REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HC.REV NO. 3 OF 2018

REPUBLIC.....APPELLANT

VERSUS

THOMAS KIPRAMOI.....RESPONDENT

RULING ON REVISION

1. The application for revision raising the same question, *[and it is relates to the same decision by the trial court made on the same date **7/2/18** on different files*] whether the trial court may lawfully close the case for the prosecution and proceed to rule on a case to answer, as a result of failure by prosecution to attend.

2. The prosecution states that it was unable to attend the trial court because there was only one prosecutor attending the 3 courts on the material date and it had 2 witness present in court that date and that it only seeks justice in the matter.

3. In its ruling declining to adjourn, the court reasoned that it could not be held ransom by the, prosecution in its failure to attend observing that it was aware that there were 2 prosecutors present at the station and no reason was given for their non-attendance and that it had given a last adjournment on 16/1/18.

4. The Respondent (Accused person) objected to the revision and urged that the trial court had given good reasons for declining the adjournment and taking the cause that it had taken, in view of the fact that a last adjournment had been given to the prosecution.

5. Upon considering the same matter in KBT Revision No. 4 of 2018, the court ruled as follows:

"REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINL REVISION NO. 4 OF 2018

REPUBLIC ..... PROSECUTOR

VERSUS

ALICE CHEPKORIR KOECH ..... 1ST RESPONDENT

MESHACK KIPRONO KOECH ..... 2ND RESPONDENT

RULING ON REVISION

*1. By ruling made on 7/2/18, the learned trial Magistrate in KBT PMCR. Case no. 453/17, **R. v. Alice Chepkorir Koech and Meshack Kiprono Koech** made an order refusing to adjourn the trial as follows:-*

"Date: 7/02/2018 1.58 PM

Coram:

Magistrate: Hon Idagwa N.M (RM)

Prosecutor: Absent

Court Clerk: Chemwolo

Interpretation: Eng/Kisw

Accused: Present

Accused Represented By:

Court – The court has been waiting for a prosecutor since 9.00 am. The accuseds have been around. As at now there is no prosecutor in court. I am aware all the other three courts are not sitting as at now. There are two prosecutors at this station at least one should be before this court. This court cannot be held at Ransom. The prosecution had a last adjournment on 16/1/18.

I have not been given any reason why a prosecutor has not attended court or why a further adjournment should be given. Besides the prosecutors were aware that the court was ready for hearing as from 9.00 am and by 1.58 pm none had bothered to appear before court. This situation was addressed by Judge Lenaola in the case of ***R B Benedict Kolorwe Kaweto*** *[2008] eKLR he held.*

'….No court should be held at Ransom by the prosecution and each Magistrate is entitled to ensure order and decorum in his court.'

In the interest of Justice and for expeditious delivery of Justice. I find the conduct of the prosecution unbecoming they being public/servants and therefore cannot take this court for granted or hold it at ransom. I do not see any reason why I should grant an adjournment in this case. I therefore on my own motion close the prosecution case. ***Ruling on a case to answer on 27/2/18.***

IDAGWA N M, RM

7/2/18

Court – The file returned to the registry for typing of proceedings for purposes of HC. CR. REV.4/18

IDAGWA N M, RM

19/2/18"

2. The record of the trial does not show whether, and by whom, the court was moved to grant the adjournment that if declined by the said ruling.

3. Aggrieved by the ruling, the DPP by letter dated 19/2/18 sought revision of the orders as follows:-

"Date: February 19, 2018

TO THE HONOURABLE JUDGE,

KABARNET HIGH COURT,

P.O BOX 66,

KABARNET.

RE: CR. CASE NO. 453/17, R VS ALICE CHEPKORIR KOECH & MESHACK KIPRONO KOECH

The above matters refers:

The above matter is before court no. 2 which is handled by Honourable Idagwa, Resident Magistrate. On the 7th day of February, 2018, the prosecutor in conduct of this case Ms Onkoba became suddenly unwell and had to rush to hospital to see a doctor. As you are aware the office of the DPP Kabarnet is experiencing a shortage of prosecutors as we are only two prosecutors manning four courts. On this material day, I was handling both court no. 1 and court no. 3. In this case two witnesses the doctor and the Investigating Officer who were remaining were present in court on the 7th of February, 2018. Unfortunately in the absence of the prosecutor, the learned trial magistrate in her wisdom closed the prosecution case and placed the matter for ruling on case to answer for 27th February, 2018.

