



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CR MISC APPL NO. 40 OF 2013**

**BERNARD KIMATHI..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Applicant was arraigned before Nkubu SP magistrate court on 4<sup>th</sup> June, 2010 with 2 others facing criminal offences. I called for original lower court file. The charge sheet shows that the Applicant was facing charges of stealing by servant contrary to section 281 of the Penal Code and in the alternative handling stolen goods contrary to section 322(2) of the Penal Code.
2. The important thing to note however is that on the date of plea 4<sup>th</sup> June, 2010 the Applicant was unrepresented by counsel. Subsequently all three accused before that court engaged counsel. They were represented when the trial begun before SM Githinji SPM, on 1<sup>st</sup> February 2011. Thereafter Mr. Githinji was transferred and Mrs. C N Ndubi took over the matter.
3. On 18<sup>th</sup> February, 2013 the learned trial magistrate invoked section 200 (3) of the Criminal Procedure Code to which the Applicant and his co- accused stated that they wished to proceed with the case from where the proceeding magistrate had reached. On that day she heard the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> prosecution witnesses. No mention was made by either accused person of an advocate. Neither did they apply to be given time to wait for counsel or engage a fresh one. The case was on that day adjourned for further hearing on 3<sup>rd</sup> May 2013. It could not proceed on said date and was adjourned again to 13<sup>th</sup> June 2013. Two witnesses were heard on the resumed hearing. Again no mention was made of any intention to have counsel represent any of the accused persons before court. On 13<sup>th</sup> June 2013 the prosecution closed its case. The court ruled on 21<sup>st</sup> June 2013 and placed the accused persons on their defence.
4. On the date scheduled for the ruling on a case to answer is the day that Mr. Mwanzia, the advocate for the Applicant appeared in court to represent him. On that date after the ruling was made he applied to re-call all the witnesses who had testified in his absence. He submitted that the court had power to re-call witnesses anytime before the judgment is delivered. He urged court to re-open the prosecution case and re-call prosecution witnesses who had testified in absence of counsel. With due respect to counsel, the learned trial magistrate had no power under the law to re-open the prosecution case.
5. The prosecutor of the case opposed the application citing difficulty in tracing some of the witnesses who had testified. He urged that witnesses had come from Eldoret and the Coastal Region, and that to get them was not just difficult but a great expense. He also urged that the case had started in 2010, and that application was an ambush. The learned trial magistrate dismissed the

application. The learned trial magistrate was of the view that no good reason had been given why the prosecution case should be re-opened or why none of the counsels were in court when witnesses testified. The learned trial magistrate also noted the prosecution's expression that tracing their witnesses again would be difficult if not impossible, and stated that the case was old and that trial should come to an end.

6. That is how the Applicant came to this court with his application dated 10<sup>th</sup> July 2013. The Application has been brought under section 362 and section 364 of the Criminal Procedure Codes which stipulate as follows:

**“362. 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. 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 -**

**(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;**

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

**(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:**

**Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.**

**(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.**

**(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.**

**(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”**

The Applicant seeks the following prayers:

1...

**2. That this honourable court be pleased to call for and examine the record before Nkubu Principle Magistrate Criminal Case No. 1087 of 2010 for the purpose of satisfying itself to the correctness, legality, propriety and/or regularity of the proceedings before that court involving the Applicant.**

**3. That this honourable court be pleased to stay the proceedings in the Nkubu Principal Magistrates Criminal Case No. 1087 of 2010 pending the hearing and determination of this application inter-partes.**

**4. That this honourable court be pleased to stay the proceedings in the Nkubu Principal Magistrates Criminal Case No. 1087 of 2010 pending the hearing and determination of this application.**

