

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.17 OF 2020

REUBEN HOSPHON MULYANGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Reuben Hosphon Mulyanga was aggrieved by a Ruling delivered by the trial court on 17th October 2019. In the Ruling, the trial court disallowed the Applicant's application to have certain prosecution witnesses who had already testified recalled for the purposes of being cross-examined by his advocate. The reason that the trial court gave for declining the application are contained in the Ruling. The court stated as follows:

“From the chronology of events, it has been one year and ten months since the accused sought to have the matter settled out of court. When the witnesses were available for cross examination the defence sought for an adjournment. It has also been 2 years 4 months since the witnesses testified. The defence has clearly delayed this matter with several adjournments and the failure by the accused to attend court. I see no good reason as to why there should be further delays in this matter. The issue of having the matter start de novo is being raised very late in the day and will only scuttle the case if the same is entertained. Even though the accused proceeded in return, the court record is very clear that witnesses were extensively cross-examined. The defence cannot delay in the matter for close to three years then make an application for de novo hearing. In the interest of justice, I disallow the application as the availability of such witnesses is not guaranteed. I direct that the matter proceeds from where it had reached and shall proceed expeditiously.”

The gravamen of the Applicant's complaint in the application brought under **Article 50(1), (2), Article 165(6) & (7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code** is that an earlier trial court had on 14th December 2017 allowed the Applicant's application to have the said witnesses who had previously testified recalled for further cross-examination. According to the Applicant, the subsequent trial court breached his right to fair trial when it denied him the opportunity to have the said witnesses recalled and be cross-examined. He was of the view that the order denying him the chance to cross-examine the said witnesses was against the rules of natural justice, rules of evidence and violated his right to fair trial. In the premises therefore, the Applicant invoked this court's jurisdiction to have the said order set aside and substituted with an order of this court requiring the said prosecution witnesses recalled so that they can be further cross-examined by the Applicant's advocate. Mr. Oketch, Learned Counsel for the Applicant reiterated these concerns in the oral submission that he made in court. He further relied on several decided cases in support of his submission. He urged the court to allow the application.

The prosecution opposed the application. Ms. Akunja for the State submitted that the application was yet another attempt by the Applicant to buy time and frustrate the trial and just conclusion of the case. She urged the court to peruse the record of the trial court and note that the Applicant had made several applications with a view to frustrating the trial and conclusion of the case. She noted that when the earlier application was allowed, the prosecution availed the witnesses for cross-examination but the Applicant responded by adjourning the hearing of the case. In the premises therefore, she urged the court not to be persuaded by the Applicant's application and proceed to dismiss the same.

This court has carefully considered the rival submission made by the parties to this application. There are several issues that came to the fore for determination by the court. But before delving on the main issue, it is important for this court to state that as a matter of policy, this court in exercise of its supervisory jurisdiction of subordinate courts as donated by **Article 165(6) & (7) of the Constitution and Section 362 of the Criminal Procedure Code** is required to exercise the power with restraint and circumspection so as not to unnecessarily disrupt and interfere with pending trials upon interlocutory application being made to it challenging certain aspects of the proceedings. This court agrees with the holding by the court in **Ebrahim, R (On the application of) v. Feltham Magistrates' Court & anor [2001] EWHC Admin 130.**:

*“We think it helpful to restate the principles underlying the jurisdiction. The Crown is usually responsible for bringing prosecutions and, prima facie, it is the duty of a court to try persons who are charged before it with offences which it has power to try. Nonetheless the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of the process. This power is “of great constitutional importance and should be...preserved”: per Lord Salmon in **DPP v Humphrys [1977] AC 1 at p 46C-F**. It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. We must therefore stress from the outset that this residual (and discretionary) power of any court to stay proceedings as an abuse of its process is one which ought to be employed in exceptional circumstances, whatever the reasons submitted for invoking it. See **Attorney-General Reference (No.1 of 1990 [1992] QB 630, 634G.**”*

It should also be noted that to ensure that the criminal trial process is fair to an accused, the **Constitution**, the **Criminal Procedure Code**

and other **Statutes** and decided cases have put in place legal safeguards in the trial process itself that protects the rights of an accused person during the entire proceedings. A court having supervisory powers, when a challenge on such proceedings before a trial court is brought before it, should not therefore hasten to proceed on the assumption that the criminal trial process itself was on the face of it or is inherently unjust. In other words, the High Court exercising its supervisory powers of magistrates' court, should exercise with circumspection its powers unless it is established that the trial process that is being challenged is so antithetical to the right to fair trial as guaranteed by the **Constitution** and **Statute** that the court in the circumstances cannot have any option but to intervene.

In the present application, this court has perused the proceedings of the trial court in light of the submission made by the parties to this application. Whereas it is true that the Applicant's counsel did on 14th December 2017 make an application seeking to have the prosecution witnesses who had already testified recalled for the purposes of further cross-examination, and whereas the prosecution had no objection and the said witnesses having been ordered recalled by the court, it was clear from the subsequent proceedings that the Applicant was unwilling to take up the opportunity availed to him to further cross-examine the said witnesses.

For instance, on 12th July 2018 when two of the witnesses were availed by the prosecution before court, the Applicant's counsel told the court that they were willing to enter into out of court negotiations with a view to amicable settlement of the matter out of court. The case was adjourned a record eight (8) times from that date to the 23rd September 2019. Out of those adjournments, seven (7) were caused by the Applicant. From subsequent proceedings, it was clear that the Applicant had no intention of negotiating with the prosecution with a view to an amicable out of court settlement. In some instances, he failed to attend court forcing the trial to be adjourned. It is in that context that the Ruling by the trial court, part of which was cited above was made.

On evaluation of the facts of this application, it was clear to this court that the Applicant failed to establish a case for this court's intervention under **Section 362** of the **Criminal Procedure Code**. It was evident to this court that the present application was made in furtherance of the Applicant's conduct or behaviour which is meant to frustrate the finalization of the trial. The witnesses that the Applicant wished to have recalled for further cross-examination were earlier extensively cross-examined. It cannot therefore be said that the Applicant was denied the opportunity to challenge their testimony in cross-examination. The Applicant was availed the opportunity to further cross-examine the said prosecution witnesses but spurned the chance when he unjustifiably and unnecessary sought unmeritorious adjournments.

The upshot of the above reasons is that the Applicant's application lacks merit and is hereby dismissed. The trial court's file is hereby ordered returned to that court for the hearing and conclusion of the case. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2020

L. KIMARU

JUDGE