



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J.)

CRIMINAL REVISION NO. 29 OF 2019

REPUBLIC.....APPLICANT

VERSUS

GRACE WAIRIMU.....RESPONDENT

(From Original Criminal Case No. 57 of 2014 of the Chief Magistrate's Court at Naivasha - Hon. E. Kimilu (PM))

JUDGMENT

1. The respondent is charged with others not before court with ten counts of fraud and obtaining money by false pretences. The particulars were with intent to defraud by obtaining a sum of Shs 110,160/= from one Ann Nyambura Nyoike by falsely pretending that the money had been invested to earn profit for the said Ann Nyambura, a fact she knew to be false. The offence is alleged to have been committed between 1st August and 31st October, 2012.

2. Plea was taken on 10th January 2014. The hearing proceeded intermittently and by April 2019 four witnesses had testified and six witnesses were remaining.

3. On 1st April 2019 when the matter came up for hearing the prosecution had no witnesses. The prosecutor sought that the file be placed aside. The defence opposed. The prosecution said they "left it to court". The court having previously granted several last adjournments to the prosecution, proceeded to close the prosecution case and called for submissions on 'No case to answer'.

4. The prosecution applied to vary or set aside the court's orders. In her ruling dated 27th June 2019, trial Magistrate dismissed the prosecution's application finding that the case had been conducted with laxity to the detriment of the accused's rights to a fair trial.

5. The Notice of Motion before me was filed under certificate on 4th July 2015 and seeks the following orders.

"1. THAT the application is certified as urgent and the same be heard ex- parte due to its urgency.

2. THAT this honourable court be pleased to grant stay of the proceedings in Naivasha Chief Magistrate's case number 57 of 2014 in which a date has been set to deliver a Ruling on whether the Respondent has a case to answer on 11th June 2019, pending hearing and determination of this application.

3. THAT this honourable court do call for and examine the record in Chief Magistrate's court Criminal case number 57 of 2014, Republic versus Grace Wairimu for purposes of satisfying and pronouncing itself as to the correctness, legality or propriety of the findings and orders issued on 27th June 2019 by Hon. E. Kimilu, PM.

4. THAT this honourable court be pleased to revise, vary and/or set aside the orders given on 29th June, 2019 by Hon. E. Kimilu PM in Chief Magistrate's Court at Naivasha Criminal Case No. 57 of 2014, Republic versus Grace Wairimu so as to accord fair administration of justice.

5. That this court issues any other Orders it deems fit."

6. The motion was supported by the Affidavit of Corporal Duncan Ogwang of Department of Criminal Investigation.

7. The Respondent filed a Replying Affidavit sworn by counsel and a supporting Affidavit of the Accused. They assert that the application was an abuse of the court process; that it had some untrue statements made under oath; that litigation has to come to an end, that the absence of one specific prosecutor who was unavailable should not unduly delay case against an accused; that no cogent reasons have been given to warrant this court's interference with the trial court's ruling; that submissions on No case to answer have already been filed in the lower court; that it is not for this court to decide on issues of fact in the lower court without the advantage the lower court had.

8. The parties filed written submissions to dispose of the application. The applicant said that when the matter was fixed for hearing on 1st April 2019 as a last adjournment, the investigating officer was off duty and had travelled to Kisumu for personal reasons. He had thus locked up the police file and travelled with the keys. The prosecutor also had a medical emergency and had her child rushed to hospital. The prosecutor holding her brief stated that the witnesses had mistakenly gone to a different court.

9. The applicant further submitted that the prosecution was prejudiced by the decision of the lower court. They rely on **HC Revision No. 4 of 2018 Rep v Alice Chepkorir Koech & Another [2018] eKLR**. There, they urge, the court found that the prosecution was not given a chance to adduce all the evidence it intended to rely on before the close of its case in the trial court.

10. In the **Alice Chepkorir** case, the application was not opposed and the court found:

“It is conceded and the applicants with the assistance of counsel have agreed that the case may be restarted.”

In the end, the court proceedings in the trial court were quashed, and the case transferred to another court.

Reliance was also placed on the case of **Prosecutor v Stephen Lesinko [2018] eKLR HC Revision No. 9 of 2018** where, again, the High Court ordered that the trial in the lower court be quashed as urged by the Director of Public Prosecution. The contention there being that it was the court's duty to protect and preserve the victims right to justice and due process.

