REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 87 OF 2014

REPUBLIC……..……APPLICANT

VERSUS

JOHN FAUSTINE KINYUA……..…..…….RESPONDENT

RULING

This revision follows a directive by the learned trial magistrate at the Chief Magistrate's Court at Nairobi in ACC. Case No.17 of 2012 that this file be placed before this court to make an interpretation of Hon Justice Mbogholi Msagha's order in his judgment in Cr. Appeal No. 305 of 2009 directing that a retrial be conducted within 14 days. A brief summary of the case is that following a conviction in case No. ACC. No.24 of 2007, the Applicant (who was then the Accused) appealed in Criminal Appeal No. 305 of 2009. The appellate judge ordered that he be retried in a court of competent jurisdiction within 14 days. The file was sent back to the trial court. During the hearing, the Applicant by way of Notice of Motion dated 8th August 2013 sought orders that the proceedings be declared out of time and a nullity, and that he be set free. The grounds for the application can be condensed into one which is; that the state did not commence the proceedings within the stipulated time. A Preliminary Objection was raised by the Respondent. It was premised on several grounds which are condensed into one namely; that the subordinate court in which the application was raised lacked jurisdiction to hear the application as per Article 165(6) of the Constitution and that the proceedings would delve into the issue of whether the High Court could limit the powers of the DPP by placing time limitations in preferring charges against a suspect.

After considering the submissions by the Applicant and Respondent, the learned trial magistrate ruled that the order that the retrial be conducted within 14 days emanated from a superior court to a subordinate court. Further, the learned judge while ordering that the Appellant be retried within 14 days did not state what should be the resultant consequences if the order was not complied with. The trial magistrate then ruled that it was un-procedural for the subordinate court to purport to make a finding on what the learned judge meant. She ruled that the correct procedure was to have the file placed before the Appellate judge for further directions/orders on the matter.

When the file was brought before me, both the Applicant and Respondent presented their submissions. Mr. Mwenda, who was the Applicant's counsel, presented both written and oral submissions which revolved around the fact that the High Court ordered a retrial to be conducted within a specific period of time which the trial court failed to do. He asked that the case be terminated. He submitted that instead of making a ruling, the learned trial magistrate referred the matter to the High Court which was an error on the face of the record.

In response, Mr. Murithi, counsel for the Respondent wished to refer to the submissions filed in the lower

court. He submitted that a retrial having been ordered, the file ought to have been sent back to the lower court. He submitted that the prosecution ought not to be penalized for a mistake they did not occasion. His view was that sending the file back to the lower court will not in any way prejudice the Applicant.

Both parties have voiced their submissions. The file having been referred to this court for revision, it is only proper that I refer to Sections 362 and 364 of the Criminal Procedure Code.

Section 362 spells out the extent of the powers of revision of this court. It provides that:

"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Section 364(1) which is of our interest provides that:

*"**in the case of a proceeding in a subordinate court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-***

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

In the present case, the revisional powers of this court are limited to determining the propriety of the decision of the learned trial magistrate. An application was filed by the Applicant to have the case terminated on ground that the case was filed out of time. The Respondent opposed the application by filing a preliminary objection dated 16thJanuary, 2014 as already mentioned above in the Respondent's submissions in the trial court.

The view of this court is that the learned trial magistrate was mandated to make a ruling on the application as opposed to sending the file to this court. The ruling would centre on whether or not the case having been commenced for retrial outside the 14 days as ordered by the learned judge, had been instituted out of time and was therefore a nullity. The trial court shielded itself from its noble duty, and precisely to state, ran away from its responsibility which, of itself, is an impropriety on the record. Based on the ruling that the trial magistrate would have made, any party would then have moved to this court by way of an appeal or a revision.

Learned counsel for the Applicant observed that the failure to conduct the retrial within the time ordered violated the Applicant's right to a fair trial as provided for under Article 25(c) and 50(2) (e) of the Constitution. He referred the court to the cases of **HON. JOHN NJOROGE CHEGE VS D.P.P NAIROBI CONSTITIONAL PETITION NO. 150 OF 2015** and **JULIUS KAMAU MBUGUA VS REPUBLIC NAIROBI HC CRIMINAL APPEAL NO. 50 OF 2015** in which it was stated that the failure to hold a trial within a reasonable time violates the accused's right to a fair trial as enshrined under Article 50(2) (e) of the Constitution.

The Court was also referred to the case of **SANDERSON VS THE ATTORNEY GENERAL, EASTERN CAPE 1988 (2) S.A 38 CC** in which Kriegler J. of the Constitutional Court of South Africa delivered himself thus:

"The qualifier "reasonableness" requires a value judgment. The question in the case is whether the burdens borne by the accused as a result of delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence and become in itself a form of extra-crucial punishment."

While referring to the above case law, Mr. Mwenda submitted that the reasons the prosecution advanced before the trial court pertaining to commencing the retrial late were falsehoods and unreasonable.

It is not in dispute that the retrial began outside the time as ordered by the appellate judge. However, I am not at this time intent on evaluating the merits or demerits of the arguments advanced by either party

before the learned magistrate. Those arguments ought to be contained in the ruling that the learned magistrate should have written. Doing so would not only pre-empt the findings of the Lower Court but also render as a nullity my view that the leaned magistrate ran away from her responsibility of writing a ruling.

In the result, this file is hereby sent back to the Magistrate's Court in Nairobi for mention on 4/11/2015 before the Chief Magistrate. The latter shall direct that either the file be sent to the magistrate who heard the submissions or that the ruling be written by another magistrate if the law allows it. Any party dissatisfied with the ruling may thereafter move the High Court appropriately. It is so ordered.

DATED and **DELIVERED** this **29th** day of **October, 2015.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Mwenda for the Applicant

2. M/s Aluda for the Respondent