



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL REVISION NO. 4 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

ALICE CHEPKORIR KOECH.....1ST RESPONDENT

MESHACK KIPRONO KOECH.....2ND RESPONDENT

RULING ON REVISION

1. By ruling made on 7/2/18, the learned trial Magistrate in KBT PMCR. Case no. 453/17, **R. v. Alice Chepkorir Koech and Meshack Kiprono Koech** made an order refusing to adjourn the trial as follows:-

“Date: 7/02/2018 1.58 PM

Coram:

Magistrate: Hon Idagwa N.M (RM)

Prosecutor: Absent

Court Clerk: Chemwolo

Interpretation: Eng/Kisw

Accused: Present

Accused Represented By:

Court – The court has been waiting for a prosecutor since 9.00 am. The accuseds have been around. As at now there is no prosecutor in court. I am aware all the other three courts are not sitting as at now. There are two prosecutors at this station at least one should be before this court. This court cannot be held at Ransom. The prosecution had a last adjournment on 16/1/18.

I have not been given any reason why a prosecutor has not attended court or why a further adjournment should be given. Besides the prosecutors were aware that the court was ready for hearing as from 9.00 am and by 1.58 pM none had bothered to appear before court. This situation was addressed by Judge Lenaola in the case of R B Benedict Kolorwe Kaweto [2008] eKLR he held.

‘...No court should be held at Ransom by the prosecution and each Magistrate is entitled to ensure order and decorum in his court.’

In the interest of Justice and for expeditious delivery of Justice. I find the conduct of the prosecution unbecoming they being public/servants and therefore cannot take this court for granted or hold it at ransom. I do not see any reason why I should grant an adjournment in this case. I therefore on my own motion close the prosecution case. Ruling on a case to answer on 27/2/18.

IDAGWA N M, RM

7/2/18

Court – The file returned to the registry for typing of proceedings for purposes of HC. CR. REV.4/18

IDAGWA N M, RM

19/2/18”

2. The record of the trial does not show whether, and by whom, the court was moved to grant the adjournment that if declined by the said ruling.

3. Aggrieved by the ruling, the DPP by letter dated 19/2/18 sought revision of the orders as follows:-

“Date: February 19, 2018

TO THE HONOURABLE JUDGE,

KABARNET HIGH COURT,

P.O BOX 66,

KABARNET.

RE: CR. CASE NO. 453/17, R VS ALICE CHEPKORIR KOECH & MESHACK KIPRONO KOECH

The above matters refers:

The above matter is before court no. 2 which is handled by Honourable Idagwa, Resident Magistrate. On the 7th day of February, 2018, the prosecutor in conduct of this case Ms Onkoba became suddenly unwell and had to rush to hospital to see a doctor. As you are aware the office of the DPP Kabarnet is experiencing a shortage of prosecutors as we are only two prosecutors manning four courts. On this material day, I was handling both court no. 1 and court no. 3. In this case two witnesses the doctor and the Investigating Officer who were remaining were present in court on the 7th of February, 2018. Unfortunately in the absence of the prosecutor, the learned trial magistrate in her wisdom closed the prosecution case and placed the matter for ruling on case to answer for 27th February, 2018.

There is no law that allows a magistrate to close a prosecution case on behalf of the prosecution. Secondly, there is no record of any last adjournment before the case was unceremoniously closed on behalf of the prosecution. The adjournments caused in this case cannot be blamed purely on the prosecution as all parties caused adjournments. The record clearly shows that there were instances where warrants of arrest were issued against the accused persons. It was therefore not fair to close the case because the prosecutor was absent especially when the learned trial magistrate very well knew the challenge that the office of the DPP is facing currently. The shortage of prosecutors we are experiencing now is not a fault of the individual prosecutors and should not be used to frustrate our efforts or to punish innocent litigants who are seeking for justice and expect us to ensure they get it irrespective of the challenges.

