



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK SUB-REGISTRY

CRIMINAL REVISION NO. 3/2016

1. SAMUEL NGARUIYA KABARU

2. MOHAMED BULLE ADAN

3. DANIEL KARANJA MUCHEMI.....APPLICANTS

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

(Being an application for revision against orders in Narok CM's Cr. Case NO. 932/13 – T. A SITATI SRM)

1. Pursuant to the application for revision filed on 11th March 2016 by Messrs Kamwaro and Kilele who are acting for the accused persons in Narok CM's Cr. Case No. 932/13, I have called for and perused the proceedings in the said case.

2. The defence complaint is 3- pronged. It is stated that;

- a. the trial court allowed the recall of a witness, PW3, despite objections made by the defence, for purposes of producing new material that had come up post his earlier testimony.
- b. that while counsel were attending to matters in the High Court on 29/2/16, the trial court proceeded to take the evidence of the investigating officer in the absence of counsel. Although counsel did eventually come to court, they were thereby denied the opportunity of hearing the evidence of the witness from the beginning.
- c. that the ruling under section 211 of the CPC was delivered and the accused put on their defence in the absence of the defence counsels.

3. I note from the record that despite the ruling above, the defence has not yet been made because on 7/3/16 counsel notified the trial court that the matter had been referred to the High Court for orders.

4. The defence counsels have emphasised in the application the serious nature of the charges facing the accused persons, and the severity of the penalty thereof. It is their contention that the **“conduct of the court in manner it has handled the proceedings herein violates the accused persons right to a fair trial”**.

5. The powers donated to this court to call for records of subordinate courts and to make revision orders are found in section 362 and 364 of the CPC. Section 362 states as follows;-

“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 irregularity of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate courts”.

6. This wide power must be exercised by this court in a judicious manner lest it appears that the High Court has taken over the role that belongs rightfully to the trial court to try the case before it. In my view, the court’s intervention, if any, must be aimed at ensuring that both substantial and procedural justice requirements are complied with and that justice is done and seen to be done in the subject trial.

7. Any person on trial, including the accused in this case who are facing a criminal trial relating to serious charges, has the right to a fair trial in all its manifestations. Additionally, every public trial entails a public interest element, and hence the wider interests of justice will also come to play. On this latter point, I note that the subject trial commenced in November, 2013 and 7 witnesses have testified to date. Clearly a lot of public resources have gone into the trial. This court would be slow to intervene in a manner that would lead to more delay to the prejudice of the accused persons, and against the interest of the expeditious administration of justice. Thus I have taken time to read through the proceedings related to the impugned decision and actions of the trial court.

8. With regard to the decision to recall PW3, I note that the trial court heard the parties’ submissions and retired to write a considered ruling. The merit of the said ruling or the probative value of the evidence tendered by PW3 during the recall in my opinion, are matters that properly belong to an appeal if any will be brought, depending on the outcome of the trial. This court cannot take an invitation at this stage to dislodge the trial court’s decision on the question of recall and substitute it with its own decision, for that would be the effect of reviewing the impugned ruling. The first complaint therefore cannot succeed.

9. I have also carefully considered the complaint regarding the proceedings conducted on 29/2/16. The record shows that the hearing slated for 2.30pm did not start until 4.13pm. However Mr. Kilele, who undoubtedly had other criminal trials before the High Court, had appeared earlier before the trial court at 12.24pm and addressed the court in the following terms;-

“I am for A2/A3 (Accused NO. 2 & 3) we shall be ready from 3.00pm as earlier indicated”.

At 4.13pm neither Mr. Kilele nor Mr. Kamwaro, who also had trials in the High Court were present. Hence the court ordered that the matter proceed, and PW7 was put in the witness box.

10. The record further shows that Mr. Kamwaro walked in just as the witness completed the introductory part of his evidence, and he was followed within moments by Mr. Kilele. At that point, counsel did not ask to have the evidence of PW 7 start afresh or be read back to them. Indeed at that point neither counsel addressed the court. Thus a large portion of the evidence of PW7 was given in the presence of both counsel. Equally, at the close of the evidence the two counsel took to the cross-examination of the witness without any objection.

11. The cross-examination session itself took some time and at the end of it neither counsel raised any application with regard to PW7. Neither of them indicated that they desired to make submissions after the

prosecution indicated closure of its case. The proceedings of the day do not show that the trial court had been notified that the defence counsels were also engaged in trials before the High Court. Thus it is difficult to lay the blame on the trial court entirely for the fact that PW7 commenced his evidence in the absence of the defence counsels.

12. The ruling was set for 2/3/16 and although no time indication had been given, the file had to be put aside by the court on its own motion to await the advocates at 3.50pm on the appointed date. The advocates had neither appeared nor seemingly sent any counsel to explain to the court their failure to attend the ruling. It is true that both counsel had matters in the High Court as the court was hearing murder cases in Narok that week. The accused persons however did not inform the trial court about the engagement of their counsel in the High Court. The trial court *suo motu* adjourned the ruling to the next day. The court did deliver its ruling on the said date, 3/3/16, whereupon the accused persons made an election under Section 211CPC and a defence hearing date was taken.

13. While in my view counsel must also take blame for failing to promptly communicate with the court on the material dates, it is also this court's view that having read out the ruling, the trial magistrate should, in all fairness, have given such adjournment as necessary to enable the accused persons to consult with their counsel regarding their election under section 211 CPC and also on directions as to hearing dates. In my view, no prejudice would have been caused by such limited hiatus between the ruling and election.

14. The defence had during the trial robustly challenged the prosecution witnesses through cross-examination. It was necessary to grant them time to prepare for the final and critical limb of their defence. That way, justice would not only be done but be seen to be done. The right to a fair trial includes the right to representation by counsel of the accused's choice and, opportunity to prepare a defence.

15. In view of all the foregoing, I find that the 3rd complaint by the defence has some merit. As I intimated earlier, this court must in the circumstances of this case exercise its revision powers in a manner that does not usurp the role of the trial court. The finding of a case to answer is no doubt premised on the trial court's perception of the merit of the prosecution case and in my view is not amenable to revision by this court under the present circumstances.

16. However, the further steps taken by the court pursuant to the ruling delivered in the absence of defence counsel though of themselves not irregular, incorrect or illegal appear in the instant case do not seem to accord strictly with the spirit of article 50 (2) of the Constitution as regards the elements of fair trial. I will therefore set aside the directions and proceedings taken by the trial court in respect of compliance with section 211 CPC, and the subsequent order fixing the defence hearing date.

17. I direct that the accused persons and their respective counsels appear before the trial magistrate on 4th May 2016 so that fresh proceedings relating to the provisions of section 211 CPC can be conducted. Upon the accused making their election a convenient hearing date will be taken for the defence and or submissions so that this old matter can be concluded with dispatch.

18. For this purpose the lower court file will be returned to the trial court. A copy of this ruling to be supplied by the Deputy Registrar to the Advocates appearing for the Accused persons and the ODPP.

Written and signed at Narok on this 26th April 2016.

C. MEOLI

JUDGE