



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CRI. CASE 42 OF 2008**

**KHAMIS AHMED KHALEF.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

Khamis Ahmed Khalef, the applicant herein, took out an Originating Motion pursuant to Section 65(2) of the constitution and under rule 3 of the constitution of Kenya (supervisory jurisdiction and protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 in which he sought for inter alia Proceedings in Mombasa C.M.C.CR. C. No. 3838 of 2006 to be stayed pending the hearing and determination of this reference. The Originating Motion is dated 20<sup>th</sup> May 2008 and is supported by the affidavit the applicant swore on 19<sup>th</sup> May 2008. The applicant also asked this court to revise the order of the trial magistrate directing him to close his case without the benefit of calling for witnesses to support his case. The applicant has complained that the trial magistrate had breached his constitutional rights to a fair trial. The applicant further complains that the deputy registrar of this court had refused to place the proceedings before this court for perusal in exercise of its supervisory powers of revision.

The Originating motion is opposed by Mr. Monda, learned Senior State Counsel who urged this court to dismiss the reference as lacking in merit. It is the submission of the learned Senior State Counsel that the trial magistrate did not breach the applicant's constitutional right.

I have perused the grounds set out on the face of the Originating motion. I have also considered the facts deponed in the affidavit of support. I have further taken into account the submissions of Mr. Justice (retired) Oguk, learned advocate for the applicant and those of Mr. Monda, learned Senior State Counsel. What provoked the filing of the Originating Motion is the order of T. Nzioki of 8<sup>th</sup> May 2008 in which the learned Senior Resident Magistrate rejected an application for adjournment made by the applicant. The trial Magistrate observed that the applicant has been delaying the finalization of the hearing of the case. The record shows that the prosecution did not oppose the application for adjournment. Can it be said that the learned trial magistrate breached the applicant's constitutional right to a fair trial? The answer to that question is in the negative. Whether the application for adjournment was opposed or not, the trial magistrate had the sole power to control proceedings before his court. He had the discretion to adjourn the matter even suo moto depending on the circumstances of the case. In the circumstances of this case I am convinced that the trial magistrate exercised his wide discretion without breaching the applicant's constitutional rights to a fair trial. The record shows that the applicant's advocate indicated he would call two witnesses in support of the defence case when he appeared before Mrs. Mdivo, learned Resident Magistrate on 5<sup>th</sup> October 2007. The defence prayed for a date in December 2007. In fact the applicant was given a hearing date for 6<sup>th</sup> December 2007. When Mr. Oguk came on record in place of Mr. Olaba as appearing for the applicant, he sought for an adjournment which was granted. The matter was then mentioned several times and finally fixed for hearing on 20<sup>th</sup> March 2008. On the aforesaid date, the case was adjourned at the instance of Mr. Olaba and marked as a last adjournment. The same was fixed for hearing on 2/5/2008 but could not proceed for hearing because a new prosecutor had come on record and needed time to peruse the file. At that time, the applicant's Counsel indisposed. The case was adjourned to 8<sup>th</sup> May 2008 when the applicant testified and thereafter applied for an adjournment to

summon other witnesses. The application was rejected on the ground that the applicant was hell bent to delay the hearing of the matter. The Chronology of events I have enumerated shows that the trial magistrate refused to adjourn the matter in exercise of his discretion. There are no constitutional provisions which can be said to have been breached. If the applicant wanted to challenge the manner in which the trial magistrate exercised his discretion then he can only do so by other means and not through a constitutional reference. For the above reasons, I dismiss the Origination Motion. The order staying proceedings in Mombasa C.M.Cr.C. No. 3838 of 2006 is hereby set aside and discharged. Let the aforesaid proceed for hearing to its conclusion. Let it be mentioned before the trial magistrate on 16<sup>th</sup> July 2008 for directions and further orders on the hearing of the case.

**Dated and delivered at Mombasa this 11<sup>th</sup> day of July 2008.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Mr. Oguk (retired) Justice for applicant. N/A for Mr. Monda.