



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CONSTITUTION APPL. NO. 1 OF 2013**

**RUTH GATHONI GICHUKI.....APPLICANT**

**versus**

**REPUBLIC .....1ST RESPONDENT**

**HER HONOUR MS C. WEKESA SENIOR**

**RESIDENT MAGISTRATE.....2ND RESPONDENT**

**RULING**

1. By an originating notice of motion dated 15th October 2012 brought under Articles 165(6) and (7), 50(1), 2 (e) and 27(1), (2) (4) and 29 (2) of the Constitution of Kenya 2010 the Applicant sought the following orders.
1. ***THAT the honourable court do grant an order of stay of proceedings in Nyeri C.M Criminal Case No. 501 of 2010 Republic vs RUTH GATHONI GICHUKI and another pending the hearing and determination of this application.***
2. ***THAT this honourable court be pleased to review and set aside the order/ruling made on 3rd October 2013 in Nyeri C.M. Criminal Case No. 501 of 2010 ordering reopening of the prosecution case.***
1. The application was filed under certificate of urgency supported by the affidavit of the Applicant wherein she deponed that the matter proceeded for hearing and on 23rd October 2012 the prosecution closed its case. On 31st October 2012 the court gave a ruling on a case to answer wherein her co-accused was acquitted and the Applicant put on her defence which she did and closed her case.
2. That judgment was set for 17th September 2013 and before the court read the same the prosecution sought to reopen the case and tender more evidence by calling some witnesses whom it alleged had not been called. On 3rd October 2013 the court made a ruling reopening the case for fresh evidence to be tendered which ruling amounted to review or appeal against the acquittal order of the co-accused and setting aside the defence of the Applicant.
3. It was further deponed that the ruling was in breach of the right to fair hearing with the court assisting the prosecution to prosecute its case.
4. When the matter came before me under certificate of urgency I certified the same urgent and directed that the same be served upon the state and the applicant's co-accused who had been acquitted as the orders sought herein might have adverse effect to the same.
5. At the hearing hereof Miss Kitoto appeared for the state, Mr. Nganga for the applicant and Mr. Gori for the co-accused.

6. Miss Kitoto for the state conceded to the application on the ground that once the prosecution and the defence closes its case it cannot be reopened.
7. Mr. Nganga submitted that the Applicant had a constitutional right to fair trial and that she was entitled to be informed in advance of the evidence of the prosecution.
8. Mr. Gori for the acquitted co-accused submitted that his client had been acquitted and should not be brought back to the matter and that the prosecution should not have asked the court to put on hold the judgment unless they knew what the judgment would have been.
9. From the submissions herein, the affidavit evidence and the proceedings, the only issue for determination is whether the prosecution in a criminal case can be allowed to reopen its case after the close of the prosecution and defence case and under what conditions if any.
10. It should be noted that in criminal trial the burden of proof is always with the prosecution to prove its case against an accused person beyond reasonable doubt.
11. Section 211 of the Criminal Procedure code provides that once the accused person is put on his/her defence the court shall proceed to hear the accused person and his witnesses if any.
12. Section 212 provides that if the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen the court may allow the prosecution to adduce evidence in reply to rebut the matter and section 215 provides that the court having heard the complaint and the accused person and their witnesses shall either convict the accused and pass a sentence upon or make an order against him according to law or shall acquit him.
13. It is therefore clear that the only time when the prosecution is allowed to reopen their case is if the accused person in his defence introduces a new matter which the prosecutor could not have foreseen.
14. The right to reopen the case should not be confused with the right to recall witnesses under section 150 of the criminal procedure code.
15. A look at the application to reopen the case before the trial court and the nature of evidence the prosecution intend to submit will confirm that it is not evidence that has arisen from the applicant's defence so as to fall under the provisions of section 212 of CPC neither is it a right to recall witnesses under the provisions of section 150 or 200 of CPC.
16. To allow the prosecution to reopen its case after the close of the defence case will amount to allowing the prosecution to fill in the gap in their case which will be prejudicial to the applicant and will amount to a breach of the right to fair trial.
17. I find support in the case of MURIMI v REPUBLIC [1967] EA 542 where the court at page 546 wherein the court held that the

***“the law required a trial court to acquit an accused person if a prima facie case has not been made out by the prosecution, if an accused person is wrongly called on for his defence then this is an error of law.”***

***It was further stated in the above case that a case for the prosecution should not be reopened to call a witness in order to establish a case against accused person.***

18. By allowing the prosecution to reopen its case the trial magistrate exceeded her jurisdiction as the same amounted to admitting that the prosecution had not made up a case to enable her put the accused on her defence and that the applicant was wrongly put on her defence whereas the public has a right to see that crimes are punished as stated by the court this must be balanced against the accused persons right to free and fair trial. I would therefore agree with the submissions by the Applicant and the concession by Miss Kitoto that the Applicant would be prejudiced by the order of the trial court herein should that evidence be adduced at this stage of the trial.
19. I therefore allow the application herein and review the trial court ruling/order reopening the case and substitute the same with an order for the delivery of the judgment herein by the trial court forthwith.
20. Dated signed and delivered at Nyeri this 4th day of April 2014.

**J. WAKIAGA**

**JUDGE**

**Mr. Karweru for Mr. Nyaga**

**Mr. Isaboke for the State**

**No appearance by Mr. Gori for the interested party.**

**Court: The ruling is read in open court in the presence of the above named. This ruling to be served upon the trial magistrate since the matter has a mention date for 14/4/2014.**

**J. WAKIAGA**

**JUDGE**