11. These two authorities, the **Alice Chepkorir** and **Stephen Lesinko** cases are not in lock-step with the present case where the prosecution case has been ordered to be closed and that parties make submissions on the issue of “No case to answer” ready for a ruling thereon by the lower court. The authorities were relied on more for the principles of: violation of arms, that is, that the victims and prosecution's right to be heard ought not to be violated; and that the courts have a duty to protect and preserve the victims right to justice and due process.

12. The respondent did not rely on any authorities. They submitted that the right to fair trial cannot be exclusive of the rights available to the accused person; that **Articles 25 (c)** of the Constitution on the right to fair trial and Article 50 (e) of the Constitution grant the accused the right to an expeditious trial. They argue that at the rate the case was proceeding hearing of four witnesses in four years means that the case would take unduly long to conclude in violation of the constitution.

13. The respondent argued that the accused has been faithfully attending court and her life has been on suspense for years. Continuation of the case at the prosecution's pace would be an abuse of her rights. Should the court allow the re-opening of the case, it would be opening up a Pandora's Box showing that the state enjoys an elevated status. Thus, the indolence of the prosecution should not be rewarded.

14. Finally, the respondent submitted that the prosecution has not satisfied the threshold of demonstrating the incorrectness, illegality or impropriety of the decision of the lower court.

Analysis and Determination

15. The motion invokes the supervisory jurisdiction of this court under **Article 165 (6) and (7)** of the **Constitution**. It also invokes the courts statutory revision powers under **Section 362, 364 and 365** of the **Criminal Procedure Code**.

Section 362 entitles the court to:

“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.” (Underlining added)

16. Thus, what must be shown under a **Section 362** of **Criminal Procedure Code** review is that there was something “*incorrect*” “*illegal*” or “*lacking propriety*” in the decision of the lower court. **Section 364** of the **Criminal Procedure Code** entitles this court to call for the record of the lower court for perusal and for the making of such order as the court may deem fit. This court called for and has examined the record of the lower court.

17. Section 365 of the Criminal Procedure Code merely allows the court to exercise discretion as to whether or not to hear parties personally during revision proceedings. The discretion to hear was exercised in this case.

18. The only issue for determination is whether it has been shown that the lower court's discretion of 27th June 2019 contains elements of “incorrectness, illegality or *impropriety*” that justify its review.

19. I have perused the lower court file. It shows the applicant was the 2nd Accused and one Simon Kamangara Wanuthia was the 1st

Accused. They took plea on 10th January 2014. The 1st accused being on bond, failed to attend court from 28th January 2014 until he was arrested and brought to court on 25th July 2014. On 27th August 2014, the case was consolidated with another CMCR No. 2899 of 2013 (Republic v Grace Wairimu Mutumo) and fresh plea was taken. After numerous mentions the matter was taken over by Hon. E. Kimilu on 6th November 2014. The record shows that 1st Accused also had criminal cases in Nairobi and Kiambu, the hearings of which interfered with the progress of this case.

20. On 4th May 2015 after the case appeared not to be making headway, the trial court ordered the 1st accused to be remanded at Naivasha Prison until the case is heard and finalized. The first witness (PW1) was heard on 22nd June 2015. The prosecution said it had ten witnesses ready for hearing. On 6th August, 2015 the prosecution indicated it had four (4) witnesses ready, but the case could not proceed in the absence of 1st Accused who had again absconded.

21. On 18th February 2016 counsel for the applicant sought that the case proceed against the 2nd Accused/Respondent herein alone. On the court's discretion, PW2 gave testimony on that day. On 19th May 2016 PW3 and PW4 were heard, but PW4 was stood down for cross-examination when the hearing resumed on 1st September, 2016 counsel for the Respondent declined to cross-examine PW4 on grounds that the defence had not received documents marked for production. The matter was adjourned.

22. The case was mentioned on several occasions thereafter as 1st Accused had emerged, and on 3rd February 2017, the court again directed that 1st Accused be charged separately. I note that the trial court, having previously ordered on 18th February 2016 that the trial should proceed against the 1st Accused alone, it should not again in 2017 have been confused by the return/arrest of 1st Accused. That caused some measure of delay in the proceedings. At the hearing fixed for 27th April 2017 a new State Counsel took over the matter and sought time to familiarize himself with the file.

23. At the hearing fixed for 24th August, 2017, the State Counsel stated that he had two witnesses ready for hearing. PW4 was recalled for cross-examination and re-examination was concluded. On 30th November, 2017, the state sought adjournment due to failure to bond witnesses. The defence counsel objected, and urged that if granted it should be a last adjournment. The court granted a last adjournment.

