REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL REVISION NO. 12 OF 2019

REPUBLIC ..... APPLICANT

VERSUS

MICHAEL REMI NGUGI .....1ST RESPONDENT

JOHN KAUA M'MBIJIWE..... 2ND RESPONDENT

JOSHUA KARANJA WAIGANJO.....3RD RESPONDENT

RULING ON REVISION

1. Michael Remi Ngugi, John Kaua M'Mbijiwe and Joshua Karanja Waiganjo (Respondents) are facing a number of counts in a ***Nakuru Chief Magistrate's Criminal Case No. 3195 of 2014***. The charged offences are abuse of office Contrary to Section 101(1) as read with Section 36 of the Penal Code and personating a Public Officer Contrary to Section 105(b) of the Penal Code.

2. The trial commenced in Nairobi in 2013. It was transferred to Nakuru Chief Magistrate's Court for hearing and disposal in August, 2014. Since then, the trial in the Magistrate's Court has proceeded somewhat torturously – but is nearing completion. Thirty-nine (39) witnesses have already testified.

3. The 39th witness was Reta Wambugu, an Executive Officer at Nakuru Law Courts. At the end of his testimony, the Prosecutor made an application that she be allowed to call a "new" witness. The witness was "new" because the witness had, apparently, never recorded a statement until two days preceding the hearing date. The witness had never been disclosed to the Defence. His statement had never been supplied to the Defence.

4. Naturally, the Defence objected to the application to introduce a new witness more than five years since the trial commenced. The Court concurred with the Defence that it would be violative of the Accused Persons' fair trial rights to call a new witness that late in the day.

5. The Prosecution, then, applied for an adjournment to call its last witness. Earlier, on 02/08/2017, the Court had indicated that the Prosecution would not be permitted any more adjournments. Indeed, on 02/08/2017, the Prosecutor had successfully applied for Warrants of Arrest to be issued to three Senior Police Officers to attend Court on 16/08/2017. The three Police Officers were identified as CIP Fatuma Abdi; SSP Johnstone Kola and Mr. Ngisa.

6. None of the three Police Officers were in Court on 16/08/2019 hence the vehement opposition by the Defence to the application for adjournment. In this context, the exact words the Prosecutor, Ms. Kosgei, used to make the application are important:

> *I seek an adjournment to call one witness: the Investigating Officer, one Fatuma Abdi. We had four Investigating Officers. We will not be calling Ngisa and One Kimilu as witnesses. One Jonathan Napikwe will also not testify. The only witness is Fatuma Abdi. She was in Court last time. She was asked to be here today but was sitting for an examination. We request for a date even next week and we will close the Prosecution's case. She would have made arrangements to defer the exams to next week but chose not to do so. She was served with summons. I seek a Warrant of Arrest to issue to be executed by the Commandant DCI*.

7. Neither the Defence nor the Court was pleased with the Application. Nonetheless, the Learned Trial Magistrate was gracious but firm in reluctantly granting the prayer:

> *Albeit reluctantly, I allow the application and categorically direct that the window granted today shall not operate to grant the Prosecution an opportunity to call any other witness apart from Fatuma Abdi and others who have recorded statements*.

8. In his ruling, the Learned Trial Magistrate had recorded his displeasure at how the Prosecution was conducting the trial in the following words:

> *I raise concern that this Court has severally been treated to what I will consider to be a circus by the Officers who are investigating this case, to a point that almost all court dates, the Court has had to retire to write rulings [on applications for adjournments]. Needless to state, I have severally point out the delay herein as being occasioned by numerous applications for adjournments which have a semblance of lack of seriousness on the part of the Prosecution.*

9. Albeit with a hint of displeasure from the Court, the Prosecution got the adjournment it yearned for. One more chance to close its case. The date was set in Court: 28/08/2017. Another Warrant of Arrest against Fatuma Abdi was issued at the behest of the Prosecution.

