

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 180 OF 2016

PAUL MURAYA NJOROGE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The original trial court file was forwarded to this court with a view to examining the proceedings of the record of 27th September, 2016 for purposes of this court satisfying itself as to the correctness, regularity or propriety of the order of the trial magistrate recorded on the said date closing the prosecution's case. This court is urged to invoke its revisionary jurisdiction under Section 362 of the Criminal Procedure Code and order a re-opening of the prosecution's case so as to allow both the investigating officer and the doctor who conducted the postmortem to testify.

The Respondent herein is the accused in **Milimani Traffic Case No. 15781 of 2014 R vs Paul Muraya Njoroge** in which he was charged with causing death by dangerous driving contrary to Section 46 of the Traffic Act.

The case for the Applicant who is the DPP and Prosecutor in the trial is that although the prosecution had been granted a last adjournment, when the trial came up for hearing on 20th June, 2016, parties had already agreed that the doctor should testify before the investigating Officer. On this date, although the investigating officer was in court, the court was informed that the doctor was out of the country and would return at the end of September, 2016. That therefore, although a hearing date for 27th September, 2016 was fixed, the doctor was yet to return. In that case, it was irregular of the magistrate to order the close of the prosecution's case when it was within her knowledge that the doctor would not be available. Furthermore, the doctor's evidence was so crucial to the prosecution's case as it was the postmortem that she conducted that would establish the cause of death of the deceased. The court was urged to balance justice for all the parties in the trial, more particularly for the family of the deceased who would want the case concluded in a just manner.

I have perused the record of the trial. By no means, the case is old as plea was taken on 11th June, 2014. On 17th November, 2015, the prosecution was granted the last adjournment. On this date, the court was informed that the last witness had not been bonded. Four witnesses had so far testified. The next date for hearing was 30th May, 2016. The prosecutor informed the court that although he had one witness in court, he would prefer that the doctor testifies first. The case was therefore adjourned to 20th June, 2016. I note however the date of 20th June, 2016 is indicated as 20th May, 2016. It is on this date that again the court was informed that the doctor was out of the country up to September, 2016. But again it is also the prosecutor who requested for a date in September and by consent of all parties, 27th September was fixed as the hearing date. Come this date, the prosecutor asked for adjournment on account that there was no police file available. The defence objected on account that prosecution had been granted a last adjournment. In overruling the prosecution, the court noted that the prosecution had been indulged on nine occasions. That, in as much as the family of the victim was entitled to a fair trial, in the same manner, a delayed trial was prejudicial to the accused. And since no witness was available in court, the trial magistrate ordered the prosecution case closed and gave a date for submissions on 6th October,

2016. This ruling is what aggrieved the Applicant culminating into this application.

I am alive to the fact that justice should be balanced both for the accused on one hand and for the prosecution and the victim on the other hand. I am also aware that justice delayed is justice denied. The Respondent has faithfully attended all the court sessions since he took plea on 11th June, 2014, but more than two years down the line the trial has not been concluded. In the instant case, it is the prosecution that requested for a date in September, they cannot now come to court to state that the doctor was not available in the month of September. Be that as it may, I take note of the fact that the investigating officer has always been available to testify save that the parties had agreed that he should testify after the doctor. Therefore, I would think that that is the reason he was not available on 27th September, 2016. In my view, notwithstanding that the doctor was absent, the prosecution should have mitigated to avail the investigating officer. That way, although the trial was to close the evidence of the investigating officer would have been on record. The family of the deceased would have observed an attempt to do justice in availing the witnesses who were ready to testify. I have therefore agonized with this matter and come to a conclusion that justice can only be balanced if the witnesses who are available are given an opportunity to testify. Whilst the prosecution would have done more, I will allow them to present their case but within the shortest time possible. I am informed in arriving at my decision purely in the interest of justice. The prosecution must take advantage of this window of extended time to ensure that they do their part.

Accordingly, I set aside the order of the learned magistrate dated 27th September, 2016 ordering the close of the prosecution's case. I substitute it with an order that the prosecution's case be and is hereby forthwith re-opened. The prosecution is granted 14 days from the date of this ruling to avail its remaining witnesses, failing which the learned trial magistrate shall apply the law accordingly. The matter will be mentioned before the trial magistrate tomorrow, 18th October, 2016 for purposes of fixing a suitable hearing date. It is so ordered.

DATED and DELIVERED this 17th day of **OCTOBER, 2016.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Ms. Kirimi h/b for Ms. Ng'ang'a for the Applicant.*
- 2. Ms. Gikonyo for the Respondent.*