24. At the hearing on 22nd March 2018 the prosecution stated that they had one witness in court and the file was placed aside for hearing later. At noon, the prosecutor stated that there was no witness. Upon objection by the defence the court extended the "last adjournment" orders. On 19th July 2018 the prosecution again sought adjournment on grounds that there was confusion as to which the witness had gone to. Mrs. Gikonyo had taken over the matter from Koima. An adjournment was granted.

25. On 1st April 2019 the prosecution had no witnesses and sought adjournment saying that the investigating officer was away and witnesses had not been bonded. The adjournment was denied. The record shows:-

“Court: All considered. Application for adjournment is denied for lack of merit.

State Counsel: I leave it to court.

Court: The prosecution case is hereby closed by an order of the court.”

What the State Counsel stated she "leave(s) it to Court", it appears she meant directions on how to proceed the application for adjournment having been denied. Written submissions were then ordered.

26. The state then filed an application seeking to set aside or review of the trial Court's orders closing the prosecution case. The trial court in its Ruling of 27th June 2019 dismissed the application, resulting in the prosecution making the present application for review.

27. I have outlined in detail the proceedings of the lower court because it is important to identify the circumstances which led to the long delay in prosecuting the case in the lower court. From what I have outlined, it seems the blame is spread fairly amongst all the parties with the 1st Accused taking the grant's share of the blame for delay during dates reserved for hearings.

28. Put in perspective of the respondent/defence, it was on 18th February 2016 that the respondent sought that the case to proceed against the 2nd accused solely. Three witnesses were heard between 18th February 2016 and 19th May 2016. PW4 was then stood down from cross-examination at the instance of the defence on 1st September 2016 until 24th August 2017 when the defence concluded the cross examination of PW4. The first of the "last adjournments" was then imposed upon the prosecution on 30th November, 2017. No similar action was taken concerning the delay between 1st September 2016, to 24th August 2017, when the defendant delayed the cross examination of PW4.

29. The case has ten victims who were allegedly defrauded: Ann Nyambura Nyoike under Count 1; Geoffrey Nganga Nyoike under Count 2; Humphery Njau Nganga under Count 3; Henry Nyoike Nganga under Count 4; Kelly Wilson Gichinga Nganga under Count 5; Harrison Mithini Mwau under Count 6; Peter Muturi Mwangi under Count 7; Gisemba Onyonka Tom under Count 8; Pauline Muthoni Mathia under Count 9; and Tabitha Wangare under Count 10.

30. Under **Article 50 (9)** of the **Constitution**, Parliament was required to enact legislation to protect victims of offences. The **Victim Protection Act No. 17 of 2014** was enacted for the purpose and provides in **Section 4** as follows:

“(2) Subject to sub-section (1) a court, administrative authority or person performing functions under this Act shall ensure that:

a.;

b. every victim is as far as possible, given an opportunity to be heard, and to respond before any decision affecting him or her is taken.

.....;

k. the victim is not discriminated.”

Section 19 of the **Victim Protection Act** entitles a victim the right to information under **Section 35** of the **Constitution**, and further a victim may be entitled under that Act to restitution or compensation.

31. Although no detailed arguments were made regarding victims, I opine that the closure of a prosecution case at the instance of the court is so drastic and extreme that a victim ought at least to be made aware of that fact by the court. In this case, the victims were all defrauded of money and may even have been following the case with the expectation of following up compensation in court actions should the trial court have made positive findings that they could later rely upon. They now have no recourse.

32. In my view the trial court should have given the state an opportunity to call the victims to be heard on the delays and or to notify them of the court’s intention to close the prosecution case.

33. I think that, on the ground that some of the delay in the case was occasioned by the accused, a point that was not taken into account by the trial court, and the fact that the victims were completely ignored in the trial court’s decision to close the prosecution case, this is a case where revision would be apt.

34. I therefore revise the trial court decision and hereby allow the prosecution case to be concluded on the following terms:

a. The prosecution case shall be fast-tracked and they shall be given ninety (90) days within which to prosecute the remainder of their case by calling outstanding witnesses.

b. The trial court set out a hearing programme for the remaining prosecution witnesses to conclude testimony within the time frame hereinbefore stated.

c. Should the prosecution fail to avail witnesses on any one of the scheduled hearing dates, the prosecution case shall be deemed, *ipso facto*, closed.

35. The file to be placed before the trial court for mention within ten (10) days from today’s date.

36. Orders accordingly.

Dated and Delivered at Naivasha this 30th Day of October, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Maingi for the Applicant
2. Rono holding brief for Gitau for the Respondent
3. Court Clerk – Quinter Ogutu