REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 203 OF 2015

DIRECTOR OF PUBLIC PROSECUTION……APPLICANT

VERSUS

LAWRENCE GITAU NG'ETHE……RESPONDENT

RULING

Pursuant to **Section 362 of the Criminal Procedure Code**, this court is asked to call for and examine the record in Gatundu Chief Magistrate's Court **Criminal Case Number 931 of 2009, Republic vs Lawrence Gitau Ng'ethe** with a view to satisfying itself as to the correctness, legality, propriety or regularity of the ruling of Hon. A.N.Maina, Principal Magistrate delivered on 10th June, 2015 denying the prosecution their prayer to withdraw the case under Section 87 of the Criminal Procedure Code. The request for revision is contained in a letter dated 3rd September, 2015 signed by Keitany Maximillan J, prosecution counsel, Gatundu on behalf of the Applicant.

The content of the letter is that, on 27th May, 2015, the trial came up for hearing before Hon. D. M. Toigat, Resident Magistrate. On this date, the prosecution did not have the police file as well as witnesses. They applied for an adjournment but the same was declined after the court noted that the prosecutor had previously been given a last adjournment. The prosecutor then applied that the case be withdrawn under **Section 87(a) of the Criminal Procedure Code** which the court also declined to grant. Instead of ordering that the matter proceeds with hearing, Hon. Maina set it for mention on 22.06.2015 before the trial magistrate for further directions. Interestingly, on this date the matter was still mentioned before Hon. Maina. On this date the prosecution had their last witness in court and they applied to have him testify. The request was objected to by counsel for the Respondent on ground that the prosecution, having been disallowed to withdraw their case under Section 87(a) of the C.P.C. meant that they had to close their case. Hon. Maina concurred with the defence and consequently the prosecution was forced to close their case. In light of this backdrop it is hoped that the court addresses the following issues:

1. Whether the magistrate having taken over the matter from her learned sister could lawfully issue substantive orders without first dealing with **Section 200 of the Criminal Procedure Code**.
2. Whether the trial magistrate could lawfully deny the prosecution the chance to call its last witness, having delivered a ruling denying the prosecution's application for withdrawal of the case yet the case was still on the prosecution's side.
3. Whether the magistrate could lawfully proceed to force the prosecution to close its case prematurely, even though its last witness was in court having travelled all the way from Mombasa.

4. Whether the learned magistrate could lawfully declare that she did not have powers to review her learned sister's orders despite being a more senior court.
5. Whether a court that is not the court on record can during a mention, deliver a ruling and issue substantive orders.

Oral submissions were made before me on 9th November, 2015. Learned State counsel M/s Keitany reiterated the contents in her letter seeking the revision. She argued that the magistrate who delivered the ruling denying the prosecution the withdrawal of the case under Section 87(a) of the Criminal Procedure Code did not take directions under **Section 200 of Criminal Procedure Code**. She submitted that when the matter was last before Hon. Toigat, they did not have their witnesses and police file in court. She contended that when the ruling was delivered by Hon. Maina, the prosecution had a witness in court and the court was informed as such, and therefore it was irregular to order that the prosecution closes their case.

Learned counsel for the Respondent Mr. Mboha, vehemently opposed the application. He urged the court to note that on the date that the adjournment was refused, the prosecution did not have their police file and witnesses in court. The prosecution had also been granted a last adjournment and had not heeded to availing witnesses in court. In any case, Hon. Maina had only read the ruling on behalf of Hon. Toigat which was a procedure allowed by the law. Furthermore, directions under **Section 200 of Criminal Procedure Code** had been given and taken on 27th May, 2015 when the defence indicated that it wished to proceed from where the matter had reached. In that regard, Mr. Mboha submitted that there was nothing before the court for revision as in any event, the Respondent had been put on defence which had been scheduled for hearing on 17th November, 2015. He urged the court to dismiss the application.

