



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKUENI**  
**HIGH COURT MISC CRIMINAL APP. NO. 1 OF 2017**

**STATE COUNSEL.....PROSECUTOR**

**-VERSUS -**

**STEPHEN NDOLO LEBO.....ACCUSED**

**RULING**

1. The accused Stephen Ndolo Lebo moves this court under Section 362 as read with Section 364 of the Criminal Procedure Code Cap 75 Law of Kenya via a letter dated 09/03/2017 in the matter of Tawa SRM CRC No.7 of 2016.
2. The complaints raised are that on 24/01/2017 while his advocate was in the process of cross examination of PW2 the trial magistrate stopped her prematurely on account of time stating that time was up and it was already 1.00 p.m. She sought to come at 2.00 p.m. to proceed with the same exercise but the court insisted that the time was up and thus the accused advocate obliged.
3. The second limb of complaint is that on 06/03/2017 when the matter was due for further hearing the advocate was late as she was travelling by way of a bus from Voi where she resides as same bus had mechanical problems.
4. She passed the same information to the court via her client/accused. The trial magistrate gave the accused 10 minutes to fetch his advocate failure of which the case was to proceed.
5. After a while the court called the matter again but as the advocate had not arrived, the trial magistrate directed that the matter to proceed.
6. The prosecution witness testified and as the accused was not able to cross examine him in absence of his advocate the prosecution closed its case. The court proceeded to make a ruling that the accused had a case to answer and put the accused on his defence.
7. The accused was further unable to proceed with his defence without his advocate and thus the court ordered that the judgment was to be delivered on 28/03/2017.
8. The accused advocate thus seeks revision on the basis that the provisions of *Article 50 of the constitution on fair hearing, Section 28 of the Criminal Procedure code* with regard to procedure followed after accused has pleaded not guilty and *Section 211 of the Criminal Procedure Code* with regard to giving accused person adequate time to prepare defence were violated and thus no fair trial accorded to the accused person.
9. Upon receipt of the said letter of complaint, the court did direct on 20/03/2017 that the subordinate

court file be placed before it for perusal of the proceedings and directions thereof.

10. On 27/03/2017 the accused advocate and the state counsel appeared in court for directions and the two addressed the court.

11. The accused advocate reiterated the content of the letter of complaint. The accused also attended the court. The state counsel opted to leave the matter to the court.

12. The court has perused the record on dates in which the complaints are founded. On 24/01/2017, the court notes that the accused advocate cross examined PW2 and thereafter the prosecutor re-examined the same witness. The prosecution thereafter sought another date and the accused advocate never raised any objection to the adjournment.

13. There is nowhere on the record indicating that the cross examination was stopped by the court nor is there record as to the application of the advocate for further cross examination at 2.00 p.m. or for another date.

14. Between 24/01/2017 to the date of the instant complaint 09/03/2017, no complaint was raised over the interference with the cross examination on 24/01/2017. The court finds no substance with regard to the complaint on the conduct of the proceedings of 24/01/2017.

15. The court notes from the record that on 06/03/2017, when the matter was called, the accused informed the court that his advocate was on the way.

16. The prosecutor stated that, it was 10.35 a.m. and the advocate was not in court and thus sought the witness present evidence to be taken.

17. The court then gave the accused 10 minutes and thereafter the court called the matter and ordered same to proceed. The court is recorded to have stated "After 10 minutes at 10.45 the defence counsel is not in court yet." Accused is recorded to state:- "I shall proceed".

18. The PW4 proceeded in chief to testify and when the accused was offered opportunity to cross examine the witness he is recorded to have stated that he had no questions for her. The prosecution thereafter closed the prosecution case.

19. The accused response was that he did not wish to submit. The court thereafter delivered a ruling holding that the accused had a case to answer and did put the accused on his defence. The accused response after ruling was that "I wish to remain silent". The court thereafter fixed date for judgment on 28/03/2017.

20. Article 50 (2) states that, ***Every accused person has the right to fair trial which includes the right:-***

***(c) to have adequate time and facilities to prepare a defence.***

***(d) to choose and be represented by an advocate, and to be informed of this right promptly.***

***(h) to have advocate assigned to accused person by the state and at state expenses, if substantial injustice would otherwise result, and to be informed of this right promptly.***

21. The above stated elements of fair trial are part of the drivers of the proceedings in judicial process. Article 25 states that the following rights ..... shall not be limited .....

### **(c) The right to fair trial**

The Accused in our instant matter having opted to have an advocate to represent him in the defilement charges, it can be presumed that he apprehended suffering substantial injustice if he was to conduct his

defence in the trial unrepresented.

22. In view of the content of the Constitutional provisions set out above, the court had option of either waiting for the advocate within a reasonable time not surely 10 minutes or adjourn to another date to enable the accused to procure his own advocate or get an advocate assigned by state under Article 50 (2) (h) or even hire another advocate of his own choice.

23. The charge the accused was facing would on conviction attract long sentence and thus trial without an advocate of his own choice or assigned by the state would occasion him substantial injustice.

24. To have expected the accused who was expecting his advocate in court to cross examine the prosecution witness, submit, give defence within such short range of time is by any standard unreasonable and impinges on the rights to fair trial.

25. The court thus finds that, the proceedings of the day did not meet the thresh hold of fair trial as set out in Article 50 (2) of the Constitution of Kenya.

26. In the case of **KOTUT –VS- R (2006) eKLR (MISC CIVIL APP 416/06)** the court held that it has supervisory jurisdiction under the constitution and was entitled to move on its own motion or on application by an accused or any party to stop any unfair trial taking place in the lower courts.

27. The issue of fair trial is central to the High Court supervisory jurisdiction. See also Article 165 (6) and (7) Constitution of Kenya.

28. The court will therefore direct that the proceedings in TAWA SRMCRC No. 7/016 be reopened for rehearing of the PW4 and thereafter the due process to follow under the strict observation of the elements of fair trial under Article 50 (2) of the Constitution of Kenya. The net effect is that proceedings of 06/03/2017 are nullified and set aside to that extent.

29. The court therefore certifies the order as herein directed for observance by the trial magistrate accordingly.

**SIGNED DATED AND DELIVERED AT MAKUENI THIS 19<sup>TH</sup> DAY OF APRIL, 2017.**

**C. KARIUKI**

**JUDGE**

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