



REPUBLIC OF KENYA



Director of Public Prosecutions v Watene & 15 others (Criminal Revision E734 of 2023) [2024] KEHC 2299 (KLR) (Crim) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2299 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E734 OF 2023
LN MUTENDE, J
MARCH 5, 2024

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

ESTHER WANGUI WATENE 1ST RESPONDENT
ALI THUO CHUPHI 2ND RESPONDENT
ALEX MAINA NDIRITU 3RD RESPONDENT
CHARLES OGEGBA ONGWAE 4TH RESPONDENT
ERIC CHESIRE KIPTOO 5TH RESPONDENT
CORNELIOUS MWNAYAMBA MWANGO 6TH RESPONDENT
FREDRICK CHERUIYOT BUSONGO 7TH RESPONDENT
SAMUEL MBURU KAMAU 8TH RESPONDENT
GEORGE GIKARU KAMAU 9TH RESPONDENT
IBRAHIM TWAHIR MOHAMED 10TH RESPONDENT
HARRISON NGIGI MUCHIRI 11TH RESPONDENT
M/S LANDMARK FREIGHT SERVICES LIMITED 12TH RESPONDENT
WYCLIFE LUKALO TRADING AS GENDIPE ENTERPRISES 13TH
RESPONDENT
DOUGLAS OKEMWA MINYONGA 14TH RESPONDENT
DOMINIC OGWAKA 15TH RESPONDENT



RULING

1. The Respondents herein who worked as Revenue Officers for government are charged with various criminal offences in Milimani Chief Magistrate's Court Criminal Case No. 2422 of 2018 following allegations of being involved in fraudulent dealings that led to loss of revenue. The stated offences include conspiracy to defraud; breach of trust; connivance to commit an offence, neglect of official duty; abuse of office; entering into an agreement permitting release of concealed goods; concealment of imported goods; making of false custom entry; fraudulent evasion of payment of duty; and refusing to answer questions by an authorized officer.
2. Plea in the matter was taken on 31st December, 2018 with those present denying charges.
3. Through an application dated 23rd October, 2023, the applicant seeks revision of a ruling delivered by Hon. Zainab Abdul, Senior Principal Magistrate, on 25th September, 2023.
4. The application is premised on grounds that PW1 Patrick M. Mugambi commenced his testimony on 15th February, 2019 when the court proceeded to the site to hear an application for release of the subject consignment to the smaller traders who were owners and proceeded with his testimony from 13th -15th December, 2023.
5. That on 25th September, 2023, Faith Gatwiri from Kenya Revenue Authority who was to testify was re-called to the office by the Director General of Kenya Revenue Authority to attend to an urgent issue required in Parliament and following the unprecedented occurrence, the prosecution sought an adjournment so as to proceed with the other witnesses who had been scheduled to testify from 26th - 27th September, 2023. However, the trial court declined to grant an adjournment on grounds that Faith Gatwiri had previously failed to attend court on similar grounds; the conduct of the complainants, the DCI and KRA demonstrated that they were not interested in the matter. In the result the applicant was ordered to either proceed with the matter; withdraw the case or close it.
6. That the ruling is marked with impropriety, illegality, errors as both the prosecution and defence made several applications for adjournments while the prosecution only sought two (2) adjournments.
7. That the trial court did not take cognizance that the matter was affected by Covid-19 Pandemic. That Faith Gatwiri had not failed to attend court at an earlier date; no interest was lost in the matter and fair trial was called for and substantive justice required.
8. The application is supported by an affidavit deposed by Delroy Mwasaru, the prosecution Counsel seized of the matter who basically reiterates what is stated on the grounds which the application is premised.
9. The application is opposed by the respondents. Through a replying affidavit sworn by the 1st Respondent, it is deposed that when the matter came up for hearing on 25th September, 2023, the prosecution had not bonded witnesses and there was no guarantee that they would bond witnesses.
10. That the Applicant has been sufficiently accommodated by both the court and defence to present all witnessed for a period of four (4) years hence the relief sought cannot be justified.
11. The 2nd and 3rd Respondents depone that the application is an abuse of court process with the intention to further delay the trial which has been caused all along by the prosecution. That the court



granted the Prosecution Counsel a chance to consult his seniors and no proper instructions were forthcoming, hence the trial court before making the ruling dated 25th September, 2023, considered the Respondents' right to fair hearing and the constitutional right to have criminal proceedings heard and concluded without unreasonable delay.