I have accordingly considered the respective submissions. First and foremost, I wish to affirm that the ruling denying the prosecution their request to close the case under **Section 87(a)** of the **CPC** was written by the then trial magistrate Hon. S. N. Toigat (Mrs), Resident Magistrate. She wrote and signed the same on 28th May, 2015. The file thereafter moved into the hands of Hon. A.N. Maina, PM on 10th June, 2015 who delivered the said ruling. As at that time, the matter had not been set for hearing and so directions under Section 200 of the C.P.C. were unnecessary.

On whether Hon. A. Maina could review the orders of Hon. S. M. Toigat, is an issue that can be discerned from the record. When Hon. Maina took over the conduct of the matter on 27th May, 2015, the defence indicated that under Section 200 of the CPC, they were ready to proceed from where the matter had reached. As at that time, the prosecution had called five witnesses. The prosecution was not ready to proceed. The matter was placed aside twice to enable the Investigating Officer to arrive with the police file but he never arrived. This prompted the court to disallow the application for adjournment from the prosecutor. The prosecutor's request to withdraw the case under **Section 87(a) of the CPC** was also disallowed in the ruling that was delivered by Hon. A. Maina. Hon. A. Maina thereafter took over the conduct of the matter. On 22nd June, 2015, learned prosecutor addressed the court with the words that the ruling implied that the prosecution could still continue with its case. She informed the court that she had a witness who she wanted to call. This request was opposed by counsel for the Respondent (accused). The learned counsel argued that if the court allowed the prosecution to call a witness, it would be reviewing an order made by a magistrate of concurrent jurisdiction. It would also amount to an adjournment which had been disallowed. The learned magistrate Hon. A.N. Maina concurred with counsel for the defence and she disallowed the prosecution to call their witness.

At this point I wish to point out that both learned magistrates presided over a court of concurrent jurisdiction. Unless where the law conferred specific jurisdiction on either of them, based on their designation, any of the magistrates could adequately review an order of the other magistrate. But in the instant case, the learned magistrate, A.N.Maina did not in any way review the ruling of Hon. Toigat. What she did was to purport to interpret the ruling of Hon. Toigat. That ruling was written in simple words which this court expects she clearly would understood. Unfortunately, given the circumstances prevailing in court at the moment, she got it all wrong. Suffice it to note, the ruling was delivered on 10th June, 2015. As at this date, notwithstanding that the prosecution was disallowed to withdraw their case

under **Section 87(a) of CPC**, they did not apply to close their case. Therefore, it naturally followed that, on 22nd June, 2015, if their witness was in court, the learned Hon. A. N. Maina, ought to have allowed them to call him or her. This would not have amounted to allowing an adjournment. But had the prosecution on this date indicated that they had no witness, the court would have had no alternative but to compel them to close their case. But the reverse was the position. It is the view of this court then that the learned magistrate Hon. A. N. Maina did not properly address her mind on the application of the ruling of Hon. Toigat given that the circumstances as at 22nd June, 2015 were not as those which prevailed on 27th May, 2015 when the prosecution was incapacitated to proceed with the trial. For that reason, it is the view of this court that the prosecution was compelled to close their case prematurely which was prejudicial to criminal justice system. I would wish to emphasize however that there was nothing wrong with Hon. A. N. Maina delivering the ruling on a mention date because all the parties to the trial were present and there was no objection to the ruling being delivered.

In the end, I find that the application for revision is merited. I allow the same with the following orders:

a. That the case for the prosecution be and is hereby re-opened to allow their last witness being the Investigating Officer to testify.
b. Consequent to order (a) above, I hereby recall the ruling of Hon. A. N. Maina delivered on 7th September, 2015 to the effect that the prosecution had established a prima facie case against the Respondent and putting him on his defence.
c. That the matter be mentioned on 27th Novembe,r 2015 before the magistrate in charge of Gatundu Law Courts for purposes of fixing a hearing date for the prosecution's case.
d. The prosecution must avail their witness on the date that shall be allocated by the court, failing which the prosecution's case shall automatically close.

It is so ordered.

DATED and **DELIVERED** this **17th** day of **November, 2015.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Wario h/b for M/s Keitany for the Applicant

2. Respondent absent