10. On 28/08/2017, all parties were in Court ready for the Prosecution's final witness. Instead, Ms. Kosgei, the Prosecutor, rose to address the Court. Inspector Fatuma had refused to attend Court, the Prosecutor told the Court. What about the Warrant of Arrest? "The School" where Inspector Fatuma was attending had, apparently, refused to execute the Warrant of Arrest. Why would the "School" refuse to execute the Warrant? According to the Prosecutor, it was because the School said Inspector Fatuma was not, after all, the Investigating Officer in the Court.

11. What was an erstwhile Prosecutor to do with this curve ball? Ms. Kosgei rose to address the Court:

> *We have overstretched the Court's patience. I have had a lot of difficulty availing witnesses. I will not seek another date as the Court indulged us for a very last time. I humbly request that Ole Sontu who has been in custody of the exhibits be allowed to produce the exhibits. He has never recorded a statement. I am aware that he has been sitting in Court as the other witnesses were testifying. We may be seeking to have the Warrant of Arrest against Fatuma Abdi executed by the DCI Director*.

12. One can almost hear the frustration and the helplessness in the application. One can hardly hear any hope that it would be granted. Of course it was not granted. Fiercely opposed by the Defence, it was shot down by the Learned Trial Magistrate with prompt alacrity: both prongs of the application were dismissed.

13. It would appear that Inspector Fatuma walked in as the Learned Trial Magistrate was delivering his ruling denying the Prosecution's application. The Learned Trial Magistrate ended his ruling thus:

> *The Prosecution has squandered the time it would have proceeded with this matter and as I have delivered this ruling at the time hereinbelow stated, I direct that should the Prosecution opt to call the witness who has arrived in Court at 3:30pm and whose delay in attending today's proceedings remains unexplained, the Prosecution will be allowed only ten (10) minutes to take the witness through [the] examination-in-chief. Judicial time is precious to all the parties in any proceedings. It is now 4:15pm*.

14. The Prosecutor reacted to the ruling by informing the Court the following:

> *I am unable to proceed. Fatuma now tells me that she is not the Investigating Officer. She only says that she can only testify on one document and clothing material. I leave to the Court*.

15. The Court, then, ordered the Prosecution case closed and invited parties to file their Written Submissions on No Case to Answer. Advocates for each of the Accused Persons filed their Written Submissions while the Prosecution indicated that it will rely on the record. A ruling date was scheduled for 31/01/2018.

16. That was not to be. On 26/01/2018, the ODPP filed an application for revision under Certificate of Urgency. The application sought a stay of delivery of the scheduled ruling and a revision of the order made on 28/08/2018 ordering the Prosecution case closed.

17. The Learned Judge, Odero J., declined to give the orders of revision. The Learned Judge wrote:

> *The proper procedure is that before coming to the High Court, the relevant application must first be made before the trial Court. Given that this was not done in this case, I am not inclined to review the orders of the Trial Magistrate at this stage.*
>
> *My advice is that this application for review of the orders of 28/08/2017 should first be made before the trial Court*.

18. The Prosecution, then, filed an Application before the Trial Court seeking, in the main, for orders staying the anticipated ruling on No Case to Answer; setting aside the order of 28/08/2018 that the Prosecution Case be closed; and an order allowing the Prosecution to re-open its case and call its remaining witnesses.

19. That Application was heard by the Learned Trial Magistrate and a ruling delivered on 21/02/2019. The ruling dismissed the Prosecution Application in its entirety.

20. On 06/03/2019, the Prosecution approached the High Court again with the present Application of even date. The two main prayers in the Application by the Prosecution are as follows:

> *i. That this Honourable Court be pleased to grant stay of the proceedings in Nakuru Chief Magistrate's Criminal Case No. 3195 of 2014 in which a Ruling on whether the Respondents have a case to answer is scheduled to be delivered on 7th March, 2019, pending the hearing and determination of this Application.*

ii. *That this Honourable Court do call for and examine the record in Chief Magistrate's Court at Nakuru in Criminal Case No. 3195 of 2014, Republic Vs Michael Remi Ngugi, John Kaua M'Mbijiwe & Joshua Karanja Waiganjo for purposes of satisfying and pronouncing itself as to the correctness, leagality or propriety of the findings and orders issued on 21st February, 2019 by Hon. J. M. Omido*, PM.

21. I directed that all parties be served. The Application was eventually argued before me by both written submissions and oral highlights.

