



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.176 OF 2015

REPUBLIC.....APPLICANT

VERSUS

ISMAEL RIOBA.....RESPONDENT

RULING

The Applicant was aggrieved by the decision of the trial court made on 30<sup>th</sup> March 2015 in **Nairobi Chief Magistrate's Court Criminal Case No.1303 of 2014 Republic –vs- Ismael Rioba**. In the said Ruling, the trial court directed that the case, which was substantially part-heard before another magistrate (who had however been transferred), to start *de novo*. The Applicant was aggrieved that the trial court had failed to take into consideration that the case had been heard and concluded and what was required of it was for the court to write the judgment. The Applicant was of the view that the decision made by the trial court for the case to start *de novo* would occasion injustice on the prosecution because some of the witnesses who testified in the case cannot be traced. It was because of that reason that the Applicant was invoking this court's revisionary jurisdiction to set aside the said order requiring the case to start *de novo* and refer the case back to the trial court for the purposes of the Judgment to be written.

During the hearing of the application, Ms. Lang'o for the State reiterated the contents of the application. She urged the court to allow the application for revision. The Respondent, who was acting in person, left the issue to be determined by the court. This court has perused the proceedings that are the subject for this application for revision. The Respondent was charged with **stealing** contrary to **Section 268(1)** as read with **Section 275** of the **Penal Code**. The particulars of the offence were that on 2<sup>nd</sup> September 2014 at Gloria House along Ronald Ngala Street in Nairobi County, the Respondent stole the sum of Kshs.35,000/- the property of Eston Njuguna. The Respondent pleaded not guilty to the charge. From the record of the court, it was clear that the Respondent could not raise bond or deposit cash bail. He has been in remand custody from the time plea was taken on 11<sup>th</sup> September 2014. It was clear to this court that if the Respondent had pleaded guilty to the charge, most probably, he would have either been fined or sentenced to serve a custodial period of less than one year. For reasons that are not of his making, the Respondent has remained in remand custody while awaiting trial for an offence that is essentially a misdemeanour.

Under **Section 362** of the **Criminal Procedure Code**, this court has powers to call for and examine the proceedings before any magistrate's court with a view of satisfying itself of the correctness, legality or propriety of any order, finding or sentence recorded or passed. In the present case, it was clear that the order made by the trial court to the effect that the case against the Respondent starts *de novo* would occasion an injustice to the Respondent. It would infringe the respondent's constitutional right under **Article 50(2)(e)** of the **Constitution** to have his trial begin and be concluded without unreasonable delay. The trial court did not take into account that the Respondent had been in remand custody at the time for a period of nine months which is more than the period that he would have been sentenced to serve if he was found guilty. The Respondent is in reality a victim of procedural injustice. He has been in remand custody for fourteen months while awaiting the conclusion of his case. The period that he has stayed in remand custody is more than the period that he would have been sentenced to serve if he was found guilty.

In the premises therefore, the order that commends itself to this court is for the Respondent to be discharged. The case against the Respondent is ordered terminated forthwith. The Respondent is ordered released from prison and set at liberty forthwith unless otherwise lawfully held. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2015**

**L. KIMARU**

**JUDGE**