



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO.155 OF 2016

MICHAEL EZRA MULYOOWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Notice of Motion dated 10th August, 2016 was filed pursuant to **Sections 362, 364, 365 and 366** of the **Criminal Procedure Code** and **Articles 50, 159 and 165(6) and (7)** of the **Constitution 2010**. The court is asked to invoke its revisionary jurisdiction to set aside proceedings of 4th August, 2016 before Hon. Jalang’o in Makadara Chief Magistrate’s Court, **Cr. Case No. 1027 of 2010 – Republic vs Michael Ezra Mulyoowa**.

The said criminal trial was initially heard by Hon. Nyongesa, SRM who took the evidence of seventeen (17) witnesses. Thereafter, he was transferred to Gatundu Law Courts. The only remaining prosecution witness was the investigating officer. His evidence was taken by the succeeding magistrate Hon. Jalang’o, SRM. According to the Applicant, during the hearing of the evidence of the investigating officer (PW18), the prosecution attempted to produce several documents to which the defence objected. This happened on several instances and the learned magistrate despite not delivering rulings on the objections allowed the production of the exhibits. The fatal blow to the defence was the magistrate’s holding that rulings on the objections would be made after close of PW 17’s evidence. That this of course would be prejudicial to the defence and amounted to a violation of right to a fair trial of an accused who would not properly chart his defence. In that respect, the Applicant opines that Hon. Jalang’o cannot accord the Applicant who is the accused in the trial a fair hearing. It is the Applicant’s prayer that the trial be sent back before Hon. Nyongesa who is still available to complete the taking of the reminder of evidence.

The Applicant further is of the view that, although initially Hon. Nyongesa could not complete the trial as she was under suspension by the Magistrates and Judges Vetting Board, she had since been cleared and was within reach by all the parties. Further, that no prejudice would be occasioned to any of the parties and more particularly the prosecution if the matter is sent back for hearing before Hon. Nyongesa.

The Respondent opposed the application by way of a Replying Affidavit sworn by Gitonga Muranga, a Prosecution Counsel in the office of the DPP sworn on 6th September, 2016. It is deponed that there is no justifiable cause for transferring the trial to Gatundu law Courts where Hon. Nyongesa is stationed as the Applicant conceded to having the matter proceed from where it had reached after Hon. Nyongesa ceased

the conduct of the trial. For that reason, Hon. Jalang'o is ably in a position to handle the trial and a transfer of the case from him would be tantamount to choosing a specific judicial officer to hear the matter. Furthermore, no prejudice would be occasioned to the Applicant as he would be given an opportunity to cross-examine the witness. It is deponed that Hon. Jalang'o would be in a position to evaluate the evidence taken by Hon. Nyongesa as the latter would have recorded the demeanor of any witness. Furthermore, Hon. Nyongesa was out of duty for a period of over one year during which time she could have forgotten the evidence and demeanor of the witnesses. There was therefore no legal basis or any impropriety or incorrectness of the trial record to warrant a revision of the order of Hon. Jalang'o declining to transfer the matter to Gatundu Law Courts before Hon. Nyongesa for further hearing. It was urged that the application be dismissed.

Learned counsel for the Applicant, Mr. Wandati in emphasizing the need for Hon. Nyongesa to hear the trial to the endm, submitted that it was apparent from the record that the Applicant would not receive a fair trial as prudence demanded that a ruling is made after each objection is raised and argued. The failure by the current trial magistrate to make rulings on objections promptly prejudiced the Applicant in that he would not be in a position to prepare his defence. He also submitted that there was no basis for the argument by the Respondent that Hon. Nyongesa may have forgotten the demeanor of the witnesses or the evidence taken as she personally interacted with the witnesses and the documents. Furthermore, the case for which Hon. Nyongesa was suspended from service was quite unrelated to the present trial.

Learned State Counsel Miss. Aluda for the Respondent submitted that after directions under Section 200 of the Criminal Procedure Code were taken by the succeeding magistrate, the Applicant voluntarily stated that he was comfortable with the matter proceeding from where it had reached. He had therefore submitted to the jurisdiction of the court which was currently hearing the trial. She contended that the learned magistrate currently in conduct of the trial promptly delivered all the rulings on all the objections raised by the defence. It was therefore questionable why the Applicant was specific that the matter should be heard by Hon. Nyongesa who is currently stationed at Gatundu Law Courts. Further, Ms. Aluda submitted that it was not appropriate that the matter be sent to Hon. Nyongesa who had had several complaints filed against her before Judicial Service Commission. In that case, Hon. Jalang'o was an independent magistrate who should finalize the trial.

I have accordingly considered the rival submissions. The proceedings of the trial show that on 4th August, 2016, learned counsel for the Applicant Mr. Mutua made an application before Hon. Jalang'o that the trial be sent back to Hon. Nyongesa as she had since been reinstated by the Judicial Service Commission (JSC) and that she had already taken the evidence of a total of seventeen (17) witnesses. The learned magistrate declined the request as he noted it would delay the trial. To this extent, this court cannot fault the said ruling. Parties had taken directions under Section 200 of the Criminal Procedure Code and the Applicant had agreed that the matter proceeds before another magistrate from where it had reached. That implies that the Applicant was willing to be heard by any other magistrate other than Hon. Nyongesa. Again, the prosecution was also ready to proceed on the spot. An adjournment would have further delayed the trial.

