



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO.16 OF 2019**

**(Application Originating from Nyahururu CM's Court SOA No.76 of 2017 by: Hon. S. Mwangi - SRM)**

**APPLICANT.....REPUBLIC**

**- V E R S U S -**

**DAVID KAHARI WANJIRU.....RESPONDENT**

**RULING**

By a certificate of urgency, the prosecution Counsel **Angeline Chinga** placed this matter before me through a Notice of Motion dated 27/05/2019 seeking orders that;

**1) Spent**

**2) That this court be pleased to issue an order setting aside the order of CM Court at Nyahururu (S. N. Mwangi SRM) dated 17/05/2019 closing the prosecution case and giving a ruling dated 7<sup>th</sup> June, 2019 on whether the accused person had a case to answer or reopening the case and calling the remaining expert witnesses pending the hearing and determination of this application.**

**3) That the Honourable Court be pleased to order the transfer of the Criminal Proceedings in Nyahururu CM Cr. SOA 76/2017 Republic vs David Kahari Wanjiru and Another Magistrate of competent Jurisdiction other than S. N. Mwangi SRM.**

The application was accompanied by the affidavit of PC Nzioka Mutisya an officer from Ol Kalou Police Station who is versed with the case in issue.

The genesis of this issue is the proceedings of 21/02/2019 when the matter which was pending before Hon. Mwangi came up for hearing and the State Counsel did not have the police file. The State Counsel was obliged by the court till 3.22pm and having not received the police file, requested the court to issue summons to the OCS Ol Kalou Police Station. The court declined summon the OCS for reasons that, that was in a manner, seeking an adjournment.

On that day the complainant and her mother were present in court. The State Counsel then applied to withdraw the case under **Section 87 (a) of the Criminal Procedure Code and Section 40 of the Sexual Offences Act**. By then, the State Counsel had received the police file, the complainant was present but other witnesses were not present. The court reserved its ruling for 15/03/2019.

The ruling was rendered on 17/05/2019 whereby the court declined to allow the matter to be withdrawn under **Section 87 (a) of the Criminal Procedure Code and Section 40 of the Sexual Offences Act**, as being an afterthought raised after the court refused to grant the prosecution further adjournment.

On that day, the investigating officer and the complainant were present in court and the State Counsel requested the court to hear the two. The Evidence of PW2 and PW3 was taken on that day and thereafter the State Counsel requested for time to call the Doctor and the Government Analyst. The State Counsel explained that the matter had come up for ruling and that the remaining witnesses, being experts could not have been availed on that day. The court declined to grant an adjournment contending that the court had issued the last adjournment.

The State Counsel felt aggrieved by the refusal by the court to grant an adjournment to call the Doctor and Government Analyst and sought review of the court's order before this court. This application is brought under **Article 50 and 159, 165 (6) and (7) of the Constitution and Section 81 and 348 of the Criminal Procedure Code**. **Article 50** guarantees an accused person's right to fair trial. **Article 159 of the Constitution** donates judicial authority from the people to be exercised by the courts wherein;

- a) **Justice shall be done to all irrespective of status.**
- b) **Justice shall not be delayed.**
- c) .....
- d) **Justice shall be administered without undue regard to procedural technicalities.**

**Article 165 of the Constitution** establishes the High Court and at **Article 165 (6)** gives the High Court supervisory jurisdiction over the subordinate courts and any person or body exercising judicial or quasi judicial function, but not a superior court.

Under **Article 165 (7)**, the High Court has the discretion to call for any record of any proceedings before any court or person and may make any order or give direction it considers appropriate to ensure fair administration of justice.

Though the State Counsel invoked Section 348 of the Criminal Procedure Code, it does not apply here because that Section applies to an appeal where one pleads guilty. The Counsel may have intended to cite Section 364 of the Criminal Procedure Code which provides for the powers of the High Court on revision. This court has powers to call for proceedings in the subordinate court for purposes of revision for purposes of ensuring that justice is done to the parties. On the other hand the court can be moved for purposes of revision, as has happened in this case.

I have given due consideration to the court proceedings before the trial court. On 15/03/2019, the trial Magistrate reserved its ruling on whether the matter should be withdrawn under Section 87 (a) CPC, till 15/03/2019. There was no indication on record that the matter was going to proceed to hearing on 15/03/2019 once the ruling was read. It seems that the ruling on withdrawal under Section 87 (a) CPC was not read on 15/03/2019 but instead, it was read on 17/05/2019. There is nothing on record to show that the hearing was to proceed on 15/05/2019, or 17/05/2019.

After the ruling was read, the State Counsel requested the court to take the evidence of the complainant and investigating officer (PW2 and PW3) because they were present. The court obliged and heard them.

The State Counsel then applied for adjournment to call the Doctor and Government Analyst. 17/05/2019 having not been reserved for the hearing of the case, the Sate Counsel was correct in applying for an adjournment to call the remaining witnesses. Once the court read its ruling on 17/05/2019, it was expected that a fresh hearing date be taken for the hearing of other witnesses. Even though the court agreed to hear the witnesses who were present, it was still necessary to give another date for the hearing.

In this case the court had said that it had given an extreme adjournment and so declined the application for adjournment. Extreme adjournment seems to be what is commonly referred to as ‘**last adjournment.**’ The grant or refusal of an adjournment is an exercise of the court’s direction which must be exercised judiciously. In the exercise of the court’s discretion an appellate court will ordinarily not interfere with the exercise of discretion by the trial court unless it is apparent that in the exercise of the court’s discretion, the learned trial Magistrate applied the wrong principles and injustice was occasioned.

In applications for adjournment, the primary consideration in determining whether to grant or not to grant the request for adjournment ought to be whether or not there are good and reasonable grounds for seeking the adjournment having regard to the facts and circumstances of the matter before the court. There are no set circumstances under which an adjournment may be granted. Even if the court has recorded that it is the ‘**last adjournment**’, the order is not cast in stone. For good reasons adduced by the applicant and in order to do justice to the parties, the court may still grant another adjournment. The court’s jurisdiction in granting adjournment is unfettered and it all depends on the reasons adduced in support of the application. In my view, the courts should avoid using the term ‘**last adjournment**’. The court can decline to grant an adjournment even if it did not record the word ‘**last adjournment**’.

In the instant case, the court in declining to allow the State Counsel to call the remaining witnesses and insisting on proceeding to hearing on a day which was reserved for reading a ruling was improper and was prejudicial to the prosecution case. The exercise of the court’s direction was unfair. For the above reason, I do set aside the order of 17/05/2019 denying the prosecution an adjournment.

Because of the application by the prosecution, I think that it is proper that this case be transferred to another court for hearing and determination. I direct that this matter be placed before the Chief Magistrate for allocation to another Magistrate of competent jurisdiction, other than Ms. Mwangi SRM, who will decide on how to proceed with the matter.

Mention before Chief Magistrate on 15/07/2019.

**Delivered, Signed and Dated** at *NYAHURURU* this 9<sup>th</sup> day of July, 2019.

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**R.P.V. Wendoh**

**JUDGE**