There is no law that allows a magistrate to close a prosecution case on behalf of the prosecution. Secondly, there is no record of any

last adjournment before the case was unceremoniously closed on behalf of the prosecution. The adjournments caused in this case cannot be blamed purely on the prosecution as all parties caused adjournments. The record clearly shows that there were instances where warrants of arrest were issued against the accused persons. It was therefore not fair to close the case because the prosecutor was absent especially when the learned trial magistrate very well knew the challenge that the office of the DPP is facing currently. The shortage of prosecutors we are experiencing now is not a fault of the individual prosecutors and should not be used to frustrate our efforts or to punish innocent litigants who are seeking for justice and expect us to ensure they get it irrespective of the challenges.

The reason for this letter is to request for revision of the orders of the 7th February, 2018 by the trial magistrate by the High Court under section 362 of the Criminal Procedure Code and allow the matter to proceed to logical conclusion for justice to be done to both accused and the complainants in the matter.

ESTER MACHARIA

ASSISTANT DIRECTOR OF PUBLIC PROSECUTIONS

BARINGO COUNTY"

4. The Respondents, who are the 2 accused persons in the trial before the Magistrate's court were in this application for revision represented by Mr. Mwaita and Mr. Kipkulei on behalf of the Law Society of Kenya, Baringo chapter who took up the matter within concurrence of the Respondents and leave of the Court.

5. On 19/4/18, when the application for revision came up for hearing, counsel for the Respondents and the Respondents themselves influenced the court that they did not object to the application for revision and that they wished that case be restarted from the position where it had reached before the ruling of the trial court.

Determination

6. The application for revision is not opposed; it is conceded and the applicants with the assistance of counsel have agreed that the case may be restarted.

7. As the revision was not agreed before me, it is improper to make conclusive finding on the merits, that is whether the trial court have made illegal or irregular decision in the matter by alleged premature closure of the prosecution case on the grounds that the prosecution counsel failed to attend court.

8. *I have noted the statement of Lenaola, J. (as he then was) in* ***R. v. Benedict Kolorwe Kaweto*** [2008] eKLR that –

"No court should be held at Ransom by the prosecution and each Magistrate is entitled to ensure order and decorum in this court."

9. With respect, it would appear that there is a question whether the statement by ***Lenaola, J.*** *Support the proposition that the court has authority to close the prosecution's case, which is the time subject of the revision application herein. Indeed, section 210 of the Criminal Procedure Code appears, to require a positive act by the prosecution which adduces "evidence in support of the charge" and the taking of any submission, if any, before a ruling on a case to answer.*

10. It would also appear that the learned trial magistrate fell into anger to make a finding and conclusion not fully based on evidence before the court but on assumptions and personal knowledge of circumstances when the she said in her ruling:

"As at now there is no prosecution in court. I am aware all the other three courts are not sitting as at now. There are two prosecutors at this station at least one should be before this court. This court cannot be held at Ransom……"

11. The presence of two prosecutors as stated in the trial court's ruling is opposed in the letter seeking revision where the Ass. D.P.P. stated that she was the only prosecutor serving the courts on the material day. In this application for revision, the court is not able to delve into a determination of the issue of fact of availability, or otherwise, of prosecutors to attend the trial court.

12. The High Court has under section 81 (2) of the Criminal Procedure Code proved the transfer of Criminal cases between courts "on the report of the lower courts or on application by a party interested or on its own initiative."

13. In view of the negative sentiments of the trial court towards the prosecution, it may appear to a reasonable man sitting in court and listening to the ruling that the court may not be impartial on the prosecution case for purposes of a fair trial court as the accused persons agreed that the matter be restarted, there shall be an order for the transfer of the case to a competent court presided over by a magistrate other than Hon Idagwa, RM.

Orders

14. In consequence, the proceedings of the trial court of 7/02/18 are quashed in exercise of the High Court's revisionary jurisdiction under section 364 (1) (b) and (2) of the Criminal Procedure Code, and the case is transferred from the trial court no. 2 to another court differently constituted, pursuant to section 81 (1) (a) of the Criminal Procedure Code which provides as follows:

"*Wherever it is made to appear to the High Court –*

"*That a fair and impartial trial cannot be had in any criminal court subordinate thereto; or*

(a) ……..

(b) ……..

(c) ……..

(d) ……..

It may order-

(i) That an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;

(ii) That a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction.

