

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. 72 OF 2014

(Application for review of the orders of Hon. Ondieki in Chief Magistrate's Court

Kibera Criminal Case No.2130 of 2014)

SILVESTER MAINGE DUNCAN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant has come to this court seeking to invoke this court's revisionary powers under **Section 362** of the **Criminal Procedure Code** to set aside the proceedings of the trial court of 12th September 2014. The Applicant complains that his right as provided by **Article 50(2)(g)** of the **Constitution** to be represented by counsel of his choice was infringed when he was denied an adjournment. Counsel for the Applicant states that she had been instructed two days prior to the said hearing date and had therefore had insufficient time to prepare for the case – this is despite the fact that in the proceedings before the trial court – it is indicated that the same counsel had indicated that she had been instructed a week earlier. Ms. Atina for the State opposes the application. She argues that the trial court correctly exercised its discretion in refusing to grant the adjournment sought because it was balancing the rights of the accused and that of the complainant. She further argued that the trial court was under a duty to hear the case without undue delay.

Having carefully considered the rival argument made in this application, it was clear to the court that the trial court was within its jurisdiction to decline to grant the adjournment sought by the applicant. The right guaranteed by the Constitution for the accused to be represented by counsel of his choice does not override other constitutional provisions that require the court to be fair and just to both the accused and the complainant in the case. This court notes, from the proceedings, that the accused's counsel was actually given ample time to prepare for the case on that particular day. This was not the first time that the accused had sought adjournment. However, the accused's counsel declined to take up the chance that she was given to prosecute the case. This court reiterates that the right of an accused to be represented by counsel of his choice does not, and cannot be the only factor during trial of a case.

In the present case, it was clear that the accused was not ready, under any circumstance, to proceed with the case. This was apparent even when his counsel was given time to prepare the case. More often than not, it is the court which is blamed for indulging parties who seek to adjourn cases without sufficient reasons. In the present case, this court cannot fault the trial court for exercising its discretion to refuse to grant the adjournment. The application by the Applicant herein lacks merit and is dismissed. However, for the interest of justice, the court directs that the accused's counsel will be given an opportunity to recall the witnesses who she may wish to recall for the purpose of cross-examination. This does not mean that the case is being reopened. Far from it. The accused should also be prepared to proceed with the case on the day the same shall be scheduled for hearing by the trial court. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF JULY 2015

L. KIMARU

JUDGE