



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISCELLANEOUS CRIMINAL APPLICATION 183 OF 2016

REPUBLIC.....APPLICANT

VERSUS

SIMON ATAVACHI MUKABWA..... RESPONDENT

RULING

The Applicant, the office of the Director of Public Prosecutions, in a letter dated 5th October, 2016 made an application for revision under Section 362 and 364 of the Criminal Procedure Code, CAP 75 of a ruling of the trial court in **Criminal Case 392 of 2015; Republic v. Simon Atavahi Mukabwa**.

It is important to set out the background to this application. The matter came up for hearing on 4th October, 2016 before the Chief Magistrate's court No. 12 at Milimani. The Applicant was ready with three witnesses, namely; the government analyst, the government doctor and a doctor from Nairobi Women's Hospital. The Applicant prayed for an adjournment and the issuance of another hearing date as the witnesses were not available in court as doctors would only avail themselves on any date that fell on a Monday. However, the court rejected the application citing that it had given the Applicant a last adjournment and would not entertain any further adjournment.

Learned State Counsel, Ms. Ntabo submitted that despite informing the court of these challenges the court disregarded them and ordered that the case stand closed due to a lack of witnesses. They thus sought to have this ruling, closing the Applicant's case reviewed. She submitted that the decision is one that would be highly prejudicial to the complainant, a two year old. It is requested that this court be pleased to order the trial court re-opens the Applicant's case for purposes of proceeding with the matter to the logical conclusion.

The Applicant, represented by Ms. Ntabo, gave oral submission which mirrored and built on the aforementioned letter. The Respondent also gave oral submissions in which he submitted that he had been in custody for a year and a half since the matter begun. He submitted that during the first year no witnesses were brought to court by the Applicant and that there was no justification for the delay in the case. He submitted that the Applicant did not give any reason why the doctors were absent on 24th August, 2016. Further that he had not been supplied with the medical document. He submitted that the Applicant had him at a disadvantage throughout the trial by failing to supply him with the means to build a defence. He submitted that the Applicant had not made the necessary steps to bond his witnesses which pointed to his laxity in the matter.

This court has been called upon to exercise its powers of revision of the ruling of the lower court. The

ruling was made on 4th October, 2016 when the prosecution's case was ordered closed on account of failure to avail witnesses. In doing so, the trial court reiterated it had granted a last adjournment on 7th September, 2016 and that a hearing was meant to proceed without fail. It further set out that the Applicant did not explain any reason for the absence of the witnesses. The court then offered the Applicant the chance to either close its case or withdraw the matter under the provisions of the law. Once again, and true to form, the Applicant left it to the court. The court then went ahead and closed the Applicant's case and set 27th October, 2016 as the ruling date *on whether a prima facie* case was established.

The court feels that a chronological view of the proceedings in this case is necessary to get to the root of the propriety or otherwise of the ruling. The accused was arraigned in court on 3rd March, 2015. The matter came up for mention on 17th July, 2015 and 14th September, 2015 and on the latter date one the court did warn the Applicant to avoid delaying the prosecution was warned against further of the trial. When the matter next came up in court on 21st and 29th September, 2015 the Applicant informed the court that the police file was unavailable and sought two weeks to reconstruct it. The matter next came up for hearing on 8th October, 2015 but the file was yet to be reconstructed. The accused objected to an adjournment but the court granted one and summons issued for the OCS Ngong, Police Station to appear in court. The next time the matter came up in court was 14th October, 2015 when the Applicant informed the court that they had successfully reconstructed the file and a hearing date was then set. On 11th December, 2015 the complainant called to testify. However, as the *voire dire* examination was being conducted the Applicant applied to stand her down. It should be noted that the Applicant had indicated he had two witnesses ready but after standing down the complainant did not call the next witness.

The matter was then heard on 11th February, 2016 and the prosecution informed the court that they had three witnesses and were ready to proceed. The matter was slated for a hearing later in the day. When the court resumed the prosecution applied to have the matter transferred to the Children's court as the environment of the court was not conducive to the complainant owing to her tender age. The matter was however returned to the Criminal court on the following day. The matter was next heard on 29th March, 2016 on which date the prosecution informed the court they had three witnesses ready to proceed but the accused was not ready as he was yet to be furnished with the statements in the case. The matter was then transferred to another court and when it was heard on 3rd June, 2016 the accused once again prayed for the court to orders the prosecution to supply him with the medical documents.