22. Most of the submissions rehashed the history I have presented above to varying extent. I will not repeat them here. In terms of arguments, the Defence advocates have raised four objections to the Application:

a. That the Application is defective and bad in law;

b. That allowing the Application would permit the violation of the fundamental rights of the Accused Persons;

c. That the Prosecution has not provided good reasons why the orders they seek should be allowed.

Is the Application Defective and Bad in Law?

23. The Defence argues that the Application is defective and bad in law for two reasons. First, the Defence argues that the High Court does not have jurisdiction to exercise revision in these circumstances. The argument is that the right of a party to seek a revision and consequently, the power of the High Court to entertain such an application is limited in section 364(5) of the Criminal Procedure Code. The limitation, argues the Defence, is that if a party has a right of appeal and does not appeal, they cannot, thereby, recapitulate and seek a revision of the orders of the Lower Court which whose legality or propriety they impugn.

24. Second, the Defence, and in particular Counsel for the 2nd Respondent argues that the High Court already exercised its jurisdiction when Justice Maureen Odero gave her directions after the first Review Application on 26/01/2018. As such, the Defence argues, the High Court has become functus officio and can no longer entertain an application for revision. In this regard, Counsel for the 2nd Respondent cited Justice Momanyi Bwonong'a's book, ***Procedures in Criminal Law*** at page 308-09 where he wrote:

When a judge of the High Court has revised an order of a subordinate court, another judge of the High Court has no jurisdiction to proceed to a second revision since there is nothing for the revision.

25. I have anxiously considered these two prongs to the jurisdiction of the Court. I am not persuaded that the Court is divested of jurisdiction to consider the application made by the ODPP in this case.

26. I will begin with the first objection: that section 364(5) forbids the DPP from invoking the jurisdiction of the High Court in cases where he could have appealed against the decision. The Defence relied on Section 364(5) of the CPC. That sub-section reads as follows:

When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.

27. I had occasion to deal with this argument in an earlier case. I have not departed from my views which I expressed there. This was in ***R v Mark Lloyd Steveson [2016] eKLR*** where I stated:

In my view, the correct reading of the section is that a party who has a right of appeal cannot "insist" on invoking the High Court's power of review; in other words, such a party does not have a right to have the court review the decision s/he is aggrieved of. The only sure way to have such grievances heard and considered as a matter of right is through an appeal. The section does not, however, mean that a party which has a right of appeal cannot thereby invoke the Court's power to review a Magistrate's court's order or decision.

For clarification, it is important to state the trite position that the High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances. While difficult to determine with mathematical precision when the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), "grave injustice might otherwise result or where justice might not by other means be attained." As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below." Hence, the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with "due regard to the salutary general rule that appeals are not entertained piecemeal."

28. The only addition I would add here is that Article 165 of the Constitution has now liberalized the High Court's revisionary powers beyond the confines statutorily put by the CPC.

29. What about the second objection – that the High Court has already exercised its revisionary jurisdiction in the matter and that it cannot now take a second bite at the cherry? I would think that objection misapprehends what happened to the original application before the High Court. At that time, the Court declined to exercise jurisdiction and directed that the DPP to make his argument for setting aside or varying the orders made before the Learned Trial Magistrate who had made then; and only afterwards, if dissatisfied, to come back to the High Court.

30. In my view, it would be absurd to rule that the party who was so guided is now debarred from presenting their grievance when the High

Court declined to exercise jurisdiction on the point that the application before it was not yet ripe.

31. I will next reverse the order and answer the third question posed by the Defence before briefly discussing the second one.

Are There Good Reasons to Allow the Application by the DPP?