7. On the face of the application it is premised on three grounds namely:

1. That a fair trial cannot ensure in the subordinate court as the Applicant was denied

- representation by counsel.**
2. **That this court has power to alter or reverse the order of 21.6.2013 shutting the Applicant's right to legal counsel.**
  3. **That this application is brought in the interests of justice.**
8. The application is supported by an affidavit sworn by the Applicant of same date. It annexes the proceedings of the lower court except the charge sheet.
  9. At paragraph 5 and 6 the Applicant avers that on 18<sup>th</sup> February when the case proceeded before the learned trial magistrate, he informed her that his counsel was not before the court as he was engaged in the High court and that he sought indulgence which the court declined.
  10. The proceedings are annexed. There is no note of an application by the Applicant seeking to have an adjournment or have the matter placed aside for his counsel both on 18<sup>th</sup> February 2013, as per paragraph 5 and 6 of the affidavit, or on 3<sup>rd</sup> May 2013, as per paragraph 7 of the affidavit.
  11. The Cause Lists for the High court Meru for both days are annexed as proof Mr. Mwanzia was before the High Court on both days.
  12. In his submission before me Mr. Mwanzia urged that the Applicant was forced by court to conduct his defence in absence of counsel, despite saying that counsel was before the High court. Counsel pointed out that the court had, prior to that date indulged the prosecution and granted adjournment on several occasions.
  13. Mr. Mwanzia urged that on 21<sup>st</sup> June 2013 when court placed the Applicant and his co-accused to his defence, counsel, applied to re-call witnesses for cross-examination but the court declined. Counsel urged that the court's ruling declining the Applicant a chance to re-call prosecution witnesses effectively shut out the Applicant from exercising his right to legal counsel, and that it denied a fair trial as envisaged under Art 25 (c) of the Constitution.

Article 25 (c) provides

**“25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—**

**(c) The right to a fair trial”**

14. Mr. Mwanzia urged this court to exercise its powers under section 362 and 364 of the CPC, and call for the lower court record and alter the finding of the court.
15. Mr. Jalson Makori, learned state counsel represented the state in this application. He urged that he had seen annexed Cause Lists which show that counsel for Applicant was before the High court on both dates. He urged that the state was not opposing the application but would request that if the court orders re-call from PW2 onwards, as counsel was present when PW1 testified.
16. I have considered the application before the court and submissions by both counsels. I have noted that the State has not opposed the application. On the Applicant's side, I noted that no cases were cited in support of the Application a practice I decry in this region, as it means the legal fraternity in this region lags behind in developing jurisprudence.
17. Section 364 of the CPC gives this court power, among many other powers, to alter or reverse an order of the subordinate court. What the Applicant is contending is that he was denied representation by counsel. He has urged the court to exercise its powers under section 362 and 364 of the CPC to reverse the lower court's order of 21<sup>st</sup> June, 2013.
18. I have considered the Application by the Applicant together with all the submissions by both counsels. I am not impressed by the Cause Lists annexed to this application as proof of the fact that one of the defense counsels was engaged before the High Court. This is because when the court gave hearing dates of the matter on 1<sup>st</sup> February 2011, Mr. Mwanzia for the 1<sup>st</sup> and 2<sup>nd</sup> Accused and Mr. Muriuki for the 3<sup>rd</sup> Accused were present in court. Both of them did not appear before the court thereafter and neither did their clients mention them at any one time thereafter. I am saying that advocates have a duty to appear before the court for the hearing of cases on the dates set for hearing and especially where the hearing dates were confirmed by them or were

taken in their presence. It is not an excuse for counsel to argue or to prove that he was before another court for hearing and therefore the court should wait until he is available. The reason dates are taken by counsel in court is so that they diarize them to ensure that the date taken is clear and that they will be available. Counsels should only take cases which they can be able to manage.

19. If for any reason a counsel is not able to present themselves for the hearing of a case they previously confirmed for hearing, they ought to send counsel to represent them. Such counsel should have full brief with complete information of the whereabouts of the advocate for the accused person, and if the excuse is that they are before another court, they should present a Cause List to support that allegation. Even then, counsel who has fixed a hearing before a court must respect the commitment he had made with that court and go for the hearing but should not expect that an adjournment will be a matter of cause.
20. I will cite a leading case on adjournments and the accused person's right to legal representation. In **Ouma & Another v. Republic [1991] KLR 539** Porter and Mbaluto JJ held.

