date was fixed if at all that was the case. In view of the same coupled with the age of the matter and a directive from the chief justice on disposal of old cases, the trial court declined to grant the adjournment sought. The trial magistrate ordered the prosecution case closes in the absence of the said witness and gave a date for submissions on 29th October, 2018.

Determination

9. **Articles 165 (6) and (7) of the Constitution** confers upon this Court supervisory jurisdiction over subordinate courts and empowers this court to make any order and/or give any direction it considers appropriate to ensure fair administration of justice. It reads as follows:

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

10. Further, **Section 362 of the Criminal Procedure Code** provides as follows:

“The High Court may call for and examine the record of 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.”

11. What the High Court can do under its revisionary jurisdiction is provided for under **Section 364 of the Criminal Procedure Code** as follows: -

“(1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence: -

(b) in the case of any other order than an order of acquittal, alter or reverse the order.”

12. It is trite that the exercise of discretion cannot amount to incorrectness, illegality or impropriety on the part of the trial court to warrant a revision of its orders. However, I am alive to the fact that the interests of justice may call for the exercise of this court’s revisionary powers. It also suffices to note that justice is not just a preserve of the prosecution but should be availed to both the accused persons on the one hand and the prosecution on the other hand. That is to say, that whereas the Applicant has a duty to avail all witnesses necessary to assist the trial court arrive at a just and fair decision, the Respondents by virtue of the Constitution are also entitled to a fair determination of the case against them within a reasonable period.

13. I have perused the passport annexed to the Applicant’s letter for revision. The same indicates that the witness left the country through Jomo Kenyatta International Airport on 1st October, 2018 and had not returned as at 9th October, 2018 since there is no stamp showing his arrival date. I have also perused the charge sheet and confirmed that indeed the trial relates to the Catholic Diocese of Kitui where the witness is said was the Bishop in charge (Now heading Nyeri Diocese). Further, I have taken note of the Applicant’s submissions that the witness is well versed with the facts surrounding the case. In the premises, I am of the view that justice will be better served if the said witness, who had not been barred from travelling out of the country at the time, is given an opportunity to testify within the shortest time possible taking into account the age of the case.

14. Accordingly, I set aside the order of the learned trial magistrate made on 9th October, 2018 and order that the prosecution’s case be and is hereby re-opened. The prosecution witness shall be allowed to testify. The file shall be mentioned before the trial court on 29th May, 2019 for purposes of fixing a hearing date. The witness must be heard within thirty days from 29th May, 2019. The original record should be remitted back to the trial court for this purpose. It is so ordered.

DATED and DELIVERED THIS 23RD DAY OF MAY, 2019.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. M/s Kimaru h/b M/s Nyauncho for the Applicant/ Prosecution.
2. M/s Muritu watching brief for the complainant in the trial.
3. No appearance for Mr. Gichimo for the Respondent/Accused.