



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL REVISION CASE NO. 91 OF 2018

BRETAH KILELE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Arising from the Ruling in Kitui Chief Magistrate's Court

Criminal Case No. 834 of 2017 by J. Munguti P M on 09/04/18)

R U L I N G

1. By a letter dated the 17th day of **April, 2018**, the firm of **Mulinga Mbaluka & Co. Advocates** who have been retained by the Applicant seek Revision of orders made by **Hon. Munguti P M** pursuant to the provisions of **Section 362** of the **Criminal Procedure Code**.
2. The Applicant was arraigned in Court for the offence of obtaining goods by false pretences contrary to **Section 313** of the **Penal Code** and issuance of a bad cheque contrary to **Section 316(1)(A)** of the **Penal Code** as amended by the **Finance Act**. Having denied the charges the case was set down for hearing.
3. It is stated that when **Mr. Mbaluka Advocate** was instructed by the Applicant he sought an adjournment to get further instructions and the Prosecution witness statements, a request that was declined by the Court. The order of the Court made the Advocate to withdraw from representing the Applicant. In the circumstances the Applicant was compelled to proceed with the matter without statements and/or representation.
4. The procedure adopted by the Court aggrieved the Applicant on grounds that failure to be allowed to be represented by an Advocate of her choice and the documents was in violation of **Article 50** of the **Constitution**.
5. A perusal of the Lower Court record shows that after the Applicant denied the charge the case was set down for hearing on the **10th August, 2017**. When the matter came up for hearing the Applicant had instructed **Mutisya Advocate** who sought an adjournment on grounds that he had just been instructed. The adjournment sought was granted.
6. On the **2nd November, 2017** the date scheduled for hearing, **Mr. Daniel Kithome Advocate** appeared and notified the Court that he had just been instructed to appear for the Applicant. The adjournment sought was granted. When the matter came up on the **9th April, 2018** **Mr. Mbaluka Advocate** appeared and made a similar application. He stated that he had just been instructed to appear for the Accused (Applicant) and sought an adjournment to another date. The application was objected to by the Prosecuting Counsel, **Mr. Mutegi**. His argument was that the Accused had been furnished with statements and was using the tactic of retaining different Advocates to frustrate the hearing of the case.
7. In his Ruling the learned trial Magistrate alluded to the sequence of events where the Applicant was provided with statements and her conduct of changing Advocates whenever the matter came up for hearing. On that basis, the learned trial Magistrate declined to grant the order sought. Following the Ruling of the Court, Counsel withdrew from representing the Applicant and the case proceeded to hearing whereby two (2) witnesses testified and were duly cross examined.
8. **Article 50(2)(c)(g)(j)** provides thus:

“(2) Every accused person has the right to a fair trial, which includes the right—

(c) to have adequate time and facilities to prepare a defence;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”

9. In the case of **Juma vs. Republic (2007) EA 461** the Court stated that:

“We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence.....”

In objecting to the application for an adjournment, the learned State Counsel, **Mr. Mutegi** stated that statements were supplied and the Applicant signed for them. In response, **Mr. Mbaluka** argued that he had liaised with previous Counsels who represented the Accused, but no statements had been filed. What is intriguing is that none of the previous Advocates sought to be supplied with statements. In his Ruling the trial Magistrate opined that it was upon the Accused to furnish her Advocates with statements. It is however the duty of the State to supply the Accused with statements which is part of the evidence that the Prosecution relies on in establishing their case that assists the defence to prepare for their case. (**See Simon Githaka Malombe vs. Republic (2015) eKLR**).

10. The Constitution guarantees an Accused person the right to engage an Advocate of his choice. However, in the case of **Delphis Bank LTD vs. Chatt & 6 Others (2005) 1 KLR** it was held that the right to legal representation is not absolute. It depends on the prevailing circumstances. (**Also see Republic vs. Silas Mutuma Marimi & 2 Others (2016) eKLR**). This is however, a case where it is demonstrated that the Applicant seemed to have abused the privilege. I say so because whenever the case came up for hearing a different Advocate would turn up and no reason would be given why the previous advocate withdrew or failed to turn up to discharge his duty to the person who retained him. Both the Accused and victim’s rights must be considered at trial. I have been asked to direct that the matter be heard by an independent Court. Looking at what transpired the learned Magistrate sought to ensure that justice was seen to be done. What transpired does not manifest an iota of bias on the part of the Magistrate. In the premises there is absolutely nothing to be revised. Save that I do direct that the Applicant be given by the trial Magistrate an opportunity of instructing another Advocate of his choice who should be furnished with copies of Prosecution witness statements. The Advocate should then apply for witnesses who have testified to be re-called for further cross examination and re-examination pursuant to the provisions of **Section 146(4)** of the **Evidence Act**.

11. Mention before the trial Court on the **14th June, 2018**.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 8th day of June, 2018.

L. N. MUTENDE

JUDGE