



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 19 of 2016

GLADYS KIANJI.....APPLICANT

VERSUS

REPUBLIC.....1ST RESPONDENT

ESTHER JEPKEMBOI TAMUNGA.....2ND RESPONDENT

RULING

Gladys Kianji, herein the Applicant, filed a Notice of Motion dated 23rd January, 2016, pursuant to Article 159 of the Constitution, Sections 9(2) &(3) of the Victim Protection Act, the inherent powers of this court and all other enabling provisions of the law. The main order ought is for the court to call for and examine the trial court file in Traffic case No. 2102 of 2012 at the Kibera Chief Magistrate's Court for purposes of ordering that the prosecution case be reopened and the remaining witnesses be called to testify.

The grounds upon which this application is premised are that the case was prematurely closed before the investigating officer and the motor vehicle inspector could testify; that the trial court issued warrants of arrest to secure the attendance of the witnesses before the case was closed and that there was a lack of seriousness in availing the crucial witnesses who happened to be public officers of the court and that the trial court ruled against reopening the case as it found that it lacked jurisdiction. It was urged that the failure to grant the application would occasion a miscarriage of justice on the part of the victim's family.

An affidavit sworn by the Applicant was annexed to the application. In it she deponed that she was the administrator of the estate of the late George Munene Kianji, who died in a road traffic accident that gave rise to the traffic case. It was her case that the prosecution's case in that trial was closed prematurely and that the investigating officer and motor vehicle inspector had failed to testify thus weakening the prosecution's case. She adds that the witnesses should be summoned to court to testify and that dismissing this application would lead to a grave miscarriage of justice. Also attached to the application is a letter of complaint dated 10th September, 2015 addressed to the Independent Policing Oversight Authority in which the Applicant raised a complaint about the handling of the trial case and the failure of the two witnesses to attend hearings.

Grounds of Opposition drawn by Arusei and Company were filed on behalf of the 2nd Respondent. Counsel urged, firstly, that the application be dismissed as the Applicant ought to have approached the

court by way of an appeal. He added that this court's jurisdiction under Section 362 of the Criminal Procedure Code was not properly invoked in that no illegality or impropriety was disclosed in the trial court record. Secondly, that under Article 50(2)(e) of the Constitution the 2nd Respondent had the right to have the trial begin and concluded without unreasonable delay. Thirdly, that the application had been overtaken by events as the prosecution's case was closed after no further witnesses could be availed. Fourthly, that the present application was an attempt by the complainant to usurp the powers of the office of the Director of Public Prosecutions which was both illegal and unconstitutional. In that case, it was stated that the application was filed with the sole intention of delaying justice.

The application was canvassed before me on 12th April, 2017 with Mr. Kurauka representing the Applicant, Ms. Aluda appearing for the 1st Respondent and Mr. Arusei & Ms. Kiget for the 2nd Respondent. Both counsel for the Applicant and 2nd Respondent's submissions mirrored on the pleadings they filed. M/s Aluda supported the application. Whilst acknowledging that the file was old, she stated that the investigating officer in the matter had been transferred to Malaba and the prosecution had done its best to avail the witnesses. Indeed, there was a witness in court on 5th June, 2015 but the defence sought an adjournment as an indication that the defence had also contributed to the delay of the trial. She submitted that the court had to balance the rights of the victim and the accused. She submitted that the trial court also noted that only the investigating officer could avail the witnesses and given his unavailability the case had to be closed. She concluded by urging this court to reopen the case in the interest of justice. Counsel for the 2nd Respondent relied on the case of **Republic v. Abdikadir Ahmed Mohamed[2013] eKLR** in asserting that the Applicant had not demonstrated that the application had merit.

I have accordingly considered the application and the respective submissions. The first issue for consideration is whether this court has jurisdiction to determine the application. The 2nd Respondent's contention is that the Applicant should have appealed. As was held in **Owners of the Motor Vessel "Lillian S" v. Caltex Oil(Kenya) Ltd.[1989] KLR 1** jurisdiction is everything and without it this court cannot take any action. The application is majorly brought under Section 362 of the Criminal Procedure Code which provides that;

The High Court may call for and examine the record of any records 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.

