REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 350 OF 2018

FROM ORIGINAL CONVICTION & SENTENCE IN

CRIMINAL CASE NO. 357 OF 2017

OF THE CHIEF MAGISTRATE'S COURT

AT MOMBASA

MOHAMMED ABDULRAHMAN.....APPEALLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G O N R E V I S I O N

1. This court's jurisdiction on review is intended to investigate and establish that the subordinate court in conducting its proceedings and coming to a conclusion has acted correctly, appropriately and legally and that the proceedings have been conducted regularly.

2. In this file, the prosecution has sought the review of the trial court order dated 29/5/2018 by which the court rejected the request from prosecution for an adjournment, had the prosecution's case closed. The record of the trial reveal that the prosecution asked the court to grant an adjournment on the basis that the investigating officer who was in court needed time to go through a document before giving evidence.

3. That application was opposed by the defense counsel on the basis that there was no ground to grant an adjournment in that even him had been supplied with the document in court but had proceeded with the case.

4. In refusing the adjournment, the trial court said that the investigating officer had been in custody of the document and the court saw no good reason to adjourn the matter. He ordered that the matter proceed. Upon that decision the prosecutor is recorded to have said:-

> ***"I leave it to the court"***

Then the court said;

> ***"Since the prosecution is not ready to proceed, the prosecutions case is closed".***

5. After the closure of the prosecution's case, it is recorded that the defense counsel sought to rely on the evidence on record and prayed for a ruling date.

6. There is no indication that the prosecutor was called upon to respond to the defense counsel's opposition to the adjournment just as there is no indication that the prosecutor was accorded the chance to put up summoning up or submissions before the court reserved it ruling under Section 211.

7. While I wholly appreciate that whether to grant or refuse a request for an adjournment is a matter entirely at the discretion of the trial court; that discretion must be aimed at achieving the justice of the case. The underlying principle is that parties must get fair and adequate opportunity to present their cases. Here, the record of the file reveal that the charge having been registered on the 6/3/2017 when the plea was taken, the charge sheet was amended on 26/9/2017 and on the same day the prosecution availed PW 1 who was heard and released and the matter stood over to the 5/12/2017. Come that next hearing date, the prosecution was ready with PW 2 who was also heard and matter

adjourned by consent to the 20/2/2018. On that third day however the matter was adjourned on account of the fact that the documents to be relied upon were still with the document examiner and matter was adjourned without objection from the defense and stood over to the 29/5/2018. Come the material day, PW 3 the document examiner was called and gave his evidence and it is after that the prosecutor made the application for adjournment I have alluded to before.

8. That history is important for the assessment whether the trial court did exercise its discretion judiciously in rejecting the adjournment application. Without substituting my discretion of that of the trial court, I do consider, noting that the case was entirely about accounting records, that the reason advanced was never entirely unreasonable.

9. In ***Republic vs Meshek Muyuri [2007] eKL*** Ouko J, as he then Was, said in relation to adjournment of Criminal case and after considering the provisions of Section 205(1) Criminal Procedure Code:-

> **"There is, therefore legal basis for adjournment of criminal trials. However in granting an adjournment, the court must not do so as a matter of course. There must be sound justification for granting an adjournment in a criminal case as the suspect is entitled under Section 77 of the constitution to a fair and speedy trial"**.

10. But fair trial does not only mean that on the face of it a decision has been reached that appear fair. No. A fair trial in a criminal case imposes a duty on the court to arrive at a judgment after accessing and considering all the relevant and important facts for its determination as to the guilt of innocence of the accused person. This is because the purpose of criminal justice system is to convict and punish the guilty and vindicate and protect the innocent. That object is only realizable where the court sets out to discover the truth. The truth in a court case lies under or within the facts availed or shown to be capable of being availed to the court for its complete evaluation.

11. It is therefore of cardinal importance that a court of law makesevery endeavor to discover and dig out the truth. This view I share with Mativo J when the judge said in ***Joseph Ndungu Kagiri vs Republic [2017] eKLR.***

> ***"A criminal trial is a judicial examination of the issues in the case and its purposes is to arrive at a judgment on an issue as to facts or relevant facts which may lead to the discovery of the facts in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question the guilty or innocence of the accused.***
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> ***Since judgment on an issue as to a fact or relevant facts which may lead to the discovery of the facts in issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused.***
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> ***Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not about over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny"***.

12. I take it that in Criminal trial, it is the evidence of the investigating officer which harmonizes and knits the other pieces of evidence and yarns same into a coherent and stable flow. Here the prosecution was not saying that they did not have the witness or the document. The prosecutor only requested to be given time for the investigating officer to "go through the documents".

13. Even though our courts are burdened with heavy workload such a request, when put in light of the previous proceedings and with the sole purpose to establish the truth in the prosecution, the trial court ought to have given to the prosecution time even if it was to be a few hours or days away. That to me would have best served the overall purpose of criminal justice. To the extent that the evidence of the investigating officer was shut out, it can be genuinely feared that justice may not ultimately result.

14. For that reason, I do find that the decision of the trial court arrived at to decline an adjournment was neither proper nor correct and that the procedure adopted to arrive at the decision was also irregular. I therefore invoke the courts power under section 362 and 364 and reverse the decision by way of revision. I set aside the order refusing an adjournment and in its place direct that the prosecution be accorded time to call the said investigating officer at the earliest opportunity as the diary of the court may permit.

Dated and delivered at Mombasa this 30th day of August 2018.

P.J.O. OTIENO

JUDGE