The reason for this letter is to request for revision of the orders of the 7th February, 2018 by the trial magistrate by the High Court under section 362 of the Criminal Procedure Code and allow the matter to proceed to logical conclusion for justice to be done to both accused and the complainants in the matter.

ESTER MACHARIA

ASSISTANT DIRECTOR OF PUBLIC PROSECUTIONS

BARINGO COUNTY”

4. The Respondents, who are the 2 accused persons in the trial before the Magistrate’s court were in this application for revision represented by Mr. Mwaita and Mr. Kipkulei on behalf of the Law Society of Kenya, Baringo chapter who took up the matter within concurrence of the Respondents and leave of the Court.

5. On 19/4/18, when the application for revision came up for hearing, counsel for the Respondents and the Respondents themselves influenced the court that they did not object to the application for revision and that they wished that case be restarted from the position where it had reached before the ruling of the trial court.

Determination

6. The application for revision is not opposed; it is conceded and the applicants with the assistance of counsel have agreed that the case may be restarted.

7. As the revision was not agreed before me, it is improper to make conclusive finding on the merits, that is whether the trial court have made

illegal or irregular decision in the matter by alleged premature closure of the prosecution case on the grounds that the prosecution counsel failed to attend court.

8. I have noted the statement of Lenaola, J. (as he then was) in *R. v. Benedict Kolorwe Kaweto* [2008] eKLR that –

“No court should be held at Ransom by the prosecution and each Magistrate is entitled to ensure order and decorum in this court.”

9. With respect, it would appear that there is a question whether the statement by **Lenaola, J.** support the proposition that the court has authority to close the prosecution’s case, which is the time subject of the revision application herein. Indeed, section 210 of the Criminal Procedure Code appears, to require a positive act by the prosecution which adduces “evidence in support of the charge” and the taking of any submission, if any, before a ruling on a case to answer.

10. It would also appear that the learned trial magistrate fell into anger to make a finding and conclusion not fully based on evidence before the court but on assumptions and personal knowledge of circumstances when she said in her ruling:

“As at now there is no prosecution in court. I am aware all the other three courts are not sitting as at now. There are two prosecutors at this station at least one should be before this court. This court cannot be held at Ransom.....”

11. The presence of two prosecutors as stated in the trial court’s ruling is opposed in the letter seeking revision where the Ass. D.P.P. stated that she was the only prosecutor serving the courts on the material day. In this application for revision, the court is not able to delve into a determination of the issue of fact of availability, or otherwise, of prosecutors to attend the trial court.

12. The High Court has under section 81 (2) of the Criminal Procedure Code provided the transfer of Criminal cases between courts “on the report of the lower courts or on application by a party interested or on its own initiative.”

13. In view of the negative sentiments of the trial court towards the prosecution, it may appear to a reasonable man sitting in court and listening to the ruling that the court may not be impartial on the prosecution case for purposes of a fair trial court as the accused persons agreed that the matter be restarted, there shall be an order for the transfer of the case to a competent court presided over by a magistrate other than Hon Idagwa, RM.

Orders

14. In consequence, the proceedings of the trial court of 7/02/18 are quashed in exercise of the High Court’s revisionary jurisdiction under section 364 (1) (b) and (2) of the Criminal Procedure Code, and the case is transferred from the trial court no. 2 to another court differently constituted, pursuant to section 81 (1) (a) of the Criminal Procedure Code which provides as follows:

“Wherever it is made to appear to the High Court –

“That a fair and impartial trial cannot be had in any criminal court subordinate thereto; or

(a).....

(b).....

(c).....

(d).....

It may order-

(i) That an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;

(ii) That a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction.

(iii) That an accused person be committed for trial to itself.

15. For purposes of restarting the trial before another court, the matter shall be mentioned before the Principal Magistrate Court within 7 days hereof for necessary directions.

DATED AND DELIVERED ON THIS 3RD DAY OF MAY, 2018.

EDWARD M. MURIITHI

JUDGE

Appearance:-

Ms Macharia Ass. DPP for the Prosecution

Mr. Mwaita and Mr. Kipkulei for the Respondents