



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL REVISION NO. 1 OF 2017

REPUBLIC PROSECUTOR

VERSUS

NANCY NJOKI MURANU 1ST ACCUSED

LOICE NYAMBURA KAMAU 2ND ACCUSED

AGNES WAITHERA KANYI 3RD ACCUSED

SUSAN WANGUI MURIITHI 4TH ACCUSED

ESTHER WANGECHI GITHAIGA 5TH ACCUSED

JOSEPHINE WAITHERERO KANYUIRA ... 6TH ACCUSED

CAESAR WARUI KIRAGU 7TH ACCUSED

[Revision from the order of mistrial in Criminal Case No. 74 of 2006 in the Chief Magistrate's Court at Murang'a by A. K. Mwachigi, Principal Magistrate, dated 20th February 2017]

RULING

1. The accused were arraigned in the lower court on *eight* counts of *forgery* contrary to section 349 of the Penal Code; *stealing* contrary to section 275 of the Penal Code; and, *destroying evidence* contrary to section 116 of the Penal Code.
2. There were two counts of *forgery*: Firstly, that on diverse dates between 8th November 2004 and 10th February 2005 at Kangema Township, the 1st, 2nd, 3rd and 7th accused, with intent to defraud or deceive, jointly forged two *activity reports* purporting them to be genuine reports for *Mwireri Senior Women Group*. Secondly, the 4th, 5th, 6th and 7th accused were charged with forgery of two other *activity reports* purporting them to be genuine reports for *Kanguru Founder Women Group*.
3. Counts 3 to 7 related to theft of various sums of money from the two women's groups. The cash was stolen from Muramati Tea Growers Sacco, Kanyenyaini Branch; and, Equity Bank, Kangema Branch on diverse dates between 19th August 2004 and 6th May 2005. The amounts ranged from Kshs 10,000 to Kshs 150,000.
4. Lastly all the accused faced an 8th count of destroying evidence. The particulars were that on diverse dates between 19th August 2004 and 10th February 2005, at Rwathia Location, they jointly and willfully destroyed the four original *activity reports* in order to derail police case number 230/344/2005.
5. The prosecution lined up 15 witnesses. A total of 44 exhibits were produced at the trial. The case was heard by *three* magistrates at different stages. The trial opened on 10th January 2006 when plea was first taken. There were fresh pleas when the charges were either consolidated; or, substituted; or, amended. The prosecution closed its case on 23rd July 2015 before T. Nzyoki, Acting Principal Magistrate.
6. The matter was then taken over by A. Mwachigi, Principal Magistrate. His task was to determine whether a case had been made out sufficient to put the accused on their defence. He was *unable* to do so for reasons that I will deal with shortly.

7. On 20th February 2017, the learned trial magistrate declared a *mistrial*. The record of the subordinate court was reported for *revision* to the High Court in the course of that ruling. The revision is thus properly before the court.

8. At the hearing of the revision I allowed learned Prosecution Counsel; and, the learned defence counsel to address me generally. The accused were all present.

9. I have considered the records and materials before me and the submissions by counsel.

10. Sections 362 and 364 of the Criminal Procedure Code clothe the High Court with enormous powers of revision. Under section 364 (1) (a) the court, in the case of a conviction, may exercise the powers conferred on it as a *court of appeal* by sections 354, 357 and 358, and may *enhance* the sentence. Section 364 (1) (b) provides that in the case of any other order other than an order of acquittal, the High Court may *alter or reverse* the order.

11. The reasons why the learned trial magistrate declared a *mistrial* are myriad. But they can be compacted into four. First, the matter had passed through the hands of *seven* magistrates. Secondly, the original handwritten transcript was partly *illegible*. Thirdly, the typed proceedings had a number of *gaps*. Fourthly all the 44 exhibits produced at the trial were *missing* from the court file.

12. I am satisfied from the record that by the time the file reached the hands of A. Mwachigi, Principal Magistrate, *ten years* had passed since the original plea was taken. No less than *seven* magistrates had dealt with the matter in one way or another. Of those, *three* had taken the substantive evidence. For instance, the evidence of PW1 and PW2 was taken on 11th June 2007 by S. Ndambuki, Senior Resident Magistrate. Pages 46, 50 and 56 of the record have cancellations and overwriting. Some parts are illegible.

13. PW1 and PW2 were recalled before a new magistrate, E. Usiu, Senior Resident Magistrate on 9th June 2009. It would appear that on 19th May 2011, the charges were substituted. *Eleven witnesses* took the stand before another magistrate, E. Osoro, Senior Resident Magistrate. But the handwriting is difficult to decipher. As a corollary, the typed proceedings have worrying gaps.

14. Finally, all the 44 exhibits produced at the trial are missing from the record. It is thus not surprising that the last trial magistrate was unable to evaluate the evidence and determine whether the accused had a case to answer.

15. I thus find that the proceedings amount to a *mistrial*. I am fortified by the decision in *Abdi Adan Mohamed v Republic*, Mombasa, Court of Appeal, Criminal Appeal 1 of 2017 [2017] eKLR where the court declared a *mistrial* in nearly similar circumstances.

16. Having reached that conclusion, should this court order a retrial? The circumstances under which a retrial should be ordered are well settled. See *Patel Ali Manji v Republic* [1960] EA 343, *Ratilal Shah v Republic* [1958] EA 3, *Samuel Nguigi v Republic*, Nairobi, Court of Appeal, Criminal appeal 218 of 2007 (unreported), *Hassan Rehman v Republic* [1976-80] 1 KLR 1243.

17. In the present case, the prejudice to the accused is self-evident. The accused have spent well over ten years on the court corridors. Fifteen witnesses testified. The learned prosecution counsel freely conceded that with the loss of exhibits, it will be an uphill task to mount a new trial. It will thus *not* serve the interests of justice to order a retrial. Since the accused had *not* been placed on their defence, they are *not* entitled to an acquittal.

18. The upshot is that the accused are all *discharged*.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 31st day of May 2018

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

All the accused.

Mr. Mwangi Ben for all the accused.

Ms. Gichuru for the Republic.

Mr. Kiberenge and Ms. Dorcas, Court Clerks.