



Office of the Director of Public Prosecutions v Oyier & another (Criminal Revision E009 of 2023) [2023] KEHC 3140 (KLR) (12 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL REVISION E009 OF 2023
RE ABURILI, J
APRIL 12, 2023**

BETWEEN

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

MOSES OMONDI OYIER 1ST RESPONDENT

FREDRICK OMONDI MAK'OSALLAH 2ND RESPONDENT

JUDGMENT

Introduction

1. This Criminal Revision matter was brought to this court through a letter dated March 14, 2023 signed by Mr S G Thuo Prosecution Counsel, Kisumu, which letter was filed on March 21 2023 complaining in the way or manner in which the trial court in Kisumu Criminal Case 379/2021 exercised its discretion in closing the prosecution's case *suo moto*.
2. In that letter, the Prosecution Counsel on behalf of the Director of Public Prosecutions (DPP) asked this court to call for and examine the record of proceedings before the trial court for the purpose of satisfying itself on the correctness, legality and propriety of the trial court's decision to close the prosecution's case.
3. The letter by the ODPP was predicated on the following principal grounds:
 - a. That this Superior Court immediately calls for the record, proceedings and impugned ruling in Kisumu CM Cr 379/2020 to satisfy itself as to its correctness, legality, regularity and propriety in line with fair administration of justice.
 - b. That upon calling for the aforesaid record the Superior Court be pleased to revise and reverse the orders dated March 14, 2023 to prematurely lock out prosecution witnesses despite non-



objection of the accused persons and failure to exhaust the available methods of compelling attendance of witnesses.

- c. That the High Court be pleased to order immediate recusal of Hon D Ogoti in Kisumu Cr Case No 379 of 2020 for the reasons highlighted hereinabove. The superior court be at liberty to summon *viva voce* evidence of the quoted sentiments which were uttered in open court and not recorded.
 - d. The court ktbe pleased to revise vary and set aside the orders given by the subordinate court on March 14, 2023 so as to accord fair administration of justice.
 - e. The court be pleased to invoke its powers and jurisdiction to review orders of the subordinate court under Articles 165 (6) of the Constitution and section 362 of the CPC and to issue any orders as it deem necessary to meet the demands of fair administration of justice including and not limited to:
 - i. Make a determination to the effect that the decision and orders issued were irregular and contrary to the prosecutions right to a fair trial and due process of law under Article 25 (c) of the Constitution.
 - ii. That the trial magistrate exercised his discretion wrongly improperly and outside the provisions set out under Article 25 (c) of the Constitution.
 - iii. Make a determination that the trial magistrate has already formed an opinion on the outcome of this matter and an order for recusal be made.
 - iv. Revise the orders and ruling delivered on March 14, 2023 on the premature closure of the prosecution's case despite the non-objection of the accused persons and failure to explore other lawful methods to compel witness attendance.
4. The background of this matter is that on September 3, 2020, the respondents were charged with conspiracy to commit a felony contrary to section 293 of the Penal Code as well as several counts of stealing by servant. However, the hearing of the matter began on June 6, 2022, when the prosecution called one witness.
 5. Subsequently, the hearing failed to take off on numerous occasions and thereafter, the trial magistrate left the station. On February 28, 2023, the new trial magistrate held a pre-trial conference with all parties and the parties agreed to have the hearing of the matter on March 6, 7, 13 and 14, 2023. The trial magistrate clearly warned the parties that he would not entertain adjournments and that all parties ought to prepare for hearing on the aforementioned dates.
 6. On March 6, 2023, the prosecution failed to proceed as it did not have the police file and further as its witnesses were not available and so, the Prosecution Counsel sought an adjournment to the 13th and 14th on which latter dates, the prosecution counsel indicated that he would be ready to proceed. However, on the said dates, the prosecution availed only one witness on 13th March and two witnesses, PW2, PW3 & PW4 on March 14 which witnesses declined to testify on account of having no complaint or interest in the case against the accused persons, respondents herein after which the prosecution sought an adjournment but the same was denied by the trial magistrate. PW2 Noel Odhiambo Agimba stated that the 2nd accused had refunded him his money hence he wished to withdraw the complaint against him. at a he witness was discharged from the proceedings as the prosecution had no objection.



