



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

HCCRREVISION . NO. 2 OF 2015

AUGUSTINE NDEREBA MWANGIAPPELLANT

-VERSUS—

REPUBLIC RESPONDENT

RULING

***(BEING AN APPLICATION FOR REVISION OF THE ORDER OF E.BETT AG SENIOR
(RESIDENT MAGISTRATE OF 11th DECEMBER 2014)***

1. **AUGUSTINE NDEREBA MWANGI** the applicant has a pending criminal trial before the Chief Magistrate court at Nanyuki being Criminal case No. 458 of 2014. In that case the applicant was charge with four counts. On the **first count** applicant was charged with the offence of being in possession of fire arm contrary to **Section 89 (1) of the penal Code**. On the **second count** he is charged with the offence of being in possession of ammuniton **Contrary to Section 4 (1) as read with Section 3 (2) (a) of the Firearm AC T CAP 114**. On the **third count** applicant was charged with the offence of rape contrary to Section 3 91) (c). Finally on the **fourth count** applicant was charged with robbery violence contrary to **Section 296 (2) of the Penal Code**.

2. Applicant's request for revision is captured in applicant's letter filed in court on 24th April, 2015.

3. The reason that the revision was not dealt with any earlier by the court was because the High Court at Nanyuki was made operational in September, 2015 when the Hon. the Chief Justice posted a Judge to serve in this court. The revision file for the applicant was first opened in High Court at Nyeri and later was transferred to High at Nanyuki.

4. The applicant's request for revision, in his own words., is on the following grounds:

1. *My Lordship I have applied for this case to be transferred out of court no. 3 severally and I prove this with the above dated applications that the court keep on insisting for I to proceed in the same court where by through my observation any rights are violated.*
2. *My Lordship I complained for dissatisfaction on the same by the response of the trial magistrate while he stopped me from cross-examining the complainant that I required him to exactly identify and establish the crystal pure truth on the alleged handcuffs.*
3. *My Lordship I have discovered in accurate exercise of the administration of justice in the course process of the hearing of the matters in question before court.*
4. *My Lordship I as the accused person have every right to make any dispute and challenge the evidence adduced by the complainant and the prosecution witness before court for the*

administration of justice to be productive and exercise as stipulated by the constitution of Kenya under the act of the law.

5. I pray that the High Court will intervene and give directions upon its observation. So therefore i seek for remedy at the high court.

5. Those grounds are directed at the Lower court's Ruling in Criminal Case No. 458 of 2014 delivered on 11th December, 2014. That Ruling was in regard to the applicant's application for the trial Magistrate to disqualify himself on the following grounds;

- a. *That the accused (applicant) was not given time to ask his question.*
- b. *That the court allowed the witness to answer questions the way he [it] wanted.*
- c. *The court declined to give the accused a chance to parade handcuffs for the witnesses identification.*
- d. *That the court prosecutor was seen with the investigating officer and the complainant talking and holding his file.*

6. The learned trial Magistrate in part, stated as follows in his Ruling

“I wish to briefly respond to the issue as under on the issue of the accuse (applicant) but (sic) being sufficient time to ask question the same is unfounded as the court on two occasions has stood down P W 1 to enable the accused exhaust his question. The cross-examination of P W 1 is till on going with regard to the mode of answering questions that accused says that the court allowed the witness a chance to answer question the way he wanted and not (sic) the court does not have control and neither is the accused on the manner in which a witness is supposed to answer questions. However the court cannot restrict the witness from answering question.

It is all (sic) argued that the court declined to allow the accused a chance to parade other handcuffs for the witness to identify on this no such handcuffs were availed other than the ones in court that the court declined the accused to use them for comparison. What is apparent is that the accused asked a question as is captured on the record and the witness answered.

On the issue of handcuffs being availed in court the accused can make a substantive oral application which was (to) be considered if allowed an order will issue to the office of the prosecution to source e for handcuffs.

With regard to the issue of the prosecution being seen with the investigating officer and the complainant. I find as submitted by the prosecution there nothing wrong the prosecution (did) if as submitted by the prosecution for pre-trial purposes.

Finally, I wish to note that this is the 2nd application by the accused of this nature. The court has been very accommodative of his every request- firstly on a multiple occasions he has requested for statements and other documents and the court has even had to adjourn or stand down witnesses to enable him get the required items. Those parties made a request that his case be heard on a priority basis and the court granted the requests and ordered hearing on a day to day basis.

This cross-examination of the witnesses has been long and as the record will bear that it has been afforded at the time and even witness stood down due to time.”

7. The above extensive reproduction of the lower court's proceedings, in my view, is necessary to enable better understanding of the back ground of the applicant's application for revision.

8. The revision was opposed by the principal prosecution Counsel Mr. Tanui. In opposing Learned Counsel Mr. Tanui stated that the trial Magistrate in making the order, reproduced above, was exercising

his judicial discretion. Further that the Learned trial court always has control of judicial time which control was used when applicant was cross examining P W 1. On the issue raised by the applicant that the prosecution was speaking to his witness, learned counsel stated that that action is in keeping with pre-trial preparation that is undertaken by the prosecution.

9. Learned Counsel Mr. Tanui submitted that applicant had failed to show any mischief on the part of the trial court and that contrary to applicant's submission, the applicant, under the Constitution of Kenya, was entitled to a speedy trial, which the trial court gave applicant.

10. The High Court's power to undertake revision of the lower court's order is found under **Section 362 of the Criminal Procedure Code Cap 75**. That Section provides:

“The High court may call for and examine the record of any 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.”

11. In the case **REPUBLIC - V- BAKTASH AKASHA ABDALLA & 3 others [2014] eKLR** the court in considering a request for revision of the lower court's order stated:

“Therefore in order to persuade the High Court that its intervention by way of review is warranted the applicant... must demonstrate that the orders made by the trial court were incorrect, lacked legal foundation or were inappropriate in the circumstances.”

12. I have perused the lower court record and proceedings of the trial. Having done so I find that there was no illegality or impropriety in the trial court's proceedings. The applicant in my view was accorded opportunity to obtain the prosecution's witnesses statement, and was allowed to cross examine those witnesses. There is nothing in proceedings of the lower court that require the intervention of this court by way of revision. The allegations made by the applicant are uncalled for and without basis.

13. It is for the above reason I decline to revise the order of the trial court and also decline to order the transfer of the trial from court No. 3 Nanyuki Chief Magistrate's court.

14. I order that the trial of the Criminal case No. 45 of 2014 in the Chief Magistrate's court at Nanyuki to proceed for hearing to conclusion expeditiously at court No. 3. In that regard I order criminal case No. 458 of 2014 to be mentioned before court No. 3 Nanyuki Chief Magistrate court on 29th February, 2016. The applicant **AUGUSTINE NDEREBA MWANGI** shall be produced before that court on that date

15. It is so ordered.

Dated and Delivered at Nanyuki this 25th February, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Kiruja

For state

For Appellant

Appellant

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE