REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

REVISION CASE NO. 605 OF 2011

DR. HOSEA WAWERU.....1ST APPELLANT

MARTIN OBONGO OLUOCH .....2ND APPELLANT

JAMES MWENDA MURWITHANIA .....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

The application before me has been brought by the prosecutor in the case of REPUBLIC Vs DR. HOSEA WAWERU & 2 OTHERS, CHIEF MAGISTRATE'S CRIMINAL CASE NO. 2399 of 2005.

Through the application the prosecutor seeks the revision of the orders made by the learned trial magistrate on 18th May 2011.

The orders in question arose from an oral application by the prosecutor, seeking an opportunity to re-open his case, so that the prosecution could thereafter call five (5) witnesses who had not yet testified.

There is a need to briefly spell out the matters leading to that application.

The accused persons are charged with the offence of Abuse of Office **contrary to section 101 (1) of the Penal Code**.

The first accused, Dr. Hosea Waweru, was the Director of Kenyatta National Hospital at the time when the offence was allegedly committed, on 15th September 2000. He is alleged to have arbitrarily and in abuse of the authority of his office, without regard to Government Financial Regulations and Procedures, approved payment of KShs.57,075,200/- in favour of M/s Countryside Suppliers Limited being 80% advance payment for the supply of bedside lockers, an act which was prejudicial to the rights of Kenyatta National Hospital.

On count 2, Dr. Hosea Wilfred Waweru is alleged to have arbitrarily and in abuse of the authority of his office, approved Import Duty and Value Added Tax reimbursement of Kshs.41,375,515.15 in favour of Countryside Suppliers Limited.

On Count 3, Mr. Martin Obongo Oluoch is said to have, arbitrarily and in abuse of the authority of his office, as the Planning Manager for Kenyatta National Hospital, issued a letter of order, charging the specified contract to the Development Account instead of the USAID Account, an act which was prejudicial to the said hospital.

On count 4, **JAMES MWENDA MURWITHANIA**, the Hospital Planner, was said to have arbitrarily and in abuse of the authority of his office, authorized the payment of KShs.41,371,615.15 to M/S Countryside Suppliers Limited as reimbursement of Import Duty and VAT expenses from the development vote of Kenyatta National Hospital.

The actions of all the 3 accused persons were said to be prejudicial to the rights of Kenyatta National Hospital.

The pleas were taken by the accused persons on 27th October 2005. Thereafter, the accused persons were released on Bonds of KShs.2,000,000/- each, with one surety for each of the accused. The case was then set down for hearing on 5th April 2006.

On that date (5th April 2006) the prosecution asked for an adjournment. The reasons for seeking the adjournment were that the Investigating Officer, Mr. Astimalle, had been transferred to North Eastern Province, whilst his assistant had passed away.

The defence did not oppose the adjournment, and the same was granted by the court.

When the trial was scheduled to commence on 27th June 2006, the prosecution sought another adjournment. The reasons for that request were that the only witness who had been bonded, was unwell.

However, the prosecution indicated that they would be ready to start the case on the following day.

On 28th June 2006, the prosecution was ready to start. However, they indicated that there could arise a situation in which the witness would need to be stood down mid-way, as she did not have possession of a document which she needed to make reference to.

Having given consideration to the scenario, the learned trial magistrate adjourned the case. It was his view that it would be unwise to start the case with a witness who would then have to be stood down.

On 28th July 2006, the trial commenced. **PW 1, LUCY WATETU MUTUNGI**, testified at length.

However, before she could complete her evidence, the 2nd and 3rd accused persons' advocate sought an adjournment. He explained that he had to handle another case which had been filed under a Certificate of Urgency. The trial court granted the adjournment.

On 17th January 2007, the prosecution had 21 witnesses. However, the trial could not resume because the learned trial magistrate had just received notification that he had been transferred.

On 3rd April 2007, the accused persons chose to have the further hearing of the case proceed before the new trial magistrate.

Regrettably, however, **PW 1** was not available as she was then a student for a Masters Degree, at the University of Nairobi. The case was therefore adjourned.

On 13th June 2007, the prosecution was ready to proceed, but Mr. Momanyi, the learned advocate for the 2nd and 3rd accused sought an adjournment.

As Mr.Etole, the learned advocate was keen to proceed, the trial resumed at 11.00 a.m. that morning.

PW 1 gave further testimony. Thereafter, she was cross-examined by the 3 accused persons.

After **PW 1** was cross-examined, the case was put-off to the next day.

On 14th June 2007, **PW 2, JORAM MPENDE**, gave his evidence-in-chief; was cross-examined by the defence; and finally, was re-examined by the prosecution.

His testimony lasted the whole day. Thereafter the case was adjourned.

On 2nd August 2007, when the trial was scheduled to resume, the prosecution informed the court that they wished to have the charge sheet amended.

The case was put-off to 24th October 2007. On that date the case was again adjourned, at the request of the prosecution. Mr. Kiage, the special prosecutor in this case, had other cases which he was attending to.

The accused persons had no objections to the adjournment.

