



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL REVISION CASE NO. 24 OF 2014

REPUBLIC.....APPLICANT

VERSUS

JACKSON MWALAO.....1ST DEFENDANT

DICKSON NDUATI NDUNGU.....2ND DEFENDANT

RULING

The Republic who is the applicant herein in its application dated 28th November 2014 seeks for revision of the order of the Embu Senior Principal Magistrate Anti-corruption Case No. 30 of 2008 made on 14th November, 2014 closing the prosecution's case before a vital witness of the prosecution testified. The application is brought under Section 362 and 364 of the Criminal Procedure Act.

The facts leading to this application as demonstrated in the application drawn by Timothy K. Miiri, prosecution counsel is that the case came for hearing before the Senior Principal Magistrate on 14th November 2014 in presence of all the parties including the counsels for the Respondents Mr. Eddie Njiru and Mr. Njeru Ithiga. The prosecution were not ready to proceed because their witness the document examiner was not in court and that the investigating officer who would have produced the experts report did not have that report in court. The prosecution applied for adjournment which was granted up to 2.00 p.m. that day.

The applicant explains that the investigating officer had to travel all the way to Thika that morning to pick the report of the document examiner and then return to Embu for the hearing in the afternoon. The state counsel argued that he understood the order of the court to be that adjournment was given up to 5.00p.m. He said that he honestly believed that he had up to the end of the working day (5.00 p.m.) to avail his witness. For the better part of the afternoon, Mr. Miiri said that he concentrated in making telephone calls to the investigating officer to find out how far the witness had travelled towards Embu from, Thika. The witness arrived in Embu after 4.30 p.m. By the time the prosecuting counsel and the witness went to court ready to produce the report of the document examiner, the court had made an order to close the prosecution's case.

The prosecution explained that the document examiner was not available to attend court personally because he was sitting for an examination on that day. The applicant's plea to this court is to set aside the order closing the prosecution's case to allow the investigating officer to produce the report of the document examiner.

The application was opposed by the respondents through their counsels Mr. Eddie Njiru and Mr. Njeru Ithiga. It was argued that the prosecution were granted adjournment by the court up to 2.00 p.m. to avail their witnesses and not 5.00 p.m. The court convened in the afternoon at 2.00 p.m. and at 3.30 p.m. but

the prosecutor and the witness were not present. The court was therefore in order to close the prosecution's case. The respondents argued that there was nothing incorrect or illegal for this court to review. Further that the case is an old one of 2008 and several adjournments have been granted. It was their contention that this application lacks merit and ought to be dismissed.

The history of the case from the record is that it is a 2008 one. A total of 19 witnesses were heard by chief magistrate M. Wachira before she was transferred to another station. The current trial magistrate Hon. Biwott took over the case and heard the 20th witness. The case was then closed on the 14th November 2014 which order is the subject of this application. In the course of hearing the 20 witnesses, the case was adjourned severally for different reasons and on application of both the prosecution and the defence. At the time the order to close the prosecution's case was made, only one witness was left. The issues for determination are:-

Whether the magistrate was right to close the case at that stage; whether he accorded fair hearing to the parties and whether the applicant has satisfied the Court that that he had a good cause to be absent from court at the time the case was scheduled for further hearing.

The prosecutor's explanation is that he was under the honest belief that he had been given time up to the end of the day to bring his witness which he believed was 5.00 p.m. and that he was in court by 4.45 p.m. just to find that the court had called out the case and made orders for closure. His witness had travelled to Thika and come with the document to be produced.

I have looked at the application made by the prosecutor for adjournment. From the proceedings, it was not clear that the prosecution were facing any predicament especially in regard to their last witness. The court was not told that the investigating officer had to travel to Thika to collect the document examiner's report. The prosecuting counsel did not explain that the document examiner was sitting an examination that day. If he did, I believe the court record would bear him out. Even if the counsel was not aware of those facts in the morning when the case came up for hearing, he should have found an appropriate time to call the defence counsels and go before the magistrate so that he could explain his predicament. I am of the opinion that if the court was aware of difficulties the prosecution was experiencing, would have given due consideration to the matter.

The court must have pronounced its order to the parties that adjournment was up to 2.00 p.m. There is a possibility that the prosecuting counsel got the time all wrong or assumed he was given up to the end of the day 5.00 p.m. to avail his witness. It appears that was his honest belief in that he turned up in court at 4.45 p.m. when his witness arrived. The order by the magistrate to close the prosecution's case was on the premise that all parties were in clear communication that the hearing was to be at 2.00 p.m upon granting the adjournment. Did the prosecuting counsel deliberately fail to attend court at 2.00 p.m.?

I have no good reason to dismiss the explanation of the prosecuting counsel that he honestly believed he had been given up to the end of the day to call his witness as not genuine. In granting adjournment, the magistrate indicated that the case of the prosecution has "to be concluded today" which could have been interpreted by the prosecuting counsel to mean up to the end of the working hours for the day. I am convinced that the mistake of the prosecuting counsel was not deliberate and should not be re-visited on the republic. The effort made by the prosecution in regard to the investigating officer travelling to Thika to pick the document examiner's report was not a mean task and should the court have been properly briefed, the magistrate in the interests of justice ought to have considered expanding the time of availing the witness up to the close of the day.

When the court convened at 2.00 p.m., the prosecuting counsel was not present. It adjourned the matter to 3.30 p.m before it closed the case. There was no communication between the court and the prosecuting counsel in regard to both sessions for the reason that the counsel was nowhere to be seen. The counsel's action of not coming to court to explain his predicament cannot go uncondemned. The counsel ought to have used due diligence to follow up his case.

In deciding a matter of this nature, the court must consider the bigger picture of all the parties affected by

the order made by the court. The order was made on the premise that the prosecution were crystal clear that the case was to come up at 2.00 p.m which was not the case. Both parties in a case should be accorded fair hearing in accordance with Article 50 of the constitution. Taking into consideration that only one witness was remaining for the prosecution to close their case, it is in the interests of justice that the irregularity which resulted from breakdown of communication be cured. The orders if granted are not likely to prejudice the respondents.

For these reasons, I exercise the powers conferred to me under Section 362 and order that the order of the magistrate made on 14th November 2014 be set aside. The prosecution's case is hereby opened for purposes of the evidence of the document examiner. Case to be mentioned before Hon. Biwott on 28/1/2015 for fixing a hearing date.

It is hereby so ordered.

DELIVERED, SIGNED AND DATED AT EMBU THIS 21ST DAY OF JANUARY, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Onjoro for the Applicant

Ms. Muriuki holding brief for Mr. Ithiga for 2nd Respondent and for Mr. Njiru for 1st Respondent

F. MUCHEMI

JUDGE