

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL REVISION NO. 3 OF 2011

NICASIO KAMAU WAMBUI.....1ST APPLICANT
JOHN WARUNGU WANJERI.....2ND APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

(Arising from Nyeri Chief Magistrate's Court Criminal Case No 2347 of 2007)

RULING ON REVISION

Proceedings relating to **Nyeri C.M.C.Cr. C. No. 2347 of 2007, R =Vs= Nicasio Kamau Wambui and John Warungu Wanjeri** were placed before this Court for perusal under *Section 362* of the Criminal Procedure Code by the learned Deputy Registrar of this Court vide his letter dated 21st February 2011. In exercise of this Court's supervisory power of revision, I proceeded to examine the aforesaid proceedings.

The record indicates that Nicasio Kamau Wambui and John Warungu Wanjeri hereinafter referred to as the '1st and 2nd applicants', were arraigned before the Chief Magistrate's Court, Nyeri to face a charge of seven counts. In the first count, the duo are jointly accused of obtaining money by false pretences contrary to *Section 313* of the Penal Code. In counts II and IV, Nicasio Kamau Wambui, the 1st Applicant herein, faced a charge of making a false document without authority contrary to *Section 357 (a)* of the Penal Code. He also faced a charge of uttering a document with intent to defraud contrary to *Section 357 (b)* of the Penal Code in count III, V, VI and VII. When the case came up for hearing before Honourable R. A. A. Otieno, learned Senior Resident Magistrate, the 1st accused raised a preliminary objection against his prosecution. He argued that he had been held in Police custody for 7 days before being taken to court in breach of *Section 72 (3)* of the old Constitution, which allowed the Police to hold such a suspect in custody for not more than 24 hours. The 2nd applicant raised a near similar preliminary objection and adopted the submission of the 1st Applicant. After considering submissions from both sides, the learned Senior Resident Magistrate declined to make a finding but instead directed the parties approach this Court under rule 11 of the Constitution of Kenya (supervisory jurisdiction and protection of Fundamental rights and Freedoms of the individual) High Court Practice and Procedure rules 2006, popularly known as the "Gicheru Rules". When the learned Senior Resident Magistrate was transferred from Nyeri, Honourable Joshua Kiarie, learned Senior Principal Magistrate, took over the case from Hon. R. A. A. Otieno. When the Applicants appeared before Hon. R. A. A. Otieno, they again raised a preliminary objection against the charges facing them. The first applicant claimed that his rights to a fair trial had been breached due to the delay in presenting him to court and the delay in filing fresh charges against him. The 2nd Applicant supported the 1st Applicant's application. The duo urged the learned Senior Resident Magistrate to refer the preliminary objection to this Court for determination. The learned Senior Resident Magistrate came to the conclusion that the issues raised were no frivolous nor vexatious. He however, concluded that a similar application had been made and the referred to this court for determination. The trial magistrate was of the view that since the matter was still pending before this court, it was only prudent to await the outcome of that reference in her ruling of 5th May 2009. When the Applicants appeared before Hon. J. Kiarie on 4th November 2009, they indicated that they intended to appeal against the ruling of Hon. R. A. A. Otieno of 5th May 2009. On 30th September 2010, Mr. Mugo,

learned advocate for the 1st accused, applied to Hon. J. Kiarie, learned Senior Principal Magistrate to frame up the issues for determination by the High Court. The Prosecution opposed the application. In his ruling of 1st October, 2010, the learned Senior principal Magistrate formed the opinion that he was *functus officio* to reopen the issue because his colleague had already formed the opinion that the court could not frame up issues because by then there was a pending reference before this court i.e. **Nyeri H.C. Misc. Appl. No. 94 of 2008**. The learned Senior Principal Magistrate then referred the case to this court. It has now emerged that **Nyeri H.C. Misc. Appl. No. 94 of 2008** was dismissed. The learned Senior Principal magistrate referred the matter to this court to give directions.

A careful consideration of the matter will reveal that Hon. R. A. A. Otieno the learned Senior Resident Magistrate, had declined to make a decision on the second application because of the pendency of **Nyeri H.C. Misc. application No. 94 of 2008**. On the other hand, Hon. J. Kiarie, learned Senior principal Magistrate had also declined to make a finding on the same application claiming Hon. R. A. A. Otieno had already heard and considered the application hence it was not open to him to revisit the issue. It is apparent from the ruling of Hon. J. Kiarie that the reference which was pending before this court i.e. Misc. Application No. 94 of 2008 was dismissed. I have also perused the aforesaid file and it is obvious that the same was dismissed on 25th November 2008. the Applicants were directed to make the appropriate application before this Court by Hon. R. A. A. Otieno on 1st April 2008. they failed to do so. Instead of the Applicants filing a reference as directed, they simply presented the proceedings of the trial court before the High Court. The Hon. Mr. Justice Makhandia perused the file and dismissed the same on the basis that the reference lacked the necessary foundation. The Applicants have now gone back to the trial court to make a similar application. With respect, I agree with the findings of Hon. J. Kiarie, learned senior Principal Magistrate, that he was *functus officio*. The ruling of Hon. R. A. A. Otieno delivered on 1st April 2008 is clear and unambiguous. The Applicants were simply directed to approach this Court in the manner prescribed under the Gicheru Rules. They did not do so. They have themselves to blame. The Applicants' conduct of making a plethora of applications before the trial court has substantially delayed the hearing of their case. The Applicants have changed their counsels midstream thus delaying the hearing and conclusion of the case. The Applicants have an option of taking out the necessary application before this court or appeal against the decisions of the trial court or in the alternative proceed with the hearing of the case and at the conclusion of the case raise those issues on appeal. In my considered opinion, there is nothing that can be reviewed at the moment. I direct that the case be heard on priority basis in view of the fact that there was considerable delay due to the many issues I have just pointed out. Let the case be mentioned before the trial court on 11th July 2011 for purposes of giving hearing dates on priority basis on a day to day basis until its conclusion.

Dated and delivered at Nyeri this 30th day of June 2011.

J. K. SERGON
JUDGE

In open court in the absence of parties with notice.