Thereafter, the case was to be heard on 20th May 2008. But even on that date the prosecutor was absent from court, prompting the accused persons to ask the court to take stern action on the prosecutor.

The learned trial magistrate observed that the prosecutor was not taking the case with the seriousness it deserved. However, the court did give to the prosecutor another chance to proceed with the case.

On 10th September 2008 the prosecutor was ready, with 2 witnesses. However, Mr. Etole, the learned advocate for the 1st accused person was absent because he was engaged in the Cockar Commission, as the Assisting Counsel. As the learned counsel was going to be unavailable for one month, he asked the trial court to accommodate him.

Consequently, the case was adjourned.

On 18th February 2009, the prosecution had 3 witnesses in court, and they were ready to proceed. However, Mr. Etole Advocate was present but unwell. Meanwhile, the 2nd accused was absent.

On 29th April 2009 Mr. Kiage, the learned prosecutor was before the Court of Appeal. Therefore the trial could not resume. It was adjourned. But on that occasion the prosecution was given the last adjournment.

On 22nd July 2009, **PW 3** testified. After he had concluded his testimony, the case was adjourned.

On 23rd September 2009, Mr. Kiage was absent from the court, resulting in the case being put-off to the next day. On 24th September 2009, the further hearing was adjourned after Mr. Kiage persuaded the court and the accused persons that he had to attend a "Stakeholders conference on Witness Protection".

On 24th November 2009, Mr. Kiage was in court, with 2 witnesses. Nonetheless, he still sought an adjournment as he had a pressing personal issue which he had to attend to. Although the case was adjourned, the court directed that that be the last adjournment.

On 15th February 2010 the trial was scheduled to resume. Unfortunately, the learned trial magistrate had been transferred.

On 11th August 2010, the prosecution sought and was given yet another adjournment.

On 30th September 2010, **PW 4** testified. After the witness had been cross-examined by the accused persons, the court also asked her some questions.

On 23rd November 2010 **PW 5** gave her evidence. After she had concluded her testimony, **PW 6** gave her evidence.

The prosecution then sought an adjournment. However, that application was vehemently opposed by the accused persons.

The learned trial magistrate did, eventually, grant the adjournment.

On 22nd February 2011, Mr. Kiage was absent from court. However, he had written to the court, with a copy to the advocates for the accused persons indicating that he would be unable to be present.

The prosecutor had no officer representing him in court on that date. That prompted the court to note that it could not act on the strength of the letter, when there was no person in court, who sought the adjournment of the case. That notwithstanding, the court adjourned the case on the grounds that there was no prosecutor in court. In putting-off the case the learned trial magistrate expressed himself thus;

"This adjournment is marked as the last for the prosecution on similar grounds. The case is to proceed for hearing tomorrow as scheduled. "

On 23rd February 2011, Mr. Kiage was still absent, but Ms Kithithi, learned state counsel, held his brief. She informed the court that Mr. Kiage was attending a retreat. Consequently, the prosecution sought a 2 weeks' adjournment.

The trial court rejected the request for yet another adjournment. In arriving at that decision, the court made the following findings;

(a) Although Mr. Kiage had written to the Executive Officer on 21st February 2011, no action was taken on that letter because the Executive Officer had no mandate in that respect.

(b) On 22nd February 2011 the letter first came to the attention of the trial court. But the prosecution was not represented by any person before the court.

(c) The letter allegedly inviting Mr. Kiage to the retreat was not made available to the court.

(d) There was no document showing that the retreat being attended by Mr. Kiage was official.

(e) Although the accused persons said that they did see Mr. Kiage in the court corridors on 22nd February 2011, the prosecution did not respond to that contention.

Thereafter, the court put-off the case to 11.30a.m.

When the matter resumed at 11.50a.m., Mrs. Obuo, learned state counsel made available to the court, the letter inviting Mr. Kiage to the retreat in Naivasha.

She then asked the court to allow her to proceed with the further prosecution from as early as the following Monday week.

The trial court rejected Mrs. Obuo's application. In doing so, the court noted that Mr. Kiage was invited to the retreat by a letter dated 17th February 2011, which was long after the hearing dates had been fixed. Therefore, the court expressed the view that the due process of the courts were no longer respected.

Having lost the bid to have the case adjourned again, Mrs Obuo closed the prosecution case.

Thereafter, the parties were due to make their submissions on the issue as to whether or not the accused persons ought to be put on their defence. However, the prosecution made an application to have the case re-opened.

When canvassing that application Mr. Kiage pointed out that very serious allegations had been made

against him, in his absence. He therefore had no opportunity to defend himself.

He also urged the court to take into account that both the court and the prosecution are enjoined to exercise their powers for the people of Kenya.

Therefore, when a prosecutor is forced by the court to close his case, whereas there was still some evidence that had not yet been tendered, the applicant expressed the view that that would be a situation in which the court would ultimately exercise its powers based on incomplete evidence.

In this case, the applicant said that he has 5 witnesses who were "extremely essential". He therefore urged the trial court to re-open the case, to enable these 5 witnesses testify.

