



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROIBI**  
**CRIMINAL CASE NO. 47 OF 2003**  
**REPUBLIC THRO' MACHAKOS POLICE STATION.....PROSECUTOR**  
**V E R S U S**  
**1. DAVID KISOYA NZIOKI.....1ST ACCUSED**  
**2. MUTISO KISOYA NZIOKI..... 2ND ACCUSED**

**R U L I N G**

On 18th June, 2003 I refused to grant an application for adjournment vigorously put forth by the learned state counsel Mr. Omirere. I reserved my reasoned ruling while making the aforesaid order.

It shall be opportune to go behind the chequered history of this case.

Initially the case against 1st Accused alone commenced before Machakos High Court in 1995 and the same was terminated at its fague end when the Prosecution offered *Nolle prosequi* . Then the two accused were arraigned in October, 1997. They were committed before the Nairobi High Court. The Number of the Criminal Case was Cri. Case No. 68/98. It went on with a crawling speed for various reasons. Due to resignation of the trial Judge the trial *de novo* was ordered by Waki J. (*as then he was* ). He made a specific order that the case be tried from 16th June, 2003 from day to day. I am sure he was mindful of the long incarceration of the Accused persons, while making the said order. The hearing date was fixed in the presence of counsel from both the sides on 30th April, 2003.

The case was listed before me on 16th June, 2003 when the matter was called out. Mr. Omirera told the court and I quote: “*I tried to contact Police officers but I could not. I do not have witnesses* ”. The state of affairs was bitterly complained against by Mr. Njanja who appeared for 1st Accused and held brief for the counsel for the 2nd Accused. Because it was the first day of hearing, I decided to give final chance to the prosecution. I made further orders that the O C P D Machakos Police and Deputy O.C. (Prosecution) C.I.D

Headquarters be summoned to appear before me at 9 a.m.

on 18th June, 2003 to explain the absence of the witness. In short I gave two days to the prosecution to prepare itself. On 18th June, 2003, at 9.30 a.m. Mr. Omirera informed the court as under:

*“ I confirm that the summons were served on DY O.C. Prosecution C I D Headquarters, Nairobi and O C P D Machakos Police yesterday. I have not seen either of them and also have not seen any witnesses also.”*

I still gave another chance to the prosecution to secure appearances of the Police Officers who had not appeared before the court despite the service of summons and to bring witnesses. Come 2.30 p.m Mr. Omirera appeared “Sans Police Officers, Sans witnesses. ”

It was submitted that a Police Officer at C.I.D. Head Quarters promised to call OCPD Machakos Police. Neither the name of the said police officer was disclosed to the court nor he appeared before the court to state what happened after he made the promised call, if he ever made.

Thus after the end of two days there was no explanation on the absence of witnesses and also on the disobedience of court summons by two very senior Police Officers. The application was made under section 283 of the Civil Procedure Code. The provisions whereof do not need elaborate consideration. The court has discretion to adjourn the further hearing or post pone the commencement of trial from absence of witnesses or any other reasonable cause to be recorded. These words do not mean that the court is helpless when the witnesses are not available. Reasons for their absence have to be intimated to the court to its satisfaction.

It was also forcefully contended that the trial before me was a de novo trial and by implication it was suggested that the history of this case should not be considered by this court. For various unfortunate but legal grounds the trial was ordered to proceed de novo . It has been made clear by the Judge ordering re-trial and this court that onus is on the prosecution to commence and finalise this trial without any delay. In any event, that is what should be considered by the prosecution without any warning or advice from the court in full view of the provisions of Section 77 of the Constitution.

The hearing was fixed as back as 30th April, 2003 in the circumstances aforementioned. Prosecution had 2 and half months to gather witness and prepare for this trial. There was no appearance from the Investigating side of the Prosecution on the first day. This court granted adjournment for two days. The day scheduled also did not bring forth any change even after even after the court adjourned the matter at 2.30 p.m.

It was brought to my attention during submissions that the case against 2nd Accused is weak and that he should have been the witness which was the initial scenario in the year 1995. I also see from the information dated 1st April, 2003 filed in the court that the prosecution was amenable to accept the offer of plea of guilty to manslaughter. The 1st Accused has been in custody at least since 1995. This fact cannot be ignored.

In short after adjourning the matter twice no explanation was before the court on the non-availability of witnesses. After balancing the interests of justice in respect of both the parties, I did not have any ground to exercise my discretion in favour of the prosecution.

I sincerely hope that this order of refusal of adjournment by me will stir motivation amongst the prosecuting arm of the Penal system to take all necessary measurements towards expeditious and efficient disposal of Criminal cases.

Dated and delivered at Nairobi this 1st day of July, 2003.

**K. H. RAWAL**

**JUDGE.**