REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL REVISION NO. 1 OF 2019

KIGORO MACHORO.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. This is a revision dated 23/07/2018 seeking for the following orders: -

> **1. That the court to call for and examine the court proceedings in Criminal Case No. 661 of 2014 before the Senior Principal Magistrate's court, Siakago for the purpose of satisfying itself as to the correctness, legality or propriety of the order(s), ruling(s) and/or proceedings passed on 19th March 2018 and 11th July 2018.**
>
> **2. That upon the examining of the said record, this court to alter or reverse the said order(s), ruling(s) and/or proceeding(s)and direct that the applicant/accused be allowed to produce and rely on the witness statements of PC David Otieno and P C Peter Mbaluka as part of his evidence.**

2. The background facts are that the applicant is facing a charge of defilement contrary to Section 8(1) and (2) of the Sexual Offences Act in Siakago Criminal Case No. 661 of 2014. The prosecution closed its case and the applicant was called upon to give his defence.

3. On 19/03/2018 when the defence case came for hearing, the applicant called two defence witnesses and then applied to be allowed to produce two witness statements of PC David Otieno and PC Peter Mbaluka as part of the defence case. This application was rejected by the court and the applicant was directed to avail the witnesses to testify.

4. What followed were several adjournments by the defence for failure to trace the two witnesses. The court allowed adjournments on several occasions on request of the defence.

5. On 11/07/2018 the defence's further plea for adjournments was declined forcing the closure of the applicant's case.

6. It is this refusal to grant adjournment that gave rise to this revision. The applicant in its prayers also included the ruling for refusal to produce the statements of the two witnesses in this revision.

7. The revision is opposed by the respondent in the replying affidavit of the prosecution counsel Leah Mati sworn on 12/10/2018.

8. Precisely, it was stated as follows: -

> **a. That there is nothing in this application that falls within the ambit of the provisions of Section 362 of the Criminal Procedure Code.**
>
> **b. That the rulings of the learned magistrate were correct, legal and proper and that the discretion of the court was exercised judiciously.**
>
> **c. That the applicant has not demonstrated how the trial magistrate erred in the rulings.**
>
> **d. That the applicant had made numerous adjournments (on grounds of non-availability of his advocate) which had been allowed**.

9. Having stated the case of the applicant and the response by the respondent, I proceed to examine the ruling of the court forming the subject of this revision.

10. On 11/07/2018, the applicant was in court for further hearing of his defence case but his advocate was absent. He applied for adjournment on grounds that his advocate was not available. He presented a letter to the court dated 11th July, 218 explaining the reasons behind the application for adjournment.

11. The letter stated: -

> **The defence humbly seeks for an adjournment on grounds that the summons issued for Defence witnesses to appear before the court today are yet to be served. This is for the reason that since the said witnesses are police officer, the OCS Kiritiri directed that the summons be issued through the Inspector General of Police as he lacks the authority to execute the summons.**
>
> ***We hu*mbly request that the summons be re-issued directing the Inspector General of Police to cause the execution of the summons as suggested by the OCS Kiritiri.**

12. The application was opposed by the respondent on grounds that the hearing date was taken by consent and that no reason was given on why the advocate was absent in court. It was further stated that the case was an old on of 2014 and had been delayed by the defence in seeking endless adjournments.

13. The trial magistrate considered the application and rejected it on grounds that are stated in the ruling.

14. I have perused the ruling made on 19/03/2018 by the learned magistrate. The defence sought adjournment to call two witnesses PC Mbaluka and PC David Otieno. The counsel also requested that if the prosecution had no objection, the statements of the said witnesses could be produced in evidence.

15. The prosecution said they had no objection in the calling of the witnesses to testify for the defence. The court then allowed adjournment to facilitate the calling of the two witnesses by the defence.

16. Starting with the ruling given on 19/03/2018, there were no controversial issues raised. The defence gave the court two alternatives; one was to call the two witnesses and the second one was to produce their statements without calling the makers. The prosecution opted to support the first option of calling the witnesses to testify and the court endorsed it.

17. Bearing in mind that there was no opposition from any person and that the prosecution took one of the options the defence gave. I reach a conclusion that there is no issue arising for revision herein. The magistrate's ruling of endorsing one of the options was correct, legal and regular.

18. The applicant has not attempted to show what was wrong with the ruling.

19. On the second ruling, I note it was an application for adjournment which was declined. The magistrate was not satisfied with the reasons given in the letter of the advocate and by the applicant. The court also took into consideration other circumstances in the case including expeditious disposal which had already been impaired by the application for adjournment.

20. The hearing date had been taken by consent in the presence of the advocate yet the advocate gave no reason as to why he failed to attend court to present his application in person.

21. The contents of the letter of the counsel dated 11/07/2018 was to the effect that the two witnesses were to be summoned through the inspector General. This was a wild and not well thought proposal.

22. Firstly, it would involve bureaucracy that would cause further delay of the case. Secondly, it was not the duty of the court to direct the Inspector General to compel police officers to appear in court and testify for the defence.

23. The defence had applied to call the two officers as their witness. It was therefore, the obligation of the defence too avail their witnesses. Five months had lapsed since the defence was granted the last adjournment yet the did not show any good reason for failure to avail their witnesses in court on the hearing date.

24. It is within the discretion of the trial judge or magistrate to allow or to refuse an application for adjournment. The reasons given for making such an application are always key to the grant or refusal of the application.

25. I have examined the circumstances surrounding the said application and the conduct of the defence.

26. I am of the considered opinion that the trial magistrate exercised his discretion judiciously. The ruling he gave was well grounded and the applicant has failed to demonstrate any irregularity, illegality or impropriety on the part of the trial magistrate.

27. I find this application lacking merit and I dismiss it accordingly.

28. It is hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Wachira for Njiru for Applicant