REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL REVISION NO. 59 OF 2018

THE OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTIONS.....APPLICANT

=VRS=

1. WILFRED OGERO MOSIGISI.....1ST RESPONDENT

2. NICHODEMUS OMBATI MOSIGISI.....2ND RESPONDENT

3. ROBINSON MICHIEKA MOSIGISI.....3RD RESPONDENT

{Being a Revision against the Ruling of Hon. N. Kahara – RM Keroka delivered on

the 12th day of June 2017 in the original Keroka Principal Magistrate's Court Criminal Case No. 1498 of 2015}

RULING

The accused persons were charged with six counts of forgery contrary to Section 345 as read with Section 349 of the Penal Code. The offences were all related to a land transaction. The record shows that they were first arraigned in a Kisii court which declined to take their plea and referred the case to Keroka where the offences were alleged to have been committed. When they were taken to Keroka the accused persons pleaded not guilty on all the charges and were granted bond. The case was fixed for hearing on 28th January 2016 but come that day the prosecution did not have its witness and it applied for an adjournment. The same was granted to 16th June 2016 but again the witnesses did not turn up although the accused and their witnesses were present. On that day the court noted that that would be the last adjournment she would allow the prosecution. The case was then adjourned to 24th January 2017. On that day only one witness was availed and after he had given evidence the prosecution applied for adjournment yet again. The case was adjourned to 4th May 2017 and the magistrate noted that the last adjournment she had granted on 16th June 2016 still stood.

On 4th May 2017 by 11.45am the witnesses had not arrived and the trial magistrate indulged the prosecution till 12.45pm and when they failed to turn up she put her foot down and decided she was not going to adjourn the case further. She called upon Counsel for the State to close his case but when the prosecution Counsel said he would not close the case she did so herself. She subsequently delivered a ruling that the accused persons did not have a case to answer and acquitted them under Section 210 of the Criminal Procedure Code.

This revision is intended to set aside, review or revise those orders of the trial magistrate and to reinstate the case.

This court heard the arguments of Counsel for the Office of the Deputy Director of Prosecutions and for the accused persons on 6th March 2019.

Miss Okok, Learned Counsel for the prosecution submitted that the trial magistrate erred in disallowing the prosecution's application for adjournment whereas sufficient reasons were advanced. She also submitted that the trial magistrate had no power to close the prosecution's case as she did. Counsel submitted that her understanding of Section 210 of the Criminal Procedure Code is that it is the prosecution that brings evidence in support of a charge against the accused person and it is also the prosecution that should bring a case to a close. Counsel contended that the trial magistrate denied the prosecution a chance to ventilate its case. She contended that the right to a fair trial guaranteed in Article 50 of the Constitution serves not just the accused but the prosecution as well. She submitted that the victims of a crime also have a right to due process. She pointed out that in this case only the complainant had testified. She urged this court to set aside the order of the trial court and substitute it with one of reinstatement of the case in the interest of justice.

The application was vehemently opposed. Miss Omwenga, Learned Counsel for the accused persons submitted that the complainant in this case is a step brother of the accused persons and the charges touched on documents related to titles to their father's property. She stated that

she acted for the accused persons in the lower court and did not miss any of the attendances. She explained that the only application she opposed was the application for adjournment on 4th May 2017 and that was because the prosecution did not demonstrate that they had bonded the witnesses. She contended that the court found the witnesses had not been bonded and no explanation had been given and refused to grant the adjournment. She asserted that the trial magistrate exercised her discretion judiciously and was seized of jurisdiction to do so. She submitted that the prosecution has not demonstrated that the trial magistrate had extraneous reasons other than those set out in the law, or that the court's discretion was exercised for purposes other than fair trial and public policy. Counsel contended that trials ought to be conducted expeditiously and the prosecution having been availed several chances to procure its witnesses it cannot be heard to say it was denied a fair trial under Article 50 of the Constitution. She submitted that the Article 50 of the Constitution cuts both ways. Counsel further submitted that the prosecution could have averted the acquittal had it appealed the order refusing the adjournment but it did not do so. She pointed out that this application was made on 15th October 2018 long after the accused persons had sued the complainant and the Director of Public Prosecutions which case has been stayed by reason of this application. She contended that these proceedings are not geared towards the interest of justice but are intended to frustrate the civil case and to abrogate the accused's civil rights.