The application was opposed by the accused persons. They felt that the prosecutor was too busy dealing with other cases, conferences or retreats. Therefore, they believed that the prosecution was not keen to finalise this case.

The accused persons felt that the delay in finalizing the case was unfair to them.

Even when Mr. Kiage was attending to important matters of national interest, the accused believe that that ought not to be allowed to violate their rights.

As six witnesses had testified over a period of six years, the accused fear that the remaining five witnesses may need another five years to give their evidence.

In rejecting that application, the court declined the invitation of the prosecution to invoke **section 150 of the Criminal Procedure Code**. It was the considered view of the trial court that that section should not be invoked to assist the prosecution to call evidence which could then be used to convict the accused persons.

This is what the court said;

"The limit of the court to call witnesses on its own motion was set out in *Murimi Vs. Republic (1967) EA 542.* ***The court held that the power vested in the court to call witnesses must be read in conjunction with the requirement of the law that the prosecution must prove its case beyond reasonable doubt. It concluded that the above provisions was not designed and should not be used to empower the trial court upon close of the prosecution case, to call a witness in order to establish a case against the accused person, except where the evidence is of purely formal nature.***

In the instant application, what the prosecution is asking the court is for this court to descend into the arena of conflict and help it prove its case against the accuseds. This amounts to an abuse of the due process of the law and the court. Under the circumstances, I find the application by the prosecution unmeritorious and I hereby dismiss the same."

In determining this application, I first wish to reiterate the fact that the court before which any case is being heard, has the right, authority and obligation to control the proceedings before it. As a part of the said responsibility, the court has authority to allow or reject applications of adjournment.

Therefore, the fact that the trial court rejected the adjournment cannot, of itself, be the basis for a revision of that court's decision in that respect.

Under **section 362 of the Criminal Procedure Code**;

"The High Court may call for and examine the record of any criminal proceedings 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."

In this instance, the applicant is questioning the correctness, legality and propriety of the decision to reject its application to have the case re-opened.

As I understand it, the trial court was convinced that **section 150 of the Criminal Procedure Code** was inapplicable to the issues before it.

That therefore raises the question as to whether or not **section 150 of the Criminal Procedure Code** was applicable. Secondly, there arises the question as to whether or not the intention of the prosecutor was simply to get the trial court to assist him to secure a conviction of the accused persons.

Thirdly, there arises the question as to whether or not **section 150 of the Criminal Procedure Code** could only come into play in situations in which the only witness to be called by the court was a formal one.

The said section reads as follows;

"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

A clear reading of that section is that the person to be called or recalled should be a person whose evidence appears to be essential to the just decision of the case. In other words, he is not just a person whose evidence is of a;

"purely formal nature",

as alluded to by the learned trial magistrate.

But how is the trial court to determine that the said witness is likely to give a testimony that will be essential to the just decision of the case?

In practical terms, until a court receives evidence from any particular witness, the court cannot determine whether or not the witness will give evidence which was essential for the just determination of the case. To that extent, the learned trial court was correct.

However, there is no way the court could ever have ascertained whether or not the evidence of the 5 proposed witnesses was essential, until and unless the said witnesses had testified. Therefore, by rejecting the prosecution's assertion, regarding the essential nature of the evidence which the 5 witnesses would provide, the court may well have rejected essential evidence. It will never know.

In this case, the case has already taken six (6) years. During that period of time, only six (6) witnesses have testified. Therefore, the accused persons are right to feel anxious, that for the proposed 5 more witnesses, they may need another five (5) years to finalise the case.

Secondly, a large proportion of the adjournments todate, were at the instance of the prosecution. Therefore, the learned trial magistrate, as well as the accused persons were right to express the view that Mr. Kiage, had not demonstrated a singular sense of urgency in finalizing the case. Too many times, the learned special prosecutor was unable to conduct the further prosecution in this case because he was engaged in other official duties.

I agree with the accused persons that even when a prosecutor was attending to official duties, that should not be allowed to violate the right of accused persons.

Such official duties may be allowed to form the basis of some adjournments. But when they appear to be too many, thus standing in the path of the expeditious disposal of court cases, the court would be entitled to reject adjournments founded upon such official duties.

Having given due consideration to the submissions made before me and the history of the proceedings todate, I find that the justice of the case demands that I should set aside the orders made on 18th May 2011.

I direct the trial court to summon the five (5) named witnesses, and to receive their evidence.

By so doing, the trial court will not be assisting the prosecution. It will only be receiving evidence which might be essential to the just decision of the case, as envisaged by **section 150 of the Criminal Procedure Code**.

However, in order to safeguard the rights of the accused persons, it is directed that there shall be no adjournments at the behest of the prosecution. The trial court will therefore hear all the 5 witnesses within the shortest time possible, and without any breaks, save for those due to time-constraints.

In order to give effect to these orders, I direct that the case be mentioned before the trial court on 23rd March 2012, for Directions as to the further hearing of the case.

Dated, Signed and Delivered at Nairobi, this 22nd day of March, 2012.

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FRED A. OCHIENG
JUDGE