12. The 4th and 5th Respondents aver that the application has the same intention of buying time for the Applicant who has not been able to make a decision on how to conduct the case. That Faith Gatwiri was only bonded to appear on 25th September, 2023 the day of hearing after the prosecution had informed the court at 9:00 am that they did not have a witness and were not ready to proceed, an application that was declined and the ruling of 25th September, 2023 was only delivered after the Applicant informed the court that they were unable to secure any witness.
13. The 6th and 7th Respondents depone that they have been subjected to an unreasonable delay in the proceedings. That the argument of the main witness having been called back to the office as urged was not justifiable but reason to delay proceedings as the prosecution failed to disclose with specificity the issue of urgency that required her personal attention and they failed to demonstrate that Madam Gatwiri attended Parliament on the material date.
14. That the prosecution failed to furnish adequate or rational justification for non-appearance of the remaining 32 witnesses over a span of five (5) years. That the delay causes significant emotional, psychological and financial hardship to the Respondents and undermines the presumption of innocence until proven guilty.
15. The 8th, 9th, 11th and 12th Respondents depone that there is nothing in correct, improper or illegal in the Ruling of 25th September, 2023. That by the State struggling to avail witnesses was a mockery of the court, waste of resources to bond witnesses and that the State has not demonstrated any prejudice that will be suffered if orders sought are not granted.
16. Further, that the Applicant cannot hide behind Article 50g (2) of the Constitution as the same does not grant it the freedom to condone an abuse of court process and delays in prosecution.
17. The application was canvassed through written submissions. It is urged by the Applicant that the decision of the Hon. Magistrate was grossly erroneous as she relied on misrepresentation from the defence Counsel, and exercised her discretion arbitrarily to the detriment of the applicant right to a fair trial as envisaged under Article 50(1) of the Constitution. That before the proceedings of 25th September, 2023, the Prosecution had only sought an adjournment once on 22nd November, 2022. Conversely, Respondents were the ones to blame for the delay and the Prosecution should not be penalized for delay when the adjournment was occasioned by their absence. Reliance is placed on the case of Republic vs Omar Kipkemboi Cheruiyot & 4 others (2020) eKLR where the court observed that:

“An accused person cannot accuse the prosecution of delaying a trial, on a day when the said accused was absent from the court. I so hold because the accused is entitled to be present, when his trial was going on. The trial should not proceed in his absence, unless the court has made an express determination to the effect that the conduct of the said accused person in court, rendered it impossible for the trial to proceed.”
18. Also cited is the case of Republic vs Paul Mutuku Magado (2019) eKLR where the court considered factors to be considered when an application is made for adjournment.
19. It is submitted for the 2nd and 3rd Respondents that the delay in the matter was caused by the prosecution. That it has taken five (5) years for one (1) witness to testify which has made accused persons suffer great prejudice contrary to rights of expeditious hearing enshrined in Article 50(2)(e)



of the Constitution. Reliance was placed on the case of R vs. Omar Mwinyi Musimba (2017) eKLR where the court observed that:

“ 15. A judicial officer is therefore bound from the day the criminal case (is) registered in court to conceive a timetable and chart a route that would enable him expeditiously meet the core and overriding objectives of the court. In setting out to execute active case management the court as the driver gets foresighted and envisages possible pit falls and impediments to its core mandate, to defeat delay and eradicate ‘case backlog’. It is therefore critical to set a timetable for surmounting such pitfalls and impedimeters or just dealing with them at an appropriate time noting that some of those issues considered pitfalls may have a determinant effect on the case as to be able to conclude it.”

20. The 4th and 5th Respondents, argue that the court record demonstrates that the prosecution caused adjournments more than once and the Respondents did not cause, eight adjournments as alleged.

21. That the defence did not mislead the trial magistrate that the applicant seems to be seeking the trial court’s recusal or transfer of the matter to another court without fling a formal application to that effect. They relied on Republic vs Henry Rotich Kiplagat & 9 others where Professor Sifuna J. held that:

Freelance and wanton revisions (especially interlocutory revisions) can really interfere with the decisional independence of subordinate courts and the smooth running of their proceedings, hence the need for regulation and moderation. As even in some extreme extents amount to arm twisting of those subordinate courts and tribunals. In Joseph Nduvi Mbuvi Vs Republic (2019) eKLR Odunga J (as he then was) stated that the revisionary jurisdiction of the High Court should not be used to micro-manage subordinate courts.

This court cannot use the power of revision to micro-manage proceedings in the lower court. For instance, as is urged in this revision, probe the deservedness of every adjournment sought by the parties in the trial court and interrogate the trial courts every decision on each application for on adjournment. This will be an absurdity. On an adjournment, this court can only be called upon to intervene in exceptional, manifest and extreme circumstances, for instance where a denial of adjournment has resulted in a violation of the constitutionally protected right to a fair hearing, provided also that the revision does not result in an absurd consequence such as an unnecessary disruption of the courts diary.

