



Muiruri v Director of Public Prosecutions & another (Criminal Revision E1219 of 2024) [2024] KEHC 13170 (KLR) (Crim) (15 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E1219 OF 2024
AM MUTETI, J
OCTOBER 15, 2024**

BETWEEN

JONATHAN KINYANJUI MUIRURI APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

STANLEY MUGAMBI THUMATIA 2ND RESPONDENT

RULING

1. The applicant was charged in Makadara Chief Magistrate’s Court Criminal Case No E899 of 2021 Republic v Jonathan Kinyanjui Muiruri with the offense of Obtaining money by false pretence contrary to Section 313 of the Penal Code.
2. The matter has been proceeding before the Honourable H.N Okwani SPM who on the 4th of June 2024 proceeded with the hearing in the absence of the applicant who was said to be unwell at the time.
3. The applicants counsel Mr. Gachee Mwanza had instructed Mr. Riunya to hold his brief and seek an adjournment to allow the accused person to be present at the hearing.
4. Mr. Riunya Advocate presented before the Honourable Magistrate a sick sheet dated 3rd of June 2024 as proof of the accused person’s illness.
5. The learned Honourable magistrate declined to grant the adjournment sought that the applicant’s counsel for reason she had earlier on granted an order for the last adjournment to the accused person.
6. The matter proceeded and the evidence of PW3 was taken.



7. Aggrieved by the decision of the Learned Honourable magistrate, the applicant through counsel filed a notice of motion dated 24th June 2024 seeking among other orders an order for the recalling of PW3 to give his testimony afresh in the presence of his counsel for the purposes of cross-examination.
8. The applicant also sought an order to lift the warrant of arrest against the applicant for his failure to attend Court on 4th of June 2024.
9. The applicant has also urged this Court to find that the trial magistrate lacks neutrality and impartiality in this matter and that the Honourable magistrate is unable and unwilling to hear the case on the basis the merits of the issues, evidence and the law.
10. At the hearing of the application Mr. Chebii counsel for the respondent indicated to this court that he was not opposed to the orders sought by the applicant being granted since according to him the record of the lower court was in tandem with the representations made by the applicant on the face of his application and the supporting affidavit.
11. He also submitted that counsel for prosecution in the lower court had not opposed the application for adjournment on 4th of June 2024 and as such the position of the respondent regarding the merits of the application for adjournment before the learned Honourable magistrate had not changed thus his concession to the application.
12. Mr. Mburu for the applicant relied on the grounds on the face of the application as well as the affidavit in support sworn by the applicant on 24th June 2024.
13. Mr. Mburu argued that the learned Honourable magistrate did not properly exercise her judicial discretion in declining to grant the adjournment sought by counsel for the applicant.
14. Mr. Mburu maintained that the reason advanced for the accused's absence was reasonable and the learned Honourable magistrate ought to have exercised her discretion in favor of the applicant.
15. Having heard both counsel, this court is minded to grant the order for the recall of PW3 to testify a fresh in the presence of the accused person and his counsel for reason that the learned Honourable magistrate appears not to have taken into account the provisions of Section 205 and 206 of the [Criminal Procedure Code](#) which sections provide as follows :-

Section '205

- (1) 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.

Section '206

- (1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the



accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.

16. A reading of the two sections cited above clearly reveals that the court has authority to adjourn a matter before or during a hearing. The duty of a party desiring an adjournment is to satisfy the court that there exist reasonable grounds for the grant of an adjournment. Needless to say, ill health if sufficiently established before a court qualifies as a reasonable ground for a court to grant an adjournment.
17. The applicant in this matter presented medical evidence to prove that he was in a state thus unable to attend court. The learned Honourable magistrate does not appear to have attached any weight to the document presented to her and there is no indication that she actually considered the application on merit.
18. The fact that the court had earlier on granted a last adjournment appears to have weighed heavily on the mind of the magistrate in declining to grant the application by counsel for the applicant.
19. The right to a fair trial under Article 50 of the *Constitution* requires that an accused person be afforded a fair opportunity to confront his accusers. The right to a fair trial is non-derogable thus before a court exercises its discretion, it must bear in mind the hallowed position of the accused person in a criminal trial. An accused person must not be needlessly exposed to the risk of a conviction on account of their failure to attend court arising from circumstances beyond their control. No one elects to fall ill. Courts should be inclined to understand the predicament of a man on trial who for reasons of ill health is unable to attend court and accommodate such an accused person once information is placed before a court to prove his indisposition.
20. The court failed to appreciate that the accused person faced a felony charge and by dint of the provisions of Section 206 of the *Criminal Procedure Code*, the court could not proceed with the matter in the accused's absence without violating the express provisions of the law.
21. It is the considered view of this court therefore, that the prayer for recall of PW3 is merited and is hereby allowed.
22. Turning to the question of the learned Honourable magistrate's perceived bias against the applicant this court is not inclined to delve into the issue without allowing the learned Honourable Magistrate an opportunity to pronounce herself first on the issue. To declare that a court is biased against a party requires more than the singling out of a single incident of an accidental slip in the exercise of judicial discretion such as happened in this case. The applicant is at liberty if he seriously believes that he cannot get a fair hearing before the learned Honourable magistrate to raise the matter with the trial magistrate and if dissatisfied with the court's ruling on the issue nothing would prevent the applicant from approaching this court by way of appeal.
23. The powers of this court under Section 364 of the *Criminal Procedure Code* are limited in scope and specifically seek to deal with any incorrectness, irregularity, impropriety and or illegality of the trial court's decision. The power cannot extend to an inquiry as to the independence of a court in the hearing of a matter. An accused person concerned about the fair mindedness of a court should first raise the issue with the concerned judicial officer before approaching this court.
24. In conclusion, the order for recall of PW3 to testify afresh in the presence of the accused and his counsel is hereby granted.
25. The warrant of Arrest is hereby lifted.
26. The lower court file shall immediately be transmitted to the trial court for further hearing.



27. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 15TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Mburu for the Applicant

Chebii for the Respondent