In the present case though, the Applicant is of the view that the process of a fair trial has already been compromised by the manner in which Hon. Jalang'o is conducting the trial; more specifically his failure to deliver rulings on the objections raised by the defence regarding the production of some documents.

The evidence of PW18 was taken on 4th August, 2016. The first objection that was raised by the counsel for the Applicant was on production of prosecution exhibit 44(b). It was argued that the document was not authored by the witness but the accused. Further, that no basis had been laid for the witness to produce the document. The prosecution countered the objection. Interestingly, the magistrate did not make a ruling on the objection but stated that the ruling would be made at a later stage and parties informed accordingly.

PW18 then continued with the evidence in chief. Defence counsel again objected to the production of MFI-15, 16 and 17 which were bank statements, MFI-18 (certificate of incorporation of Sun Space Company), MFI -20 (Memorandum and Articles of Association of the company) and a folder. The basis

of the objection was that the documents were recovered from the Applicant by other officers whose identity was not disclosed. Further, that no bank official had authenticated the documents. Once again, the prosecution opposed the objection citing that the documents had been recovered by a known police officer and had been identified by PW5. Similarly, Hon. Jalang'o did not rule on the objection but made a remark that "**determination on the production at a later stage**". PW 18 was allowed to continue with evidence in chief.

Soon thereafter PW18 introduced yet another document, account opening document in the name of the Applicant. The defence counsel once again objected to its production as they had not been identified by a bank official as authentic bank documents. They allegedly were obtained from Uganda. In opposing the application, the prosecutor invoked the Mutual Legal Assistant Act, specifically Section 63. In the same style, no ruling was made by the learned magistrate who noted "**the determination of production of document to be made later**".

Once again, PW18 was allowed to continue with evidence in chief. The prosecution closed that case and cross-examination and re-examination of the witness was closed without a ruling on the objections being made. It is at this stage that the Applicant asked for certified copies of proceedings recorded by Hon Jalang'o which culminated into this application.

It is not only procedural but legal that a trial court should make a ruling on any objection made instantly before allowing further evidence to be adduced. It is clear that the basis on which the objections by the defence were made was not frivolous but hinged on the strength or otherwise of the prosecution's case. Rulings on the objections would have availed the defence an opportunity to chart their defence and cross examination of PW18 who was a key prosecution witness. I need not emphasize that a majority of the questions in the cross examination would hinge on the said documents. As at the time PW18 closed his evidence in chief, the impugned documents had not been produced, raising weighty questions on how the defence would have mounted their defence. It also laid bare the prosecution case as in attempting to produce them, the prosecution wished they be considered as evidence in their case.

It is the duty of the court to ensure that a fair trial is accorded to all the parties in a trial. That is to say that the scale of justice must be balanced for all parties in the trial. Clearly, in this case, the manner in which the evidence of PW18 was taken vitiated the trial. It represented an irregularity on the record which irregularity can only be corrected by invoking Section 362 of the Criminal Procedure Code.

Having made the above observation, it is safe to conclude that the Applicant would not be accorded a fair trial before a magistrate who is oblivious of how proceedings should be recorded in a trial when objections are raised. I hold that the entire evidence of PW18 recorded by Hon. Jalaong'o is a nullity and must be set aside.

The next issue is whether the said magistrate should re-hear the witness. With the obvious errors that the magistrate has made, the defence is skeptical of being accorded a fair trial before the said magistrate. On the other hand, the prosecution contends that taking the file back to Hon. Nyongesa would amount to forum shopping, more so because the magistrate was faced with complaints before the JSC. My view is that a good trial should be conducted by one magistrate, unless where, for various reasons, the trial magistrate is unable to complete the trial. The rationale for this is that the trial magistrate who takes the evidence of a witness freshly registers it in his mind and is unlikely to forget the disposition of the witness. He can recall this evidence with clarity when writing judgment. He is able to record any demeanor of the witness that is likely to influence the outcome of a trial. He is the person better placed to conclude a trial than a succeeding magistrate. That is why it is not unusual that trial magistrates are sometime recalled to their former stations for purposes of concluding trials. In rare instances, a file can also be sent to where the trial magistrate is currently stationed if no party would be prejudiced by the move.

But this is a case where one party is not comfortable with the previous trial magistrate continuing with the trial. In fact, on record is a lengthy ruling dated 24th October, 2013 by Hon. Nyongesa in which she declined a call by the complainant to disqualify herself from the trial. Although she found the grounds

advanced by the complainant unsubstantiated, as the adage goes, **“justice must not only be done but be seen to be done”**, I do not think in the circumstances she is the appropriate magistrate to continue with the trial.

In the end, I give the following orders;

- a) The proceedings recorded by Hon. Jalang’o in Makadara Cr. Case No. 1027 of 2010 – Republic vs Michael Ezra Mulyoowa on 4th August, 2016 be and are hereby set aside.
- b) The said Cr. Case No. 1027 of 2010 be transferred for hearing from Hon. Jalang’o to another magistrate with competent jurisdiction at Makadara Law Courts.
- c) The matter be mentioned before the Magistrate in charge of the station on 17th October, 2016 for purposes of fixing a hearing date before another magistrate other than Hon. Jalang’o.

DATED and DELIVERED this 11th day of OCTOBER, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Wandati h/b for E. Mutua for the Applicant.
2. Miss Sigei h/b Miss Atina for the Respondent.