7. On March 14, PW3 Paul Omondi Odhiambo took oath and stated that he was not interested in being a witness against the two accused persons and the prosecution allowed the court to discharge the witness. PW4 Julia Anyango Awuor took oath and withdrew her complaint against the two accused persons and with no objection from the prosecution counsel, she was discharged from being a witness.
8. Subsequently, the prosecution asked for adjournment but the trial magistrate declined and ordered the prosecution to close their case and invited the parties to file written submissions for determination of whether the respondents herein had a case to answer. It was the trial magistrate's finding that the prosecution failed to give a reason why the prosecution witnesses were not in court as promised by the prosecution during the pre-trial conference on February 28, 2023.

The Respondents' Response

9. When the matter came up for hearing before this court on March 27, 2023, the 1st respondent opposed the application for revision on account that the prosecution had failed to demonstrate that there had been illegality or impropriety on the part of the Chief Magistrate.
10. It was his case that the case had come up for hearing from December 8, 2020 until March 14, 2023 during which time he and the 2nd respondent had attended court faithfully despite the fact that the 2nd respondent was based in Turkana and lived in Eldoret. He further submitted that the prosecution had only availed one witness since the matter began in 2020 and always sought for adjournment whereas the witnesses who attended court stated that they were not interested in pursuing the matter.
11. The 1st respondent further submitted that he had a right to an expeditious trial which right the court had to protect and that as a result of the case against them and the constant travelling to attend court, he had lost employment and thus he urged this court to uphold the ruling of the trial court.
12. On his part, the 2nd respondent submitted that they appeared in court on March 6, 13 and 14, 2023 when the court made it clear that witnesses be availed in court and the prosecution indicated that all witnesses would be in court but they were never availed.
13. He submitted that the case had taken a toll on him having begun the case in 2020 and that he prayed that the file be returned to the trial court so that they could file submissions on a case to answer. The 2nd respondent submitted that the prosecution had more than sufficient time to call witnesses.

The Applicant's Rejoinder

14. In a brief rejoinder, the Prosecution Counsel submitted that Article 50 of the *Constitution* referred to the accused persons and the victim who had a right to be heard. Mr Thuo further submitted that the trial court failed to provide alternatives for attendances of the witnesses. It was his submission that the respondents were silent on his application for warrant of arrest and further that he was not granted the last adjournment. Mr Thuo further submitted that the denial of adjournment was an administrative requirement and a technicality.
15. Counsel further submitted that the accused persons were entitled to an expeditious not hurried hearing and that the trial court expressed itself negatively in the matter. It was his submission that the trial magistrate ought to recuse himself from hearing the case as he had already formed an opinion on it.



Analysis and Determination

16. I have considered the application for revision of the trial court’s decision not to adjourn the case for the prosecution to call more witnesses and the closure of the prosecution’s case, the submissions by both the Prosecution Counsel and the defence. In my view, the question to be answered is whether this court should revise the orders made by the trial magistrate in Kisumu CM Cr Case No 389 of 2020 on March 14, 2023.

The Law

17. The constitutional provision on supervisory jurisdiction of the High Court to make orders of revision is Article 165 (6) and (7) of the Constitution of Kenya, 2010 which stipulates that:

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

7 For the purposes of clause 6 the High Court may call for the record of any proceedings before the subordinate court or person, body authority referred in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.” (emphasis added).

18. Statutorily, Sections 362 and 364 of the Criminal Procedure Code empower this Court to deal with the issue at hand and the said sections provide 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”

364 (1). In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge

b In the case of any other order other than an order of acquittal alter or reverse the order.

