



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Revision Case 59 of 2008**

**MARY NYAMBURA WEBER.....APPLICANT**

**- VERSUS -**

**REPUBLIC .....RESPONDENT**

**RULING ON REVISION**

The Court was moved for a revision hearing by a letter from *Ms. Othieno Ochieng*, Advocate, dated 3<sup>rd</sup> July, 2008 and filed on 10<sup>th</sup> July 2008. She was acting on the basis of s. 362 of the Criminal Procedure Code (Cap. 75, Laws of Kenya), and her contention was that there were “erroneous orders” in respect of Children’s Court Cr. Case No. 70 of 2006. The said orders, which had been made on 18<sup>th</sup> June, 2008 and 20<sup>th</sup> June, 2008 were said to be “highly prejudicial to [the applicant]”; and learned counsel asked that the same “be reviewed and set aside in the interest of justice and the rule of law”.

The matter was presented on behalf of the applicant by learned counsel *Mr. Opiyo* and *Ms. Othieno Ochieng*, while the respondent was represented by learned counsel *Mr. Mulati*. *Mr. Opiyo* stated that, owing to lapses in proceedings in the Children’s Court, the applicant was currently on two separate bonds; and he urged that one of them be discharged. Counsel stated that the presiding Magistrate had heard all but one witness, when he, entirely *ex mero motu*, disqualified himself; and the effect was that investigations were undertaken on the applicant, on a different subject, namely a Court file that could not be traced; and in the process, the Court cancelled the applicant’s bond and remanded her in custody, this being followed by new bond terms. Attempts to have the earlier bond released were unsuccessful.

Counsel urged that it was irregular to subject the applicant to two separate bonds; he asked that the subsequent bond be released to the surety.

Learned State Counsel, *Mr. Mulati* stated that the original Court file in Criminal Case No. 70 of 2006 was lost; and so on 18<sup>th</sup> June, 2008 the Court used a skeleton file, without knowing the content of the original file; and on 20<sup>th</sup> June, 2008 the trial court ordered release of the applicant on a fresh bond; and the defence counsel sought release of the bond which had been recorded on the lost file. Counsel submitted that the Court should not have given fresh bond on 20<sup>th</sup> June, 2006 because there were no records to serve as the basis.

*Mr. Mulati* submitted that the prosecution had applied for the trial Magistrate to disqualify himself – and

this is how the Magistrate, on 18<sup>th</sup> June, 2008 came to disqualify himself, and the defence counsel had acceded to the prosecution's application.

*Mr. Mulati* submitted that retrial had become necessary after the original proceedings were lost.

On 25<sup>th</sup> November, 2008 I made orders requiring the Deputy Registrar to check on the state of bonding, in respect of the accused in the case in question. The response made by the Senior Resident Magistrate on 4<sup>th</sup> December, 2008 thus reads:

“Please note that the only bond we have in our custody in relation to our file [SRM/CH.C/15] is a Log Book No. R0132987E for motor vehicle KAX 253Y Toyota Corolla.

“Attached to the log book is a copy of records from K.R.A., payment receipts, valuation report, pictures of the vehicle and ID. Photocopy.

“This would therefore mean that only one bond exists in our Criminal Case No. 70/06.”

This is in contrast to the representation made by counsel for the applicant: that there is a bond of 20<sup>th</sup> February, 2006; and there is a bond of 25<sup>th</sup> June, 2008.

The offences in question, as shown on the charge sheets, were alleged to have been committed between January 2001 and December 2004. The record of proceedings shows the dates on which the matter in question has been placed before the trial Court to be as follows:

- (i) 16<sup>th</sup> May, 2008;
- (ii) 28<sup>th</sup> May, 2008;
- (iii) 6<sup>th</sup> June, 2008;
- (iv) 18<sup>th</sup> June, 2008;
- (v) 20<sup>th</sup> June, 2008;
- (vi) 25<sup>th</sup> June, 2008;
- (vii) 4<sup>th</sup> July, 2008;
- (viii) 7<sup>th</sup> July, 2008;
- (ix) 11<sup>th</sup> July, 2008;
- (x) 25<sup>th</sup> July 2008.

The record shows that the learned Senior Resident Magistrate, *Mrs. E. W. Mbugua* released the accused person on “fresh bond of Kshs.100,000/= [and] one surety of the same amount [or a] cash bail of Kshs.100,000/=.”