1. **The convenience of counsel is not the only consideration which a magistrate should have in mind when considering whether or not to adjourn. The matter is in the discretion of the trial magistrate.**
2. **The way in which the ruling of the trial magistrate was expressed left doubt that he had formed the opinion that counsel were trying to interfere with the course of justice by delaying the expeditious hearing of the case.**
3. ...
4. ...
5. **Every accused has the undoubted right to be defended by counsel. If an accused is deprived of that right through no fault of his own and through no fault of his counsel and conviction follows, the conviction will be quashed on appeal.**
6. **The court strongly approve of any proper steps taken towards the speedy administration of justice provided such steps were not detrimental to the rights and interest of accused persons.**
7. **In this case the magistrate in the exercise of his discretion failed to take account of these rights and interests and justice was not manifestly seen to be done."**

21. Article 50 (2) (c), (e) (g) of the Constitution stipulates as follows:

**(2) Every accused person has the right to a fair trial, which includes the right—**

**(c) to have adequate time and facilities to prepare a defence;**

**(e) to have the trial begin and conclude without unreasonable delay;**

**(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;**

22. Conversely the court has a duty to check its record before commencing hearing of a case before it to confirm what the representations are and in case of an accused person whether he is present and whether he is represented by counsel. If from the record it shown that the accused person has previously been represented by counsel and that counsel be absent, it is the duty of the court to find out from the accused person where his counsel is, and whether he wishes to be represented by him, or whether he chooses to engage a different counsel, or to proceed with the matter without counsel. In this case the learned trial magistrate took over the hearing of the matter from a previous magistrate who was transferred from the station. The previous magistrate had taken the evidence of one witness. It is very clear from the record that the accused persons were represented by counsel. At the commencement of the hearing before the subsiding magistrate no notice made regarding representation of the accused persons by counsel all that is recorded is compliance with section 200(3) of the Criminal Procedure Code.

23. As I have stated herein above it was the court's duty and the learned trial magistrate should have found out from the accused persons where their counsels were. The learned trial magistrate

should have noted on the file that the question was put to the accused persons regarding their representation by counsel and their answer should also be duly recorded. The learned trial magistrate should then have made a short ruling or a direction, depending on what the accused persons told her or him. Whatever the case, the court should have given the accused persons an opportunity to be represented by counsel by informing the accused persons that it was their right to be so represented, the court would have then given them an opportunity to make an election whether or not they wanted to be represented by counsel. If they wished to have such representation, then the learned trial magistrate should have afforded them a reasonable time to get their counsels. If counsel failed to appear on the date set for hearing, the court may grant adjournment and give fresh dates. However, this should not be interpreted by counsel to mean that the court must always adjourn cases to wait for counsel. Counsel has an equal duty to come before court on date scheduled for hearing unless for good reason which must be demonstrated, his presence could not be secured. It should be noted that engagement in another court, whether senior or not, is not a good excuse unless it was a certificate of urgency or counsel was summoned by court either way, it must be proved why counsel could not attend court on date scheduled for hearing especially where he took the dates in court. The reason why court should not wait for counsel indefinitely is because the court has a duty to afford the accused person before it a speedy trial. Both rights must be balanced fairly.

24. In the instant case the learned trial magistrate failed in its duty first for not noting that accused had counsels and that their counsels were absent. Secondly by not informing the accused persons of their right of continued representation by counsel. As a result the Accused persons were denied representation by counsel and therefore a fair trial for no fault of their own.
25. I have come to the conclusion that the accused did not have a fair trial due to the omissions by the learned trial magistrate to accord them an opportunity to be represented by an advocate. Consequently it is my considered view that the only way to correct that mistake is to declare the hearing a mistrial quash the proceedings and ruling of the court and to order that the hearing of the case should start de novo before any other magistrate in that court other than the one conducted the trial which I hereby do.
26. The original court record be returned to PM's Court Nkubu for hearing and disposal of the case against the accused persons in compliance with the order herein above.
27. The application dated 10<sup>th</sup> July 2013 is allowed to the extent stated under paragraph 24 herein above.

**DATED SIGNED AND DELIVERED THIS 1<sup>ST</sup> DAY OF AUGUST 2013**

**J. LESIIT**

**JUDGE.**