2 No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.”

19. This Court acknowledges that under Article 157 of the Constitution, the powers to institute criminal proceedings is conferred on the Director of Public Prosecutions. The Director of Public Prosecutions may also take over criminal proceedings instituted by other persons or institutions. In addition, the Director of Public Prosecutions may also discontinue criminal proceedings commenced by his office or by any other person, with leave of the court. The Article provides that:

157(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may –



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 under paragraph (b)

- 7 If the discontinuance of any proceedings under clause 6(c) takes place after the close of the prosecution case, the defendant shall be acquitted.
 - 8 The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.
20. In every criminal prosecution, the court must be alive to the presence of the complainant whose interest although advanced by the Prosecution stands to suffer when the criminal complaint is dismissed for reasons other than merit of the case. Unlike the plaintiff in a civil suit who may sue his Counsel for professional negligence in the event of Counsel mishandling his case, the same is not open to the complainant in a criminal case when a charge is dismissed for reason of failure of the Prosecution to attend Court or to bring witnesses to testify to prove the complaint beyond reasonable doubt.
21. The criminal process is not all and only about the fair trial of the accused; there is also the interest of the complainant victim of the criminal offence as provided for under the *Victim Protection Act* No 17 of 2014, particularly section 4 (2) (b) thereof. It is for that reason that victims of offences are allowed to give their victim impact statement after conviction and before sentencing of the offender. In this regard, Section 4 (2) (b) of the *Victim Protection Act*, 2014 provides that:
- “2 Subject to subsection (1), a court, administrative authority or person performing functions under this Act shall ensure that—
- a;
 - b Every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken;”
22. I note that a person who approaches a court on revision is only asking the court to take a rather narrow look at the proceedings of the trial court where the focus ought to be on the regularity or propriety or correctness of the proceedings conducted or the decision arrived at. In other words, the challenge is more or less on the regularity or correctness or propriety of the process rather than on the merits the final determination of the trial court.
23. I have perused the trial court record and found that the Magistrate made an order that the prosecution’s case be closed. The trial court record shows that the plea in this matter was taken on September 3, 2020 on which date the court was informed that the statements had not been supplied to accused persons. The case was then fixed for hearing on the 25.05.2021 eight months later on which day the Investigating Officer informed the trial court that witness statements had not been collected and the same was to be done on that date.
24. The matter was then fixed for the 9.8.21 three months away on which date the statements had still not been received by the accused and the case was thus fixed for hearing on the 19.10.21 two months away when it was still not ready for hearing as witness statements had just been supplied to the defence counsel that very day of the hearing. The record also reveals that the matter could not proceed on December 14, 2021 whereas on February 8, 2022 the 1st accused was absent and a warrant of arrest was issued but lifted on the same day. The matter was then set for hearing on April 5, 22 but did not proceed as the second accused was bereaved.



