



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL REVISION E033 OF 2021**

**DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**VERSUS**

**JAMES LEWIS KIMATHI NGAI.....RESPONDENT**

**RULING**

1. The application is brought pursuant to the provisions of section 362 as read with section 364 of the Criminal Procedure Code and seeks to invoke the courts powers on revision but also an order that the further proceedings in the matter proceeds before another Judicial Officer other than Hon. T. M. Mwangi (SPM).
2. The facts disclosed to premise the application are that on the material day, the 19/6/2021, the matter was due for further hearing and was infact fixed for hearing on that day and again on the 21/06/2021. At call-over the prosecution is said to have intimated preparedness to proceed and was ready with one witness for the day. However the court took a short break, resumed thereafter in the absence of the prosecutor and proceeded to close the prosecution case then set a date for delivery of a ruling on whether or not a case to answer had been made out. It was then contended that the court having been made aware of the presence of the prosecutor and one witness in the precincts of court on the material day and having been aware that the matter had already been scheduled for hearing on two days, ought to have opted for a less drastic order than closure of the prosecution's case. It was lastly asserted that the closure was an action that visited upon the victim in the matter the mistake of counsel. The order sought to be revised was made on the 9/6/2021 and the current application made on the 11/6/2021 barely two days later. I note that to demonstrate speedy and commendable action by the prosecution.=
3. The application and request for revision was resisted by the accused/respondent by his affidavit sworn on the 16/6/2021. The gist of that affidavit is to the effect that indeed both counsels were in court on the material day when the court adjourned for about 10 minutes with both counsel being told to strictly observe time. It was then averred that the prosecutor did not come to court at the appointed time and the matter was thus called out in his absence and an order closing his case made. To the respondent, no valid reason has been made out to justify revision but the application itself is a nonstarter as the prosecutor sought to hold the court at ransom. It was additionally contended that justice remains a double edged sword that cuts both ways and that the law dictates that the respondent gets speedy trial especially on the fact that he has been suspended from employment since the alleged incident in 2018.
4. To the respondent, the court in closing the prosecution's case was exercising a judicial discretion which cannot be curtailed by the power on revision and that the grounds put forth would justify an appeal and not revision. The counsel stressed the fact that power to revise lower court orders are intended for supervision and never for micromanagement. Lastly, on the request to transfer the matter to another Judicial Officer, it was contended that the same cannot be by way of revision but by an application for transfer. On those grounds, it was urged that the application lacks merits and is a good candidate for dismissal.
5. Having read the trial court and the record of the application here and in exercising the courts powers under Section 365 I invited oral submissions from the two counsels.
6. From the prosecution/applicant, submissions were offered to the effect that the decision to close the prosecution case was too harsh while the respondent maintained that the order was made in exercise of discretion and to achieve expeditious disposal of the matter.
7. I am not in doubt that the order closing the prosecution's case on a date the matter was due for hearing is an order that calls for revision rather than appeal. I therefore do not agree with the respondent that the court ought to have been approached by way of appeal rather than revision. I hold the view that the decision to close the prosecution's case is not being challenged on the merits but rather on propriety or regularity. It thus cannot be a basis of an appeal.
8. I have had a chance to read lower court file and I do note that the coram for the day reads as follows-;

**9.6.2021**

**Before HON. T. M. MWANGI SPM**

**C/P Kinyua (absent)**

**C/A Saiputa**

**Accused – present Time ~~12.30 p.m~~ 9.45 a.m**

**Prosecutor – I have one witness**

**Nelima – I am ready for trial**

**(file placed aside)**

**12.30 pm.**

**Coram as before**

**Save that the prosecutor is absent**

**COURT**

**In the absence of the prosecutor with notice of today's hearing date, the prosecution's case is marked as closed.**

**M/S NELIMA – The court can make its ruling**

**COURT - ruling on 30/6/2021.”**

9. That record of the file show clearly that the prosecutor was indeed in court and told the court that he had a witness when the matter was adjourned. The minutes however say he was absent. It thus cannot be accurate that he was absent the notice to him of the date notwithstanding. The said record does not clearly say at what time the matter was adjourned and for how long. It shows that the time was indicated as 12.30 p.m. then crossed and replaced with 9.45. None of the counsel has told the court when the matter was adjourned although the respondent says the adjournment was for 10 minutes. Such details are important for the court to gauge how long the prosecutor had taken over and above the 10 minutes of adjournment.

10. That notwithstanding the course of justice even in criminal matters seek to establish the truth and that objective is achieved best when all sides are given their time to place all their material before the court. Nothing in the file shows the prosecution to have created in the mind of the court the picture of a litigant keen to obstruct the court process and course of justice by delay. At least such impression if in the mind of the court ought to have been recorded. It was never recorded.

11. I also take the view that in the kind of a matter before the trial court, the investigator is the cog and binder that puts together the various pieces of evidence and his evidence was central to the court in reaching a just and fair decision. In shutting out that evidence, it appears to me that the court denied itself the chance to get all the evidence needed.

12. To that extent alone and it having been asserted by the applicant and not denied by the respondent that the witness was indeed in court when the closure order was made, I am prepared to find that the court acted in a rather hasty manner and it calls for my revision. I do revise the order of closure and order that the matter be opened for the prosecution to present its case at the earliest opportunity capable of accommodation by the diary of the court. I say the order was made in haste for I fail to understand the hurry when the matter had been allocated two days which had not been exhausted.

13. On the prayer that I direct that the matter be heard before another Judicial Officer, I say, that is outside the jurisdiction on revision. In any event, the power to recuse a judicial officer from a matter on the basis of bias resides in the subject judicial officer and not another court. It is beyond me to determine that another judicial officer has exhibited bias and to direct them to recuse themselves. I find that prayer not to lie and I direct that the matter shall proceed before the officer it has been unless and until there be an order of recusal duly sought and obtained.

14. Lastly, I note that while this matter was pending this determination, and after the trial court file was called for by a letter dated 30/6/2021 and received by that registry on the same day, the court indeed proceeded and delivered its ruling and put the respondent on his defence on the 2/7/2021.

15. I do consider, flowing from my decision that the closure was unwarranted and improper, that the ruling flowing from the said unwarranted act cannot stand. I direct that it be set aside and that the prosecution case stands opened to proceed from where it stood on the 9/6/2021.

**DATED, DELIVERED AND SIGNED AT MERU BY MS TEAMS THIS 7<sup>TH</sup> JULY, 2021**

**PATRICK J.O OTIENO**

**JUDGE**

**In presence of**

Mr. Maina for the applicant

No appearance for Nelima for the respondent.

**Patrick J.O Otieno**

**Judge**