22. The 6th and 7th Respondent submit that the first prosecution witness testified four (4) years later; length of time was untenable and unreasonably inordinated to have further adjournments. That the next witness chose to heed to calls of Parliament and contemptuously ignore summons to attend court demonstrated the indifference of the Kenya Revenue Authority who was technically regarded as a complainant; hence the reason was not justifiable.

23. That in the case of Fredrick Kirimi Mugiri vs Republic (2016) eKLR it was pointed out that both the Constitution and the Law are to be interpreted broadly to promote and protect the rights of an individual and not otherwise.

24. That the bone of contention is whether the delay is are excusable and by extension that there is no illegality perpetuated by the ruling of the court due to the fact that the ODPP is granted the powers to discontinue criminal proceedings under Section 5 of the Office of Director of Public Prosecutions.



25. The 8th, 9th, 11th and 12th Respondents urge that the applicant has not met the threshold for granting the orders sought by demonstrating that the impugned Ruling is marred with incorrectness, impropriety or illegality. That the applicant has fronted an appeal masquerading as an application for revision.
26. On the question of jurisdiction under Section 362 and 364 of the CPC reliance is placed on the case of Wasley Kiptui Rutto & Another vs Director of Public Prosecution, Kabarnet KBT HC Criminal Revision No. 2 of 2017.
27. Also cited is the case of Wahome vs Republic (1981) KLR Criminal Appeal No. 68 of 1981 where the court held that revisionary jurisdiction of the court is discretionary.
28. That as held in Director of Public Prosecution vs Perry Monsukh Kansagara & Others (2020) eKLR a balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro-manage the trial court's independence in the conduct and management of its proceedings.
29. Plea in the matter was taken on 31st December, 2018, so far one witness has testified. Impugned orders herein were issued on 25th September, 2023 and subsequent directions were given on 27th September, 2023.
30. The matter was scheduled for hearing when the Prosecution Counsel sought an adjournment on grounds that the Prosecution witness who was on her way to court had been summoned by the Director General KRA for duty related purposes. The Prosecution also stated that the Investigating Officer was away on leave and the second officer was also on sick leave but he did not have the leave documents.
31. The application for adjournment was opposed by the Respondents through their respective counsels.
32. It was contended that the matter had delayed in court for over 5 years, that the Respondents had been dismissed from employment following the charges before court, and, they had diligently attended court, incurred travel expenses in the process and had also closed their businesses on court date. That their rights to fair and expeditious trial had been violated.
33. In the stated ruling the trial court declined to adjourn the matter and gave the Prosecution three options to either close its case, withdraw or proceed. The matter was placed aside after the prosecution through Prosecution Counsel, Mr. Akula sought to obtain instructions from the Director of Public Prosecutions (DPP). He particularly prayed for time to seek approval from the DPP to withdraw or close its case and cited Section 22, Section 5 Section 85, 86, 82 ODPP Act and regulations 2 and 3 of the Subsidiary legislation thereto.
34. The matter came up for mention on 27th September, 2023 when Mr Akula told the court that he had not obtained instructions for the reason that the DPP who had been recently appointed was outside the jurisdiction of the court and that his superiors could not issue such instructions. He also told court that he had two (2) witnesses in court.
35. The Respondents raised issue with the witness attendance that day stating that the Prosecution had been given a chance and failed to avail witnesses, that the ruling was clear and limited, the Prosecution to was required to withdraw or close the case, and, lastly that the matter was for mention to confirm this purpose and not for hearing. It was also submitted that the ruling had not been appealed and that the court was functus officio.
36. The court in its ruling delivered on 27th September, 2023 stated that: The window to call witness closed on 25th September, 2023 and it was a mockery to court procedures for witnesses to attend court yet



they have never shown interest in the matter. That the only option available was to close or withdraw since it became apparent they were never ready to proceed.

37. I have examined the trial court record regarding what transpired. Issues for determination are whether the court committed an illegality or irregularity when it locked out further witness attendance, and, whether it erred in compelling the Prosecution to close or withdraw its case. Revisional jurisdiction is founded on the Constitution and Statute.

38. Article 165 (6) of the Constitution provides that:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

39. Section 362 of the Criminal Procedure Code states as follows:

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 orders recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

40. The power of revision is limited to the court interrogating the lower court record with a view of amending irregularities, illegalities and procedural breaches. The provisions of law are not invoked to direct the trial court on how it handles its proceedings, considering its wide discretion, but, the High court also intervenes where there is grave injustice.