25. The trial court record is also disjointed in the sense that although the partly typed proceedings show that on June 6, 2022 the case proceeded to hearing with PW1 testifying, this is not supported by the handwritten proceedings recorded by Hon T.Odera, as she then was.
26. On February 21, 2023, directions were taken before Hon Dr D Ogoti and section 200 (3) of the CPC complied with. On February 28, 2023, the trial court held a pre-trial conference with all parties in which the parties agreed to have the case heard on March 6, 7, 13 and 14, 2023 at the request of the prosecution. The trial magistrate clearly warned that he would not entertain adjournments and that all parties ought to prepare for the hearing on the aforementioned dates. The prosecution informed court that it would bond all the witnesses as 12 witnesses lived in Kisumu and its environs and could be reached with ease.
27. On March 6, 2023 the prosecutor once again sought an adjournment on the grounds that he had not received the police file as the investigating officer had made an emergency visit upcountry and that the five witnesses who had been called to attend court that day were not in court. The adjournment was granted.
28. On March 13, 2023 the prosecution availed one witness, PW2 who indicated that he was no longer interested in pursuing his case against the accused and he was discharged from being a witness with no objection from the prosecution. On March 14, 2023 the prosecution called two witnesses, PW3 and PW4 who both took oath but indicated that they were no longer interested in pursuing their cases against both accused, which the prosecution did not object. The prosecution further informed the court that 11 witnesses had been bonded but were not in court. No evidence of bonding of the said witnesses was presented before the trial court.
29. The 2nd accused raised the issue that one of the alleged witnesses, Wycliffe Omondi Ogada was not listed in the charge sheet as a witness and further that his statement had not been supplied to the accused persons.
30. the prosecution Counsel outlined to court the efforts that he had made to get the witnesses on that day in vain as all witnesses were said to be away on their own business an indication that they had not been bonded at all as no bonds were available in the court file.
31. Nonetheless, when the trial court adjourned the hearing from March 6 to March 13 and 14, he gave a go ahead for summons to issue to the witnesses. Those copies of summons to attend court are in the court file but there is no evidence that the same were served on the said witnesses meaning, the attempt by the prosecutor to apply for warrants of arrest of the witnesses who had neither been bonded nor served with summons was all an effort in futility as no court of law can bypass that legal process and simply cause to be arrested witnesses for the sake of it or to please the prosecution.
32. I have set forth the history of this matter and it clearly shows that indeed, it was the prosecution who have contributed substantially and majorly to the delay in the hearing and determination of the criminal case and not the defence. No explanation was given by the prosecution as to why the witnesses were not in court on the particular date only that the prosecutor was applying for warrants of arrest, yet there was no evidence that the witnesses had been bonded earlier on and declined to attend court, even before the summons commanding their attendance were issued. There was also no evidence that those summons requiring attendance of the said witnesses were served upon the witnesses and that they had declined to honour the summons before a warrant of arrest could be sought. Indeed, Mr Thuo had on his own accord acknowledged earlier on in his submissions that he had informed the investigating officer by noting on the investigations file that should the witnesses fail to attend Court, the case would be closed prematurely or dismissed for want of prosecution. In addition, I note that from the trial court



record, on the date that the three hearing dates were fixed, the hearing dates were specifically requested for by the prosecution upon a commitment to avail all the witnesses.

33. In my humble view, courts cannot be used to keep proceedings pending forever. The record of the trial court shows that the prosecution has been lackluster in prosecuting the case which has been pending since 2020. The trial magistrate in declining to adjourn the case further had considered all the circumstances of the case including three witnesses who had declined to testify against the accused persons saying they had no interest in the complaint and the prosecution never objected to that. The prosecution additionally never demanded that those witnesses be treated as refractory witnesses. There is no reason why the prosecutor was making extremely frantic efforts to trace witnesses on the last hearing date as opposed to making appropriate arrangements well in advance of the hearing to get the witnesses, speak to them and even get them bonded to attend Court.
34. The Court's supervisory jurisdiction in revision should never be used to interfere with the discretion of the magistrate's courts as the High Court does not superintend over the magistrate's courts in their exercise of judicial discretion.
35. In this case, although the prosecution claimed that they were denied a fair trial, the prosecution can never and has never been on trial before court of law and therefore citing Article 50(2) of the Constitution was done in vain. An accused person's rights to an expeditious trial is guaranteed and in the circumstances of this case, I am unable to find as was submitted by Mr. Thuo that the trial was being hurried to the detriment of the complainants or victims of offences when the said victims were not willing to come to court to testify or had come to court but declined to give evidence against the accused persons. The question is, what victims was the prosecution counsel referring to and trying to protect their interests?
36. A court of law, in my view, should never be held at ransom and grant of an adjournment being in the discretion of the court, I find that in the instant case, the trial magistrate exercised his discretion to reject more adjournments judiciously as the prosecution had not shown sufficient cause to warrant the adjournment sought.
37. In addition, I find nothing illegal or wrong with the trial magistrate exercising discretion to order closure of the prosecution's case if the prosecution was non committal on closure of its case or even termination under section 87(a) of the Criminal Procedure Code yet it had no witnesses to call and the court had already declined an adjournment with reasons.
38. This court is not persuaded by the reasons given by the applicant prosecution for interference with the trial magistrate's discretion and order. The court in Republic v John Wambua Munyao & 3 others [2018] eKLR, (Odunga J as he then was) weighed in on what criminal jurisdiction entails when it stated that:
 - “ 31. ... 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...”
39. My finding in the instant case is that the exercise of discretion by the trial magistrate either way cannot amount to incorrectness, illegality or impropriety on the part of the trial court so as to warrant this Court exercising its revisionary powers to disturb the decision reached after considering all circumstances of the case. I further find no satisfactory grounds advanced before the Trial Court which would have compelled the Court to adjourn the proceedings. Whereas another Magistrate may have exercised discretion differently, and indeed, the record shows that previous judicial officers who