The matter next came up for hearing on 21st June, 2016 on which date the prosecution informed the court that they did not have the police file. The matter was therefore adjourned to 5th July, 2016 on which date they once again lacked the police file. The same reason was used to ask for an adjournment on 17th August 2016. On 22nd August, 2016 when the matter next came up for hearing the prosecution once again sought to rely on the lack of the police file to seek an adjournment. This time however, the court refused to grant one and the matter was allocation time for hearing later in the day. When it came up the prosecutor informed the court that he had contacted the investigating officer in the case and that she had informed them that the witnesses would be availed the next time. The court, in reliance of this undertaking, ruled that all witnesses be availed on the next hearing date, 24th August, 2016.

On 24th August, 2016 four witnesses testified. The fourth witness was stood down to grant her a chance to produce the complainant's birth certificate and a DNA sampling report. The accused did not object to the request. On 5th September, 2016, the prosecutor went to court seeking an order that more time be given to avail DNA sampling results. A hearing date was fixed for on 7th September, 2016. On the date the report was not ready and the court set 28th September, 2016 as the next hearing date. On this date the prosecutor informed the court that the report was ready but logistical issues meant it had not arrived yet. A mention was set for the next day to ensure that the report had been received and a hearing date set for 4th October, 2016. On the next hearing date, the prosecution was not ready and the court's refusal to grant an adjournment culminated into this application.

It is clear from the record that the Applicant had ample opportunities to set the case in motion but a series

of events seemed to halt any progress in this case. The issues complained of and that led to the Applicant asking for constant adjournments might be legitimate but a perusal of the record shows that the Applicant relied on the issue of the police file being unavailable too often. Furthermore, after the file was reconstructed it later went missing for three hearing dates. But it resurfaced when the court refused to grant an adjournment on 22nd August, 2016.

The entire proceedings taken cumulatively, demonstrate that to a large extent the prosecution has contributed to the delay of the trial. In fact, the tendency appear to be deliberate albeit, at the expense of justice. Surprisingly, even when the DNA report was availed, no reason was given as to why the necessary witness to adduce it was not in court. This court recognizes the right of an accused to a fair hearing under Article 50 of the Constitution. This right includes but is not limited to an expeditious disposal of the trial. As the adage goes ‘*justice delayed is justice denied*’ a delay of the trial infringes an accused’s right to a fair trial. But even in recognizing this constitutional provision, the court must balance justice for all parties involved in a matter. In the case, complainant and her family are eagerly awaiting for a fair disposal of the case. Of most concern is the hapless victim who cannot fight for herself. In as much as the prosecution has been indolent to expedite the trial, a fair decision can only be arrived at if all the witnesses were given an opportunity to testify. In recognition of this observation, the remaining witnesses are expert witnesses. The court recognizes the difficulties of availing such expert witnesses not only because of their limited number but also because of their busy schedule in the ordinary course of their duties and their requirement to testify in various courts. This is the factor that the trial court should have taken into account and availed at least one more chance, fixed on an appropriate date when the witnesses would be available. It is for this reason I would reluctantly order a re-opening of the prosecution’s case so as to avail the prosecution another chance to call all the witnesses.

Again, the age of the matter in court is approximately one and a half years. This by no means cannot be regarded as such a long period as to contribute to an extremely delayed trial. In that respect, I will give the prosecution a window of only one month to avail their remaining witnesses. In considering this time length, I am minded that the Respondent is in remand and an expeditious trial is not a choice but his right. In that period, they should be in a position to select convenient days of the week which the various expert witnesses can testify.

In the end, the application is determined in favour of the applicant with the following orders

- a. The order of the learned trial magistrate of 4th October, 2016 closing the prosecution case is hereby set aside.
- b. The same is substituted with an order that the prosecution’s case be and is hereby re-opened.
- c. The prosecution is given 30 days from 31st October, 2016 to avail their remaining witnesses.
- d. The matter shall be mentioned before the trial magistrate on 31st October, 2016 for purposes of fixing a suitable hearing date.

DATED AND DELIVERED AT NAIROBI THIS 25TH OCTOBER, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Ms. Sigei for the Applicant

2. Respondent in person