(iii) *That an accused person be committed for trial to itself.*

15. For purposes of restarting the trial before another court, the matter shall be mentioned before the Principal Magistrate Court within 7 days hereof for necessary directions.

DATED AND DELIVERED ON THIS 3RD DAY OF MAY, 2018.

EDWARD M. MURIITHI

JUDGE

Appearance:-

Ms Macharia Ass. DPP for the Prosecution

Mr. Mwaita and Mr. Kipkulei for the Respondents"

6. I adopt the ruling and reasons of the court in the said decision as it applies to this revision to the same effect.

7. I would emphasise, however, that section 210 of the Criminal Procedure Code provides for an elaborate mechanism for the fair trial of criminal cases requiring the following:

i. Production of evidence in support of the charge.

ii. Hearing of such summing up, or submissions or arguments as may be put forward.

iii. Determination that a case is made out against the accused person sufficiently to require him to make a defence.

8. The consideration in s. 210 of the Criminal Procedure Code as to whether to require an accused to make a defence is not a casual matter. It requires deliberate and positive acts in the three stages outlined above. Indeed, the Court of Appeal in ***Murimi v. R*** [1961] EA 542, 545 ruled that:

"*If an accused person is wrongly called on for his defence then this is an error of law".*

See also KBT HC CR. Revision No. 2 of 2017, ***Wesley Kiptui Rutto &Anor. v. R***.

9. The prosecution alleges in the application for revision that it had 2 witnesses before the court on the day that the prosecution's case was closed by the court. Indeed, the court may not know who of the persons before the court are witnesses in what case, and the accused also may not know who will be witnesses in his case, even though he may have their written statements. I cannot find that the prosecution did or did not have witnesses before the court on the day that its case was closed by the trial court and ruling on case to answer reserved.

10. There is a sense of glaring injustice if the prosecution's case were closed by the court when 3 witnesses had already testified and 2 witnesses were before the court on the material date, merely because the prosecutor was not before the court. Further, the trial court could not reserve ruling on case to answer before taking submissions or arguments as the parties may have wished to offer in support of and in defence to the charge.

11. Granted that the trial court should not be held at ransom by the prosecutor, the court should have set the case for delivery of submissions before deliberating on whether a case against the accused had, on the evidence, been established sufficient to call on him to make his defence.

12. As in the civil process where mistake of counsel is generally not visited upon the parties, the justice of the case in criminal cases should also dictate that misconduct of the prosecutor, if proved, should not be punished on the complainant. This would be the spirit of the constitutional provisions permitting private persons to file or proceed with criminal prosecution under Article 157 (6) (b) of the Constitution and section 88 of the Criminal Procedure Code. In the matter before court particularly, the subject of the offence being alleged injuring an animal capable of being stolen contrary to section 338 of the Penal Code, the matter attains a specially private and personal interest of the complainant who would be punished by the termination of the case on account of mistake of the prosecutor. The trial court may properly have allowed the complainant to proceed with the trial pursuant to section 88 (1) of the Criminal Procedure Code, which provides for private prosecution of criminal cases as follows:

> "1. *A Magistrate trying a case may* ***permit the prosecution to be conducted by any person but no person*** *other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecution in their behalf be entitled to do so without permission*".

13. It was obvious from the record of the proceedings that the trial court was angered by the failure of any of the 2 prosecutors she was aware were in the station to attend the court yet at the time of the ruling indicated as 1.51 pm she was *"aware that as now both High Court, court 1 and court three are not sitting"*.

14. As observed in Revision Case no. 4 of 2018 above, it appears to this court that the trial court took into consideration matters that were in her personal knowledge rather than objective factors and in so doing showed herself to a reasonable person as laboring under a likelihood of bias.

Orders

15. In these circumstances, it is the duty of the High Court exercising supervisory jurisdiction, revision and pursuant to the powers under section 81 of the Criminal Procedure Code, in the interest of a fair and impartial trial of the charge herein, to direct that the trial shall be transferred for hearing and disposal by a competent court differently constituted and in accordance with section 200 of the Criminal Procedure Code.

16. The case shall be mentioned for directions as to hearing before the Principal Magistrate Head of Station within fourteen (14) days.

DATED AND DELIVERED ON THIS 26TH DAY OF JULY, 2018

EDWARD MURIITHI

JUDGE

Appearances:

Ms Macharia Ass. DPP for the Respondent

Respondent in person