



**REPUBLIC.....APPELLANT**

**VERSUS**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Criminal Revision Case 16 of 2008**

**REPUBLIC.....APPELLANT**

**VERSUS**

**1. DAVID MAULA MAKAYAU**

**2. MICHAEL MUTUNGA KIOKO alias SOLDIER**

**3. BENJAMIN MUTHAMA KITONYI ..... ACCUSED**

**REVISION**

1. I have seen a letter dated 16/6/2008 from the accused persons in **Kitui SRM'S Court Criminal Case No.639/2007**. In that letter, the accused persons have sought this court's intervention on a number of issues viz;

i. that because the complainant is deceased, there is no reason for them to remain in custody;

- ii. that they require witness statements;
- iii. that the trial is dragging while there is no evidence of a first report made in respect of Count II;
- iv. that they require a speedy trial and in the alternative, the hearing be transferred to another court.

2. I have called for and perused the lower court file and to my mind, the powers of revision under Section 364 of the Criminal Procedure Code cannot properly be invoked in this case. Section 364 must be read with Section 362 of the Criminal Procedure Code which provides as follows:-

“362. The High Court may call for and examine the record of any criminal proceedings before any subordinate court 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.”

3. I have seen no illegality or impropriety in the proceedings at Kitui and in fact, the 2<sup>nd</sup> accused is represented by Mr Mwalimu, Advocate who himself has raised no issue of anything untoward in the subordinate court. The issue whether a complainant is deceased or not cannot be a reason for this court to interfere in a part-heard criminal case. It is the trial court to weigh the value of evidence before it whether or not the complainant is alive and has testified. Similarly whether or not a first report was ever made in respect of Count II is a matter of evidence to be tendered before the trial court. This court cannot be converted to be that court as this court's role at this stage is merely supervisory and not appellate. It cannot otherwise convert itself into the trial court.

4. Regarding the speed at which the trial is being conducted, after the trial was adjourned on 28/1/2008 for cross-examination of PW3, Francis Muema Makanda, it was fixed for hearing on 28/2/2008 but on that day the trial magistrate was not sitting for an unclear reason. When it came for hearing on 10/3/2008, although there was a witness present, the 1<sup>st</sup> accused professed illness and the trial was adjourned to 14/4/2008 but again the trial court was not sitting. It was stood over for hearing on 15/5/2008 but the prosecution had no witness present. On that day also, witness statements were applied for and the prosecutor promised to trace them and sought time to do so. Hearing was adjourned to 25/6/2008. On that day, the 2<sup>nd</sup> accused sought an adjournment because his advocate was absent. Hearing was adjourned for that reason to 20/8/2008, three weeks or so from today.

5. On 9/7/2008, when the matter had been listed for mention, the 1<sup>st</sup> accused asked for witness statements and the prosecutor asked for time until 10/7/2008 to do so. On 10/7/2008, Mr Mwalimu advocate sought an adjournment for this court to address the present issues.

6. From the above summation, there is no basis for the claim that either the prosecution or the trial court are deliberately delaying the trial of the matter. Further, the court and the prosecution are addressing the issue of witness statements and this court's intervention at this point in time is vain.

7. Since all the issues raised can be addressed by the trial court, no basis for a transfer of the case to another court has been properly placed before me and I decline to do so in any event.

8. In the end, the complaints by the accused persons are baseless. I will order that the original trial file be returned to Kitui Law Courts forthwith and the hearing to proceed expeditiously until conclusion. There is nothing to revise in any event.

9. Orders accordingly.

Dated and delivered at Machakos this 12<sup>th</sup> day of **August** 2008.

**ISAAC LENAOLA**

**JUDGE**

In presence of: **Mr O'Mirera for accused**

ISAAC LENAOLA

**JUDGE**