On the order of the trial magistrate closing the case, Counsel submitted that the same should have been appealed as provided under **Section 364 (5) of the Criminal Procedure Code**. She contended that there is no law that prohibits a court to direct the prosecution to close its case and should they decline to do so the court should do it itself. Counsel further argued that the court is clothed with responsibility to develop the law where it falls short and that the court does not act in vain. She pointed out that after the accused persons were acquitted the complainant caused his other step brothers to be arrested over the same charges which portrays him as one using the court process to address otherwise civil and succession matters. She contended that reviewing the orders of the trial magistrate will not aid the interest of justice but rather promote what she described as the complainant's unjust and illegal intent. She added that a complainant who was aggrieved would not have waited until he was sued to seek revision. She urged this court to dismiss this application.

In reply, Miss Okok reiterated her submissions more so the submission that this review was sought in the interest of justice and public interest. She contended that the civil remedies open to the complainant are not a bar to criminal prosecution and that the prosecution had given plausible reasons for the non-attendance of its witnesses. She urged this court to allow the application.

I have had ample opportunity to consider the application and the submissions of Learned Counsel for both sides. My finding is that the application has no merit. There is nothing to demonstrate that the trial magistrate exercised her discretion in an unlawful manner or that the proceedings culminating in the acquittal of the accused persons were illegal or irregular. The record indicates that the prosecution was granted several adjournments before the court finally put its foot down and ordered it to either call its witnesses or close its case. The record shows that it even waited for the witnesses to arrive before it made its order. It is my finding that the trial court's decision to refuse the adjournment was not made capriciously or at a whim. Contrary to Counsel for the prosecution's submission that there is no law giving a court power to close the prosecution's case, **Section 202 of the Criminal Procedure Code** does envisage that the court can close the case. The accused's right to a fair trial which includes **the right to have a trial to begin and conclude without unreasonable delay (Article 50 (2) (e)** of the **Constitution** is sacrosanct and cannot be limited **(See Article 25 (c) of the Constitution**). The trial magistrate gave the prosecution enough time to procure its witnesses but it appears that the prosecution believes it should have had the upper hand and so should have been granted an adjournment even where no sufficient cause was shown. Dealing with a similar application in **Republic Vs. John Wambua Munyao and 3 others. Machakos Criminal Revision No. 215 of 2018** Odunga J, stated and I agree with him: -

> ***"34. Where an issue arises as to whether the decision of the court below is correct in its merits either as a result of wrong exercise of discretion or otherwise, but which decision does not call into question, its legality, correctness or propriety, the right approach is to appeal against the same preferably at the conclusion of the proceedings or in limited instances before then…….***
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> ***36. In my view the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocate is discretionary save for where the orders intended to be made will prejudice the accused person."***

It is my finding that nothing barred the court from closing the prosecution's case given that the prosecution would not do so yet it did not have witnesses to call to the stand. It is also instructive that the trial court did not acquit the accused persons on that same day. It reserved its ruling to a later date but the prosecution did not do anything to arrest the acquittal. Counsel for the accused person correctly submitted that the prosecution could have averted the acquittal by appealing against the order refusing the adjournment. I find and hold that this case is not suitable for revision. The ruling acquitting the accused persons was delivered on 12th June 2017 and this application was not made until 15th October 2018 making likely to be true Counsel's submission that it was brought to vitiate a civil matter against the complainant and the prosecution. No explanation was given for this ordinate delay. In that event the application is not brought in the interest of justice or public policy. In any event and more importantly **Section 364 (1) (b)** of the **Criminal Procedure Code** clearly provides that this court cannot exercise its revisionary power to alter or reverse an acquittal. The application is therefore dismissed.

Dated, signed and delivered in Nyamira this 26th day of July 2019.

E. N. MAINA

JUDGE