



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 308 OF 2011**

**DPP.....1<sup>ST</sup> APPLICANT**

**EACC.....2<sup>ND</sup> APPLICANT**

**VS**

**REPUBLIC .....1<sup>ST</sup> RESPONDENT**

**FLORENCE BETH MUREVU.....2<sup>ND</sup> RESPONDENT**

**REUBEN NYARURI OISEBE.....3<sup>RD</sup> RESPONDENT**

**ALEX KILINGI KITHUKU.....4<sup>TH</sup> RESPONDENT**

**RULING**

By an application dated 30<sup>th</sup> November 2017 the 1<sup>st</sup> Applicant sought for an order revising orders in Meru CMC Anti-corruption Case No. 5 of 2015 made on 31<sup>st</sup> October 2017 and revive/reinstate the trial before another magistrate. The application was supported by the sworn affidavit of Jonathan Learamo a police officer seconded to the offices of Ethics and Anti-corruption commission who averred he investigated the case and caused the arrest and charging of accused persons Florence Beth Muremu, Reuben Nyaruri and Alex Kilingi Kithuku. He claimed that the trial magistrate offered no reasons for terminating the case under S.202 of C.P.C. he admitted the case had delayed for nearly 2 years but delay should not have been attributed to the complainant. He claimed that the prosecution asked for time allocation on the material day and not an adjournment and the complainant arrived at 12.30 p.m. Mr Learamo averred that the complainant was condemned unheard by concluding that he had choice of proceeding with the case before the trial magistrate in Meru and that the matter in Maua was filed later.

It was averred that acquittal under S.202 C.P.C was a misapprehension of the law by the trial magistrate. It was further averred that the trial magistrate failed to take into account that the complainant in a criminal case is the state as opposed to the person who reported the case thus compromising public interest in getting the matter heard and determined.

It was also argued that the trial magistrate failed to take into account that there were other witnesses presented by the state who could have opted to proceed with even in absence of the complainant.

It was further argued that terminating the case was serious setback to the war on corruption.

That if the decision of the Learned trial magistrate is allowed to stand, it may set a bad precedent in hearing of criminal cases as it may be construed to mean that the complainant in criminal cases is the person who reported the commission of an offence, yet the complainant in such cases is the State which has a duty to ensure compliance with the law of the land for a just and orderly society. M/s Kaberia Ariamba and Co. Advocates filed Notice of preliminary objection dated 5<sup>th</sup> December 2017 to the effect the application for revision is incompetent and a nullity for failing to enjoin the applicants hence condemning them unheard which is against principles of natural justice. They relied on the authority of Eng. Michael Kamau C.A. No. 102 of 2016 consolidated with C.A. No. 90 of 2016 as well as Letter by EACC dated 31.8.2017 and 6.10.2017. Florence Beth Mulevu filed an affidavit in support of the Notice of Motion dated 5.12.2017 seeking to be enjoined in application for revision of the trial magistrates order in Meru C.M.C Anti-Corruption case No. 5 of 2015 where they were acquitted under S.202 C.P.C.

Alex Kilingi by an application dated 4.12.2017 also sought to be enjoined in the application for revision. Upon being joined Alex Kilingi Kithuku and Florence Beth Mulevu filed Replying affidavits in opposition to the application for Revision of the orders of the trial magistrate acquitting them under S.202 C.P.C.

In the affidavit of Florence Beth Mulevu sworn on 5.2.2008 are 2 annexures FMB. Letters from ODPP dated 6.10.2017 and EACC dated 31.8.2017 instructing that all Anti-Corruption Cases affected by the Court of Appeal cases No. 90 and 102 of 2016 shall be withdrawn and/or terminated under S.87 C.P.C as and when each of those cases came upon court next for hearing a mention.

There were further instruction given by ODPP to the EACC which were to be complied with within 21 days from date of receipt of files remitted after withdrawal.

The 1<sup>st</sup> ad 2<sup>nd</sup> Applicants have not addressed the issues in these annexures whether it affected the matter that was terminated under S.202 C.P.C and it therefore remains unchallenged that the Respondents were charged for offence allegedly committed between 22<sup>nd</sup> June 2015 and 1<sup>st</sup> July 2015, a period that falls between 13<sup>th</sup> May 2015 and 18<sup>th</sup> January 2016, a time when the commission was without commissioners and by letter addressed to ODPP from EACC the 2<sup>nd</sup> Applicant acknowledges that by virtue of the Court of Appeal decisions the charges cannot be sustained and ODPP wisely advised for termination under S. 87 (a) C.P.C pending appeal to the supreme court.

Whether the trial magistrate acquitted the 3 Respondents or not the proceedings were a nullity ab initio as they offended the decision of the court of appeal and the advice of the office of the DPP.

Secondly, the section under which the application for revision has been brought is S.364 of the Criminal Procedure Code. It is a discretionary order that has to be exercised judiciously and S.364 (2) provides that it shall not be made to the prejudice of an accused person whereas S. 364(d) provides that

**“Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.”**

It is further the view of this court that what was appropriate in the circumstances was for the applicants to appeal against the order terminating trial under S.202 C.P.C.

Turning to the proceedings in Meru CMC Anti-corruption case No. 5 of 2015 and without regard to the 2 already analysed reasons why the application for revision can't stand the trial magistrate has listed the number of times the prosecution asked for and was granted adjournment spanning a period of 2 years from 14.7.2015 to 3<sup>rd</sup> October 2017, to say that this is inordinate delay is an understatement. The investigator claims that other witnesses were in court before the complainant came from Maua Court at 12.30 pm but he doesn't give their names. The said complainant has not sworn an affidavit to say what the investigator is saying on his behalf.

The fact that a charge of corruption is filed against an accused person is not a ticket to delay it. Contrary to what the investigator says these economic crime matters are supposed to be heard and concluded expeditiously on a day to day basis and delay of over 2 years is to say the least unreasonable.

Three magistrates have handled the matter without concluding thanks to the excuses by the prosecution. It is not enough to have suspects in court without prosecuting. Successful prosecution of the economic crimes is what should count. In the circumstances the application for revision is not sustainable and is dismissed.

**HON. A.ONG'INJO**

**JUDGE**

**Ruling Signed, Delivered and Dated this 3rd Day of MAY 2018.**

**HON. A.ONG'INJO**

**JUDGE**

**Mrs Mwathi for DPP & EACC Mr Omari Advocate for Respondents – 1<sup>st</sup> & 2<sup>nd</sup>**

**Mr Omari Advocate holding brief fro Mr Ogesa Advocate for 3<sup>rd</sup> Respondent.**

**HON. A.ONG'INJO**

**JUDGE**