



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Criminal Revision 2 of 2012

CATHERINE MUENI MAKAUACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

ORDER ON REVISION

Cellz-R-US Ltd, is the complainant in criminal case number 535 of 2008 pending before the Chief magistrate's court, Machakos. The accused is one, **Catherine Mueni Makau**. She faces four counts of issuing bad cheques contrary to section 316 A(1) of the Penal Code. It is claimed in the four counts that on 29th and 31st January, 2008 respectively and on 5th and 7th February, 2008 in Machakos township of Machakos District within Eastern province with intent to defraud, the accused issued equity bank cheque numbers 000083, 000086, 000089 and 00087 for KShs.381,295/-, 414,380/-, 250710/- and 440,100/- respectively to **Cellz-R-US Ltd**. for payment knowing that the account number 0291255828 had insufficient funds.

The accused entered a plea of not guilty on 8th April, 2008 and the trial commenced before **Hon. Oseko PM** on 17th December, 2008. She took the evidence of 2 prosecution witness but left the station on study leave. The case was then taken over by **Hon. Mungai PM**. Pursuant to the provisions of section 200 of the Criminal Procedure Code, the accused elected to have the case commence *de novo*.

On 13th May, 2009 the hearing commenced once more before **Hon. Mungai**. He heard the entire prosecution case and on 23rd February, 2011 ruled that the accused had a case to answer. No sooner had **Hon. Mungai** ruled as aforesaid than he was transferred to take charge of the Chief Magistrate's court Nakuru. The task of presiding over the defence case now fell on **Hon. Gesora SPM**.

On 28th March, 2012, the case came before him when again pursuant to section 200 of the Criminal Procedure Code, the accused elected that the case starts all over again. The learned magistrate then fixed the case for hearing on 9th May, 2012. This alarmed the complainant. Through its counsel, **Kenneth Mbuvi esq.**, it wrote a protest letter to this court dated 16th April, 2012. To the complainant, no credible reason was given as to why the record could not have been typed and the case attended to by another magistrate from where the previous one had left off. It was therefore a gross miscarriage of justice and

guaranteed to result in an unconscionable delay in its conclusion, to now require the prosecution and the complainant to commence the case afresh. The order was most unfortunate and regrettable bearing in mind that it had taken the prosecution almost 4 years to close its case, following numerous adjournments at the instigation of the accused and or its counsel. On the other hand, the complainant had diligently attended court for over 3 years despite numerous adjournments so as to adduce evidence and see to the prosecution of the case. To the complainant the order of the court that the matter begins afresh if allowed to stand, will be a serious travesty of justice. It is already a travesty, indeed almost a sham, that a simple case of issuance of bad cheques should take 4 years and 3 magistrates to preside over without conclusion. The complainant suspects corruption and foul play aimed at denying it Constitutional right of access to justice as provided for under Article 48 of the Constitution. It may now be particularly difficult for the complainant to get all the witnesses, especially the former employees, the investigating officer and the Government documents examiner, to again attend court to adduce evidence afresh.

For all the foregoing reasons, the complainant prayed that this court in the exercise of its powers of revision pursuant to section 364 (1) of the Criminal Procedure Code do call for the record of the subordinate court and reverse the order of the court aforesaid and replace it with an order that will allow for the case to proceed before a new magistrate, but from where the previous one left off, as opposed to commencing *de novo*, so that justice may be seen to be done.

I have since called for the subordinate court's file and have perused the same. Most of the complaints raised by the complainant are valid and germane. However, the power of this court under the revision jurisdiction is not to micro-manage the subordinate courts in their day to day running of their affairs. The jurisdiction is limited to ensuring that such courts do not make findings, orders and or impose sentences that incorrect, illegal, irregular and to ensure that such proceedings do not suffer from acts of impropriety.

The complainant faults the order by the subordinate court that the case starts afresh, though it had reached the stage of defence hearing. Such an order is not, in my view, illegal, incorrect or irregular. Nor can it be said that it lacks propriety. It is perfectly legal. Indeed section 200(3) under which the learned magistrate acted in making the order for the case to commence *de novo* enjoins the trial magistrate taking over a partly heard criminal case to strictly comply with the provision which is in terms that:-

“200(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.”

This provision has been given a liberal interpretation to mean that it is entirely up to the accused to chart the way forward of his case where it is taken over by another magistrate. He may elect to have the case commence *de novo* or proceed from where the previous magistrate left. Therefore, the decision whether to proceed from where the previous magistrate left does not lie with the magistrate. It is with the accused. The incoming magistrate has no discretion or choice in the matter. The provisions are couched in mandatory terms. These are some of the so called fair trial provisions of the law. They cannot be sacrificed at the altar of the complainant's convenience. Yes, the record of the trial court so far does not paint the accused in good colour. It is replete with the accused's numerous attempts to sabotage the course of justice. She, her lawyer and the prosecutor have been the cause of all the adjournment. It is not possible to tell whether the prosecutor is acting in cohorts with the accused and her lawyer to frustrate the hearing and final determination of the case. However, going by the record, that possibility cannot be wholly ruled out.

Again, the complainant may say that the accused has all along been represented by counsel and therefore the order for a re-run of the case is most unfortunate. However, it must be appreciated that it is the accused who is on trial here and the duty of the court is to the accused and not her counsel. The duty by the incoming magistrate to explain to the accused the provisions of section 200 is mandatory. It cannot be passed over or surrendered to his counsel.

The incoming magistrate having explained to the accused the aforesaid provision of the law, she opted to have the case start all over again. That is her right which cannot be taken away or glossed over; despite

her previous conduct clearly aimed at frustrating the hearing and final determination of the case. Since the magistrate had no choice in the matter but to act on her election, the order for the re-hearing of the case is neither illegal, incorrect, irregular nor is it laced with impropriety.

In the circumstances, the revision sought is denied. The lower court's file is returned herewith. The learned magistrate who will eventually hear the case is instructed to do so expeditiously given what has transpired since the case was filed to date.

RULING DATED, SIGNED and DELIVERED at MACHAKOS this 15TH day of JUNE, 2012.

**ASIKE-MAKHANDIA
JUDGE**