



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CRIMINAL REVISION NO. 28 OF 2019**

*(From Original conviction and sentence in Criminal Case No. 73 of 2016*

*of the Principal Magistrate's Court at Engineer)*

**REPUBLIC.....APPLICANT**

**-VERSUS-**

**KEPHA NYAGA.....RESPONDENT**

**IN CHAMBERS ON 22<sup>ND</sup> JULY, 2019**

**BEFORE HON. JUSTICE R. MWONGO, J**

**ORDER ON REVISION**

1. The Prosecution filed an application for revision of the Ruling of 14<sup>th</sup> June, 2019 of the trial magistrate declining to grant an adjournment and directing the closure of the prosecution case.
2. By way of background, this is a matter in which the Prosecution's first two witnesses had been heard by Hon. Opakasi as at 5<sup>th</sup> March, 2018. The date indicated it had three (3) more witnesses to call.
3. On 30<sup>th</sup> April, 2019 the file was transferred or allocated to Hon. D. Sure. At the mention on that date the Prosecution indicated that only one (1) witness, the Investigating Officer, was remaining, but was not then available to proceed as the Investigating Officer was at Kiganjo for training. The parties also agreed that the matter proceed from where it had reached. The trial magistrate then stated:-  
  
***"I will reluctantly grant prosecution the very last adjournment. Hearing [on] 4<sup>th</sup> June, 2019."***
4. On 4<sup>th</sup> June, 2019 the matter could not proceed as the Investigating Officer could not make it. The court waited for his attendance, and finally the prosecutor was unable to get him on the phone, which had been switched off. The trial magistrate appeared frustrated by the excuses of the prosecutor and made a ruling expressing the frustration of having to wait for hearing from 9.30am.
5. In her ruling the trial magistrate suggested that the prosecutor was being dishonest on the whereabouts of the witness, stating the prosecutor had told "a cock and bull story of the Investigating Officer's" whereabouts. The court declined an adjournment and directed the parties to file written submissions having ordered the prosecution to close its case. It is that ruling which the prosecution has sought to revise.
6. The record shows that the proceedings herein commenced on 28<sup>th</sup> January, 2016 when the Accused took plea, on a charge of stealing a motor vehicle and alternative charge of handling stolen property; the Accused pleaded not guilty to both charges. The Accused was represented throughout and a counsel was holding a watching brief for the complainant.
7. I have not seen any complaints from counsel concerning delays or raising issue with prosecution's conduct of the case whilst the hearing proceeded with the two prosecution witnesses up to 5<sup>th</sup> March, 2018.
8. There is an indication that Hon. Opakasi ceased to handle the file on 6<sup>th</sup> December, 2018 upon her transfer. The next mention was on 30<sup>th</sup> April 2019 before Hon. D. Sure as earlier mentioned. This being the first appearance of the parties before Hon. Sure, it is not clear why she

“reluctantly” granted the prosecution “*the very last adjournment*” as she did not explain the circumstances.

9. Nevertheless, that was within her judicial discretion even though the defence counsel stated incorrectly, that the prosecution had been “*given several adjournments*”. Indeed on 6<sup>th</sup> December, 2018 when the matter was last before Hon. Opakasi, the regular prosecutor was not present and his brief was held by another prosecutor. Defence counsel did not oppose that adjournment and there is no clear record indicating that a last adjournment was granted to the prosecution.

10. The court’s discretion to grant or refuse an adjournment has to be exercised judiciously, depending on the circumstances of each case. Further adjournments are available to both prosecution and defence. There are numerous authorities on these two points. See e.g. **FUM V Rep. Criminal App. No. 139 of 2010** (Court of Appeal). There is no suggestion that the prosecution had been indolent or had received numerous adjournments to the detriment or prejudice of the accused.

11. The court’s role is to carefully balance the rights of the parties and the right to adequate time to prepare for trial by the defence with a counterbalancing right of the prosecution to proceed within a reasonable time. Where, as in the present case, the refusal to grant an adjournment also led to an order to close the prosecution case and file submissions, it appears that the court acted in the frustration of having been kept waiting for the investigating officer to appear that morning.

12. In my view it was unfair to the prosecution to be denied an adjournment when there was no prior record of “many” last adjournments having been granted to them. In the circumstances, I will exercise this court’s supervisory power to revise the trial court’s ruling and to allow the Prosecution to call its last witness, the Investigating Officer, which I hereby do.

13. This order for revision is granted on the condition that the Prosecution shall ensure that the Investigating Officer shall:

a) Be present for hearing at the next hearing fixed by the trial court.

b) Give a full explanation to the trial court for his/her absence at the hearing which had been fixed for 14<sup>th</sup> June, 2019.

14. The order of the trial court for ruling on written submissions is also hereby set aside.

15. Orders accordingly.

**Dated at Naivasha this 22<sup>nd</sup> Day of July, 2019.**

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**RICHARD MWONGO**

**JUDGE**