Republic v Ndiba & 2 others (Criminal Revision E185 of 2022)
[2023] KEHC 17486 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17486 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL REVISION E185 OF 2022

PM MULWA, J

MAY 11, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

KEVIN MUIGAI NDIBA ..... 1ST RESPONDENT

MOSES NDIBA MUIGAI ..... 2ND RESPONDENT

STEPHEN KARIUKI KAREITHI ..... 3RD RESPONDENT

(From the original order in Limuru Criminal Case No. 303 of 2018 – Hon. Magori, SPM)

RULING

1. By an application dated March 18, 2022, the applicant herein requested that this court grants a stay order against the proceedings in Limuru Magistrate's Court Criminal Case No. 303 of 2018 with a view to setting it aside and enable two prosecution witnesses attend court and testify.

2. According to the applicant, when the said criminal case came up for hearing on January 25, 2022, the prosecution case was closed without calling key witnesses, that is, the doctor and the investigating officer.

3. According to the applicant, the prosecution counsel handling the matter at the time was not well versed with the same and that is why he sought for adjournment as there were no witnesses in court.

4. It was averred by the applicant that despite the fact that two crucial witnesses had not testified, the trial court went ahead to rule that the prosecution do close its case. It was therefore submitted that the prosecution intended the case be reopened for purposes of properly arguing its case as mandated under Article 157 of *the Constitution*.

5. In this respect the applicant relied on the case of *Murimi vs Republic* (1967) EA 542. In this case, it was submitted that the prosecution did not seek to re-introduce new evidence but merely to have witnesses, whose statements had already been availed to the defence, testify.

6. The Respondents opposed the application by way of a Replying Affidavit sworn by Bonface Nyamu who averred that:

   i. That the Application is a non-starter and lacks in any merit. `

   ii. That Limuru Criminal Case No. 303 of 2018 was over four years old and had been severally adjourned at the instance of the prosecution.

   iii. That justice delayed is justice denied, and if the case is re-opened the respondents stand to suffer great prejudice.

   iv. That the trial magistrate exercised his discretion judiciously and there is absolutely nothing to fault.

7. It was submitted on behalf of the Respondents that since criminal case no. 303 of 2018 was registered four years earlier, only two witnesses had testified and the same had been adjourned at the instance of the prosecution for a record seven (7) times, the last two being granted as terminal adjournments.

8. It was further submitted that the reasons for adjournment ranged from inadequate prosecuting counsel, to lack of the police file, to lack of witnesses.

Analysis and determination

9. I have considered the material before, the submissions as well as the authorities cited.

10. I agree with the general proposition in Article 50 (2) (e) of *the Constitution* that:

> " Every accused person has the right to a fair trial which includes the right-
>
> e) to have the trial begin and conclude without unreasonable delay.

11. Article 165(6) and (7) of *the Constitution* confers upon this court supervisory jurisdiction over subordinate courts and empowers this court to make any order to give any direction it considers appropriate to ensure fair administration of justice. The said provisions are couched in the following terms:

   (6) 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.

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

12. As regards the Revisionary powers of this court, the legal provision is section 362 of the *Criminal Procedure Code* which provides 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 order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

13. 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.

14. In the case of *Joseph Nduvi Mbuvi vs Republic* (2019) eKLR, Odunga, J stated thus:

> " Therefore it is my view that jurisdiction should not be invoked so as to micro-manage the lower courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisional jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion.
>
> Where an issue arises as to whether the decision of the Court below is correct in its merits either as a result of wrong exercise of discretion or otherwise, but which decision does not call into question, its legality, correctness or propriety, the right approach is to appeal against the same preferably at the conclusion of the proceedings or in limited instances before then".

15. On the merits, this application is based on ground that the Learned Trial Magistrate having declined to grant the prosecution a further adjournment on January 25, 2022 essentially left the prosecution with no option but to close its case. That calls into question whether or not the trial court acted correctly, legally and/or properly.

16. In this case, it is evident from the lower court record that the respondents were first arraigned in court on April 26, 2018 and denied the charge of grievous harm contrary to section 234 of the *Penal Code*. Thereafter the case was listed down for hearing and adjourned as follows: -

    a. July 30, 2018 – adjourned as prosecution had no police file.

    b. October 8, 2018 – Pw1 testified and adjourned for more witnesses.

    c. January 22, 2019 – Pw2 and Pw3 testified and adjourned.

    d. April 9, 2019 – adjourned for lack of the police file.

    e. June 19, 2019 – accused persons absent. Warrants of arrest issued but later lifted.

    f. September 17, 2019 – case adjourned for lack of prosecution witnesses.

    g. November 25, 2019 – defence counsel held up at the High Court.

    h. February 25, 2020 – adjourned as 1st Accused unwell.

    i. August 24, 2020 – no prosecution witnesses. Last adjournment to prosecution granted.

    j. March 9, 2021 – adjourned as trial magistrate attending training.

    k. May 25, 2021 – adjourned for lack of prosecution witnesses. Summons issued to them

    l. November 10, 2021 – case fixed to proceed on January 25, 2022. Order for last adjournment extended.

    m. January 25, 2022 – no witnesses present. Adjournment sought by prosecution but declined.

17. I must state with due respect to the applicant that this was a rather casual and nonchalant way of handling such a serious matter. The prosecution was granted humble time, three years to be precise, to call the remaining witnesses after Pw3 testified on January 22, 2019. Yet they kept on seeking for adjournment.

18. In this case there is no evidence that there were any attempts made to avail the remaining prosecution witnesses and no reasons were advanced for their absence.

19. Therefore, a case cannot be adjourned endlessly and especially is the party mandated to prosecute the same is not keen to do so, and without any reasonable justification. The exercise of discretion by the court to expedite litigation 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. In this case there was no reason placed before the trial court which would have compelled it to adjourn the proceedings further.

20. It is therefore my view that the learned trial magistrate was perfectly entitled to proceed in the manner he did and even if this court would have proceeded differently that does not warrant interference by way of revision.

21. Final Orders:

    a. I find no merit in this application which I hereby dismiss.

    b. For avoidance of doubt the order staying proceedings of the lower court is hereby vacated.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 11TH DAY OF MAY, 2023.

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P.M. MULWA

JUDGE

In the Presence of:

Kinyua/Duale – Court Assistants

Mr. Muriuki - For State/Applicant

N/A - For Respondents