



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO.70 OF 2015

JOSEPH MWALUKU alias MWALILI.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

RULING

1. The applicant has by way of Notice of Motion dated 24th July 2015, requested that this court calls for Mombasa Chief Magistrate's Court Criminal case No. 3451 of 2009, Republic vs Joseph Mwaluku and examine the same for purposes of satisfying itself as to the correctness, legality and propriety of the order of the trial court of 14th July, 2015 and of the proceedings generally.
2. The application is supported by the grounds in the supporting affidavit sworn by Mr Kioko Maundu, Counsel for the applicant in which he has given a chronology of the events in the aforesaid criminal case.
3. The main ground of the application is that the case which was first initiated before the court on 29.10.2009, has been slated for hearing before five (5) different magistrates for more than twenty (20) occasions but never taken off for lack of witnesses. That only two witnesses have testified in the matter where several orders of last adjournment have been granted and not honoured by the various magistrates who have been in conduct of the same.
4. The applicant's counsel deponed that he and the accused person have faithfully attended court on most of those occasions ready to proceed.

It is therefore the applicant's prayer that;

- (a) the court finds the lower court's order of keeping on adjourning the case when witnesses fail to attend court for no good reason for unreasonably long period improper;
- (b) the court proceeds to acquit or discharge the accused person or;
- (c) place the matter before the learned magistrate with an order that the matter proceeds for hearing on one day only.

5. The application is made under section 362 of the Criminal Procedure code which states;

“The High court may call for and examine the record of criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality and propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court”

6. I have perused the record in Mombasa “Criminal case No 3451 of 2009, Republic Vrs Joseph Mwaluku alias Mwalili and confirm that the same was initiated on 26.10.2009 and has been pending before court since then. I also confirm that it has been handled by about five (5) magistrates and adjourned for over ten (10) times on the ground of witnesses failing to attend court for hearing. I further confirm that on a number of occasions the prosecution has been granted a last adjournment but the same has never been enforced by the court.

Article 50 (2) (e) of the Constitution provides that;

“Every accused person has the right to a fair trial which includes the right;

(e) to have the trial begin and concluded without unreasonable delay”

7. It is therefore instructive to note that the pendency of this case before court since 2009 has resulted into delay in disposing the same hence an infringement of the applicant’s right to fair trial. The court is tasked with the mandate of ensuring that the rights and freedoms of the accused person are upheld so as to save them from suffering irreparable loss, damage and prejudice.

8. While parties in a case are entitled to adjournments, the same must be granted with good reason. They must be earned. It is therefore upon the court to exercise proper control of the court process and conduct of the parties before it in light of the provisions of Article 50 (2) (e) of the Constitution and embracing the judiciary’s practices rules on case management. The court, in granting parties adjournment orders, they must be firm and judicious in enforcing them, to avoid being taken for granted.

9. Having made the above observations, I find that to grant the prosecution another adjournment would be improper and a furtherance of the infringement of the applicant’s right to fair trial.

10. I therefore order that the said **Mombasa Criminal Case No 3451 of 2009** be placed before the trial magistrate within 7 days for fixing of a hearing date on one day, which day, the prosecution to be ordered to avail their witnesses or evidence and close their case to enable the court be geared towards putting this case to a closure.

Orders accordingly.

Ruling delivered, signed and dated this 18th day of May, 2018.

LADY JUSTICE D. O. CHEPKWONY

In the presence of :

M/s Ngina, counsel for the state

Mr Olendi, counsel holding brief for Mr Maundu for the Applicant

C/clerk- Beja