



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HC CR. REVISION NO. 9 OF 2017

REPUBLIC.....APPLICANT

VERSUS

PAUL MASAI KIMWELI.....1ST RESPONDENT

JOSEPH KIOKO MULAMBA alias ENYUNDE....2ND RESPONDENT

RULING

1. The Applicant moved court via Chamber Summons dated 03/10/2017 under Section 8 Judicature Act, Section 362 CPC and all enabling provisions of the law seeking the order of revision of proceedings of 25/09/2017 of the trial court in Makueni Cr. No. 360/2017; *inter alia*.
2. The Application was supported by the grounds on the face of the Summons and an Affidavit of ANN PENNY M. GAKUMU, State Counsel sworn and filed on 03/10/2017.
3. The Application was served upon the accused advocate but they opted not to oppose the same but instead left to the court to decide the matter.
4. The genesis of the complaint herein can be traced in the proceedings of 22/09/2017 to 25/09/2017.
5. On 22/09/2017, it was scheduled for hearing after the court had heard 4 witnesses by close of business on 31/07/2017. The court had fixed hearing dates on 04/12/2017 but on learning that the trial magistrate was on transfer, on 06/09/2017 the hearing dates were changed to 22/09/2017.
6. Come 22/09/2017 the prosecution was not ready with remaining witnesses and thus sought an adjournment terming it "THE VERY LAST ADJOURNMENT".
7. The court adopting same term granted the very last and final adjournment to both parties. The matter was fixed for further hearing on 25/09/2017.
8. The prosecution has a witness DCIO Kibwezi by 9.00 a.m. The Trial Magistrate did not sit until 2.45 p.m. by that time the only prosecution witness present had left by 2.00 p.m. on account of a security meeting at Kibwezi.
9. When the Trial Magistrate appeared at 2.45 p.m., the State Counsel tried to explain the circumstances in which the witness was summoned for a security meeting and thus she could not proceed.
10. The court which had clearly failed on its duty of sitting in time rejected the application by the

prosecution was reflected and prosecution forced to close its case pre-maturely.

11. The Defence proceeded and there was no cross examination for the reasons best known by the State Counsel present in the material date.

12. Obviously the court violated the tenets of fair hearing provided and anchored on the provisions of Article 25(c) Constitution of Kenya. Same applies both to the Defence and the Prosecution.

13. **Article 25.** Despite any other provision in this Constitution, the following;

(a) Rights and fundamental freedoms shall not be limited.

(b) Freedom from torture and cruel, inhuman or degrading treatment or punishment.

(c) Freedom from slavery or servitude.

(d) The right to a fair trial; and

(e) The right to an order of habeas corpus.

14. Pursuant to the provisions of **Section 362 of the Criminal Procedure Code**, the High Court is mandated to call for and examine the record of any criminal proceedings before any subordinate court. The purpose for which the High Court is so mandated is to satisfy itself as to the following;

“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.”

See **LIVINGSTONE MAINA NGARE -VS- REPUBLIC [2011] EKLR.**

15. The powers of the High Court on revision are spelt out in section 364 of the Criminal Procedure Code. Of relevance to the matter before me is section 364 (1) (b) which clothes the High Court with power;

“In the case of any other order other than an order of an acquittal, (to) alter or reverse the order.”

16. The learned trial magistrate found no merits in the prosecution’s application for adjournment in view of the circumstances created by the trial court.

17. Clearly, that was an order of the court. Therefore, it falls within the ambit of **section 364 (1) of the Criminal Procedure Code**. And this court can inquire into its correctness, legality or propriety. In other words, this court has the requisite jurisdiction to inquire into the findings and the orders made by the learned trial magistrate, with a view to revising it, if the court should find it necessary to do so.

18. The High Court can and should exercise its jurisdiction if it was satisfied that any finding, sentence or order recorded or passed; or the regularity of any proceedings of any court subordinate to the High Court, did not meet the required standards of correctness, legality or propriety.

19. I now need to ask myself whether or not the findings and order made by the learned trial magistrate, on the matters in issue, fell foul of the required standards of correctness, legality or propriety.

20. The court ought to have considered that by its delay in sitting, it occasioned the circumstances which occasioned the sought adjournment. It was court occasioned adjournment not by either party.

21. The season the country was in was of high security alert occasioned by the ongoing campaigns for the presidential elections after the general elections of 08/08/2017 and the nullification of presidential election on 01/09/2017. This could have been taken judicial notice of.

22. Thus for DCIO to go at 2.00 p.m. for security meeting could have been taken into account.

23. In the circumstances of the case, I find the court acted unfairly to the prosecution and thus the proceedings of 25/09/2017 cannot stand.

24. Thus the court makes the following orders.

i. The proceedings of 25/09/2017 are hereby set aside.

ii. The judgement date is vacated.

iii. The matter to be placed before Court No. 1 for directions with a view of either proceeding from where prosecution case had reached by the 25/09/2017 or otherwise as provided by the provisions of the CPC.

iv. The matter to be tried by any other Magistrate other than C.O. Nyawiri, SRM.

v. Being offence under Election Offence Act No. 37/2016, the same be heard on priority basis.

SIGNED, DATED AND DELIVERED THIS 18TH DAY OF DECEMBER, 2017.

C. KARIUKI

JUDGE

.....