The provision must be read together with Article 165(6) of the Constitution which confers this court with supervisory jurisdiction over subordinate courts exercising judicial or quasi judicial function. The test then is whether there exists any impropriety, illegality or incorrectness in the decision given on the one hand or irregularity of the proceedings on the other hand. It calls the court to reexamine what transpired in the court before the case for the prosecution was closed. The 2nd Respondent was arraigned in court on 4th August, 2011 and the first witness was not heard until 21st September, 2012. PW2 and PW3 gave evidence on the next hearing date, 28th January, 2013, while PW4 and PW5 testified on 8th April, 2013 which was the next hearing date. The matter later came up for hearing severally but failed to take off as the remaining witnesses, the investigating officer and a motor vehicle inspector failed to appear. They had been bonded and summoned severally. This led the court to decline a further adjournment on 25th August, 2015 to the prosecution. The prosecution had no option but to close their case.

From the chronology of the proceedings, it is clear that there was no irregularity, incorrectness or illegality in the order issued by the learned magistrate directing the prosecution to close their case. It is also trite that under Section 364(5) of the Criminal Procedure Code, a revision would not lie where an appeal is the available remedy. But again, the court must not be bound by technicalities at the expense of doing substantive justice (**Article 159(2)(d) of the Constitution refers**). Therefore, this court has jurisdiction to in far as satisfying itself on the regularity of the proceedings and for purposes of doing substantive justice to entertain the instant application.

Further, the Applicant came to this court under Sections 9(2) and (3) of the Victim Protection Act. The same provide as under:

(2) ‘Where the personal interests of a victim have been affected, the Court shall-

a. Permit the victim’s views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and

b. Ensure that the victim’s views and concerns are presented in a manner which is not-

i. Prejudicial to the rights of the accused; or

ii. Inconsistent with a fair and impartial trial.’

(3) The victim’s views and concerns referred to in subsection (2) may be represented by a legal representative acting on their behalf.’

Further, under Section 9(1)(d)

‘a victim has a right to have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law’.

The Applicant’s role in this application is her position as the administrator of the estate of the deceased, the victim of the accident. I need not emphasize that in her own right she carries a personal interest which would warrant her to demand a fair and impartial trial. She thus has a locus standi to file this application. She was not at all usurping the powers of the DPP in this respect. Moreover, no prejudice will be occasioned to the accused if the application is granted.

It is my view that the trial magistrate’s ruling refusing to grant an adjournment may have been unexpected. She ought to have made an order for a last adjournment to the prosecution so that the prosecution knew that they had no other opportunity to avail the witnesses. Indeed this is an order that ought to be given as a matter of course. It provides an opportunity to the party to which the order is directed to adequately prepare for any eventuality, or do what is needed to ensure that the case proceeds. Whilst I think that the prosecution failed to do enough to secure the availability of the remaining witnesses, say ensure that the warrants of arrest were executed, I think justice demands that they be given a last opportunity to avail the remaining witnesses.

Let me mention that the present case can be distinguished from that of **R V Abdikadir Ahmed Mohamed case(supra)**. In the latter, a last adjournment had been given and the applicant sought to have the case reopened so as to introduce further evidence. In the present case, the complainant thinks that justice was not done by the case closing pre maturely. On my part, I think that for the failure of the court to warn the prosecution that no further adjournment would be accorded, denied them a fair platform on which they would have expected the order if they had no witnesses. I will therefore rule in favour of the Applicant.

I do not however think that any good ground was advanced to warrant the trial being transferred to another magistrate. This can only be done if the trial magistrate has since left the station.

Accordingly, I order that the prosecution case be and is hereby reopened. The file shall be mentioned before the trial court on 28th April, 2017 for purposes of fixing a hearing date. The prosecution case must be heard and closed within thirty days with effect from 28th April, 2017. The original record should be remitted back to the trial court for this purpose. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH APRIL, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. *Mr. Kurauka for the Applicant*
2. *Miss Sigei for the 1st Respondent*
3. *Miss Kiget for the 2nd Respondent*