handled the case adjourned the hearing quite generously, at the instance of the prosecution for non supply of witness statements to the accused persons over a long period of time, that does not bring the matter in the purview of section 362 of the Criminal Procedure Code for revision. This court abhors delay of case and it is not lost to this court and I must remind us all that it is in the public doermain that the judiciary has been blamed for allegedly delaying the hearing and determination of cases yet it is the parties like in the instant case who, more often than not, apply for adjournment after adjournment and when an adjournment is denied, applications such as these are filed complaining against the judicial officers including judges.

40. It is therefore important that this court pronounces itself quite loudly and clearly that it shall not be used to accumulate case backlog which are already suffocating our court Registries. When parties approach the court seeking justice, they must also be alive to the mantra that justice delayed is justice denied and that justice shall be administered woithout delay, a principle which is clearly espoused in Article 159 of the Constitution. Parties are called upon to aid in backlog clearance and not to aid in creation of backlog. Each case is important and any party who feels that their cases are very important, they must be ready to proceed with the hearing and prepare in advance and not make frantic efforts last minute.I hasten to add that refusal to grant an adjournment is not a a mere adminstrative or procedural technicality. It is a serious matter in the administration of justice such that if cases were to be adjourned at will without censor, no case would ever be determined by the court. Adjournmnet of cases is one of the parameters by which the performance of judicial officers and judges is measured and indeed, we are evaluated on the same on an annual basis through Performance Managment and measurement Understanding.It is therefore mandatory that adjournments are only granted where they are deserved and not gratuitously in every other case or situation. It is not a right conferred on any party in a given court proceeding.
41. For the above many reasons, I find and hold that the Learned Trial Magistrate was perfectly entitled to proceed in the manner that he did and even if this Court would have proceeded differently, that does not warrant interference by way of revision.
42. Finally, on the complaint that the “trial court already having formed an opinion in the case”, in my mind amount to alleged bias on the part of the Court and these are matters suitable for an appeal on the merits when the Court examines the facts of the case as a whole. However, the issues before the Court are clear issues of regularity or propriety dof the order of the trial Court in eclining to grant an adjournment and closing the case for the Prosecution.The Prosecution Counsel’s allegation of bias on the part of the trial Court is not a proper subject of a revision. Counsel may have taken it up before the trial magistrate by way of an application for his recusal rom hearing the case and not to ask this court to order the trial magistrate to recuse himself efrom hearing the case further.
43. In the end, I find no merit in this request for revision dated March 14, 2023 which I hereby dismiss. For avoidance of doubt, the order staying proceedings of the lower court in Kisumu Chief Magistrtae’s Court Criminal Case No. 389 of 2020 is hereby vacated and the trial court file shall be returned to the trial court for further directions and orders on April 17, 2023 before Hon Dr D Ogoti, Chief Magistrate. On the request by the 2nd accused who has a prior enagement in Nairobi, he is hereby allowed to attend the mention before the trial court virtually. However, the 1st accused shall attend court physically.
44. This judgment and order be supplied to the trial Magistrate forthwith.
45. I so order and proceed to close this revision file.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF APRIL, 2023



R E ABURILI
JUDGE