41. In Republic -vs- John Wambua Munyao , Odunga GV J (As he then was) held that:

“It is therefore clear that the powers of revision under section 362 of the Criminal Procedure Code are only to be invoked to enable this Court satisfy 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 subordinate court. Therefore, if out of anger the Court makes a decision which is wanting in its correctness, legality or propriety or the proceedings are irregular, this Court no doubt will step in and correct the same.”

42. Article 165(7) of the Constitution also speaking to this court’s revisionary and supervisory power, provides that the High Court is empowered to:

“Make any order or, give any direction it considers appropriate to ensure the fair administration of justice” (Emphasis mine)

43. The proceedings are clear, the matter has been in court since 31st December, 2018, when some of the accused persons took plea while others were absent. Depending on circumstances of the matter, a case taking that long may be contrary to the Constitutional requirement of expeditious determination of a matter and this duty is placed on all parties to a trial. In this case the Prosecution had the primary obligation to avail witnesses in a manner that demonstrates their intention to have the matter come to an end. It is notable that on some occasion, the Prosecution would be ready to proceed but not the defence, therefore, both parties were to blame for causing adjournments.



44. The criminal procedure code foresees a criminal trial being heard on a daily basis to its conclusion with limited adjournment. Section 205 (1) of the [Criminal Procedure Code](#) provides that:

(I) The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may allow the accused person to go at large, or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties conditioned for his appearance at the time and place to which the hearing or further hearing is adjourned: Provided that no such adjournment shall be for more than thirty clear days, or, if the accused person has been committed to prison, for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day.

45. In this case, the ruling of 25th September, 2023 following exercise of discretion of the court that was persuaded that there was no ground to allow further adjournment may have been procedural, but, after such an order declining grant of an adjournment, the court was expected to cause the matter to proceed hence culminating into application of the provisions of Section 210 of the [Criminal Procedure Code](#) that would have resulted into determination of the case.

46. Section 210 of the [Criminal Procedure Code](#) particularly provides that :

If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

47. Withdrawal from prosecutions in trials before the subordinate court is provided for in law. Section 87 of the [Criminal Procedure Code](#) provides:

In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions*, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal –

- a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;
- b) If it is made after the accused person is called upon to make his defence, he shall be acquitted.

48. Under Article 157(6) (c) of the [Constitution](#), the Director of Public Prosecutions shall exercise state powers of prosecution and may:

- i. Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.
- ii. Take over and continue any criminal proceedings commenced in any court (other than the court martial) that has been instituted by another person or authority with the permission of the person or authority.



- iii. Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions.
49. The provision of the law does not give the court power to compel the prosecution to act in a certain manner. Similarly, it does not give room for the court to act on its own motion or move the prosecution or even suggest to it to withdraw or close its case as it did in this case. If that was intended, the draftsman would have expressly added this option.
50. It is also not automatic that the Prosecutor would withdraw the case whenever witnesses are not available or whenever a matter has stalled. Section 87(a) of the [CPC](#) particularly makes it important for Prosecutors before subordinate courts to seek approval from the DPP before withdrawing the case. The decision made by the DPP under Section 87 of the [CPC](#) is taken after considering the public interest which is at stake and may not be at the spur of the moment as expected by the Respondents counsel. This is because the DPP acts on behalf of the public at all times.
51. In [Republic -vs- Seketo](#) (2019)eKLR, Nyakundi J observed that:
- “An important element of the power to initiate, undertake or withdraw any criminal proceedings by the prosecutions is to ensure justice is not only seen to be done but that justice is done in the matter.”
52. The court was right in granting the Prosecution time to seek clear instructions. However, the court’s view that the chance to bring witnesses was closed on 25th September, 2023 was erroneous and unprocedural that caused grave injustice. Witnesses available were not allowed to testify, yet, there is no rule that prevents the Prosecution from availing witnesses on a mention date, contrary to counsel view, their attendance meant that the Prosecutor was ready to proceed with the matter as directed.
53. I must also point out that the unfortunate remark that witnesses could no longer be availed and the option was to either close or withdraw the case was illegal and irregular. The options given on 25th September, 2023, included proceeding with the case. The court did not grant the Prosecution a last adjournment or did not proceed to make its ruling under Section 210 after it noted that the Prosecution had no more witnesses to avail.
54. From the foregoing, I call to this court orders of the trial court that I quash and set aside. The matter shall be placed before the trial court for fixing of a hearing date which if practicable shall be heard on a day to day basis. For avoidance of doubt, this order shall not bar the court from exercising its discretion in accordance to the law.
55. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 5TH DAY OF MARCH, 2024.

L. N. MUTENDE

JUDGE

In The Presence Of:

Court Assistant – Habiba/Hadija/Fatuma