The record also shows that there was *Criminal Case No. 36/05* which came up for hearing in February, 2005 but, after it had been heard for *one year*, it was withdrawn under s. 87 of the Criminal Procedure Code (Cap. 75, Laws of Kenya); it was subsequently recommenced as *Criminal Case No. 70/06*, but this time again, hearing was not completed. After all the prosecution witness had been called, except for the Investigating Officer, the original Court file went missing and could not be traced.

The prosecutor, on 6<sup>th</sup> June, 2008 made an application to the Court to re-commence proceedings *de novo*; upon which application the learned Resident Magistrate, *Mr. Mutua*, made a ruling. In this ruling, the learned Magistrate stated that his Court was a Children's Court, and he was thus "bound to consider the best interests of the children in addition to other consideration". He went on to state: "interests of justice demand that the trial starts *de novo*".

The prosecutor, on the occasion of the said ruling, urged the Court to simply *abandon* the earlier bond arrangements, because "none of us has details of the bail terms". The learned Magistrate ruled that *new bond terms* would have to be set by the Court. When the matter passed on to a different Magistrate, Her Honour *Mrs. Mbugua*, she thus ruled, on the issue of bond:

"This Court has no idea what were the contents of the original file, or what were the terms of bond; hence it is unable to release the accused on the old surety documents the said bond having been cancelled by JC2 [who] also ordered the accused to take *fresh plea*. Reconstruction of a criminal file is impossible and also not provided for by law. Inserting a charge sheet which the accused has not pleaded to is also irregular ...."

The learned Magistrate went on to state that she "had no doubt [the accused] was out on bond but there is no record of the said documents"; and so she set the bond/bail terms of 20<sup>th</sup> June, 2008.

The new bail/bond terms have been ordered not because a trial is in progress, but because the Children's Court has made orders for trial *de novo*, for the *second time*. It is not clear *when* the accused would undergo trial for the third time; for the learned Magistrate states:

"... in the circumstances it is right that a retrial should be conducted but only after an inquest has been carried out as to how the Court file disappeared. In this regard, I will order the DCIO Central to open an inquiry file to confirm or find out how this Court file C.C. 70/06 disappeared from our Registry. The inquiry may take long and, in this regard, it would not be fair to leave the accused in custody."

Section 77 (1) of the Constitution provides that:

*"If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial tribunal established by law"*.

The principle in the foregoing provision is given effect by ordinary statutes, notably by the Criminal Procedure Code (Cap. 75, Laws of Kenya).

When the case against the applicant herein was withdrawn the first time, it was by way of a *discharge*, initiated by the Attorney-General, under s. 87 of the Criminal Procedure Code. Thereafter, proceedings were recommenced, but, without a similar discharge, the Children's Court on its own, declared the proceedings terminated on the grounds of *loss of a file* in the Registry; and the same Court ordered that there be a *retrial*. It is not clear to me that there would have been a basis for a Subordinate Court, in law, to make such an order.

That position is strengthened by the consequential order which the trial Court made; that the retrial was not to take place *until the Police authorities had made certain investigations* regarding the loss of a file in the Court's Registry. It would not be clear *how long* such investigations would take, and how the findings of the investigations could affect the trial process itself.

In those circumstances, it is apparent, firstly, that the Court had handed over the matter to the prosecution authorities and the police; and secondly, that the principle of *expeditious criminal trial* referred to in s. 77 (1) of the Constitution would not be achieved.

In exercise of this Court's revision jurisdiction under s. 362 of the Criminal Procedure Code, I hereby vacate the orders of the Children's Court made on 18<sup>th</sup> June, 2008; 20<sup>th</sup> June, 2008; and 25<sup>th</sup> June, 2008.

This matter shall be mentioned before the Presiding Magistrate at the Children's Court on 16<sup>th</sup> of February, 2009, and on that occasion the Attorney-General shall make a suitable application regarding the mode of prosecution of the case against the applicant herein. The learned Magistrate shall deal with the said application as necessary, and shall give directions.

Orders accordingly.

DATED and DELIVERED at Nairobi this 26<sup>th</sup> day of January, 2009.

**J B OJWANG**

**JUDGE**

Coram: Ojwang, J.

Court clerk: Huka

For the Applicant: Mr. Owino Opiyo; Ms. Othieno Ochieng

For the Respondent: Mr. Mulati