32. In a word: no. From the history rehashed above, if ever there was a candidate for refusal to exercise the High Court's jurisdiction in revision, this case presents the poster child for it. The history of this trial in the lower Court is littered with punctuation marks for delays; half-starts and stalled movements by the Prosecution. On several occasions, the Prosecution was specifically allowed a "final" adjournment. Somehow, the Prosecution still managed to eke out a few more. The very words by the Prosecutor on the fateful day which I reproduced above were:

> *We have overstretched the Court's patience. I have had a lot of difficulty availing witnesses. I will not seek another date as the Court indulged us for a very last time.*

33. These are the words of the Prosecutor who was in conduct of the matter. She then informed the Court, after the witness she was waiting for had arrived, that the witness had denied that she was the Investigating Officer. Upon being given an admittedly scant ten minutes to conduct her examination-in-chief of the witness, the Prosecutor declined. It is important to point out that the Prosecutor did not decline to put the witness on the stand because of the unreasonableness of the time limitation for examination-in-chief. She declined because she felt that it would be pointless for her to do so in view of the fact that the witness who had turned up had now told her that she was not the Investigating Officer and that, therefore, she would be unable to produce most of the exhibits the Prosecutor had hoped that the Investigating Officer would produce.

34. Where, then, did the Trial Court go wrong? What wrongful or inappropriate order did the Learned Trial Magistrate make which calls for revision by this Court? The obvious answer to the rhetorical query is none. The truth of the matter is that the Prosecution now seeks to re-do their case. In fact, the Prosecution hopes to now be given an opportunity to call witnesses who it failed to call despite several warnings by the Court.

35. In my view, to allow the Prosecution to re-open the case and call new witnesses would be unfair and prejudicial to the Defence. The Prosecution had more than five years to conduct its case. I have looked at the history of the case. It is plain that we had reluctant witnesses and, perhaps, a nonchalant Prosecution. Many "final" adjournments were granted in order for the Prosecution to bring the witnesses. It failed to do so. Indeed, the Prosecution had applied for, and obtained Warrants of Arrest for the two witnesses it now wishes to call. This was on 02/08/2017. They were to be in Court on 16/08/2016 under Warrants of Arrest. There was no explanation why they were not brought to Court. The Supporting Affidavit of Fatuma Abdi – she who kept the Court waiting until 3:30 pm despite there being a Warrant of Arrest against her – now says that these two witnesses are very eager to appear in Court to testify.

36. I have said enough to indicate why this Application cannot be allowed. It will be bad practice and precedent to allow it. It would be the clearest signal yet to the Prosecution that no expedition is allowed on their part in conducting prosecution of criminal trials; that even where they fail to produce witnesses despite firm and repeated Court orders, they can run to the High Court for relief. That cannot be.

37. There is a second reason the Application must fail. As the Defence ponderously argue, allowing this Application will turn the trial in the Lower Court into a persecution. The Learned Trial Magistrate in his ruling of 21/02/2019 had the following searing words: "I need not restate my findings above on the immense prejudice occasioned already upon the Accused due to the unwarranted delay occasioned by the Prosecution."

38. Looking at the history of the trial, it is clear that affording the Prosecution another opportunity to prolong the trial would be highly prejudicial to the Defence. Firstly, it will abrogate the constitutional right to a speedy trial. Secondly, it will permit the Prosecution to re-open the case when the Defence has already made its submissions on a No Case to Answer ruling. This will make the trial highly irregular. It is probably enough to cite Mutuku J. in ***R v Abdikadir Ahmed Mohamed [2013] eKLR*** who, in refusing to acquiesce to the DPP's application to call Prosecution witnesses in almost similar circumstances said:

> *Trials must be heard and concluded in the in the shortest time possible to ensure fair trial, a fundamental right guaranteed in our law. Cases cannot go on infinitum. It is in view of this that this court is firm in that it shall not be part of the delay in the conclusion of this case. I need not repeat the circumstances that led to the closing of the prosecution case. In the circumstances therefore, I will and do hereby invoke the provisions of Articles 50 (2) (e) and 159 (2) of the Constitution that every accused person has the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay that justice shall not be delayed, respectively. To allow a case to go on and on without concluding it, especially when it is obvious that the officers responsible for securing the attendance of witnesses have failed in so doing, can be termed as unreasonable delay*.

39. I need not say more. This Application is for dismissing, which I hereby do. The criminal trial in the Lower Court should proceed apace.

40. Orders accordingly.

Dated at Nakuru this 30th day of July, 2019

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JOEL NGUGI

JUDGE

Signed and Delivered this 31st day of July, 2019

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J. N. MULWA

JUDGE