

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. APPLICATION NO.1099 OF 2018

REPUBLIC.....APPLICANT

VERSUS

RAMADHAN SULEIMAN ABDUL.....RESPONDENT

RULING

The prosecution was aggrieved by the decision of the trial court (**Nairobi Chief Magistrate's Court Criminal Case No.685 of 2016**) which ordered the prosecution to close its case. This was after the prosecution's application seeking to adjourn the case was disallowed. The prosecution moved this court under **Section 362 and 364** of the **Criminal Procedure Code** seeking to have the said decision revised. The prosecution complained that the decision of the trial court did not take into account the fact that the prosecution had given genuine reason for its failure to produce the witnesses on the day the case was scheduled for hearing. The prosecution urged the court to take into consideration that the case facing the Applicant is serious as it involves the best interest of a child who is the victim in the case. The prosecution was of the view that if the trial court had taken into account the entire circumstances of the case, it would have allowed the adjournment sought by the prosecution. In essence, the prosecution was saying that the trial court had no basis to deny its application for adjournment on the particular day.

The Respondent opposed the application. The Respondent's mother Fatuma Harun swore a replying affidavit in opposition to the application. She stated that the prosecution were given several adjournments to enable them produce the witnesses in court but failed to do so. She urged the court to balance the rights of the Respondent with that of the prosecution and uphold the verdict of the trial court that denied the prosecution another adjournment which they had sought ostensibly allow them to produce their witnesses. She explained that the Respondent was also a child whose best interest ought to be taken into account by the trial court. It was the Respondent's case that the prosecution had not treated the entire trial with seriousness due to the fact that it had sought several adjournments which unreasonably delayed the trial and conclusion of the case. She further stated that the trial court was entitled to make the decision that it did after it had clearly indicated to the prosecution that it had been granted a last adjournment. In the premises therefore, the Respondent urged the court to dismiss the application.

During the hearing of the application, this court heard oral rival submission made by Ms. Atina for the prosecution and Ms. Mundia for the Respondent. This court has carefully considered the said submission. It has also had the benefit of perusing through the trial court's proceedings. It was clear from the said proceedings that the prosecution sought several adjournments culminating in the decision given by the court on 6th August 2018 granting the prosecution a last adjournment. The case was listed for hearing on 20th November 2018. On that day, the prosecution again applied for an adjournment. The explanation given by the prosecution for its failure to produce the last two witnesses was that the date given by the trial court was inconvenient to the witnesses. The prosecution therefore applied for a date which would be convenient to the said witnesses. The Respondent opposed the application essentially on the ground that the prosecution had been given more than sufficient time to avail its witnesses before the court. The trial court agreed with the Respondent that indeed the prosecution had been given sufficient time to avail its witnesses. It adjourned the matter for two hours to enable the prosecution avail the witnesses. After two hours, the prosecution again informed the court that it did not have its witnesses. It was on that basis that the trial court ordered the prosecution to close its case. It is this decision that provoked the present application.

In considering whether or not the trial court made the right determination, this court is called upon to determine whether the decision reached by the trial court in that regard was reasonable in the circumstances. This court is also aware that in determining whether the decision should be upset or not, the rights of the complainant and the Respondent who is the accused ought to be taken into account. In the present application, it was clear to this court that the trial court gave the prosecution more than ample opportunity to avail its witnesses before the court. It was apparent that the prosecution treated casually the opportunities given to it in the various adjournments that it had sought. This culminated in the final adjournment that was granted by the trial court. If the prosecution was serious, it would have taken heed of the notice that it had been given by the trial court when the last adjournment was granted. Sadly, that was not the case. The prosecution again applied for adjournment this time giving an explanation that the date given by the trial court was inconvenient to the witnesses. This court formed the view that the explanation given by the prosecution was unreasonable. It was untenable. It was the duty of the prosecution to suggest a date convenient to its witnesses when the trial court granted the last adjournment.

This court agrees with the Respondent that his right to fair trial was infringed by the many applications for adjournment that the prosecution sought. This court is aware that the rights of the victim who is a child ought to be taken into account. Similarly too, the right of the Respondent who is also a child should be of paramount consideration to this court. This court cannot therefore fault the decision reached by the trial court in denying the prosecution yet another adjournment to avail its witnesses. This court noted that despite the fact that the prosecution had not availed the particular witnesses, the trial court has placed the Respondent on his defence. The defence hearing is scheduled for 11th December 2018. It is only fair that the trial court be given a chance to conclude the trial.

In the premises therefore, the application by the prosecution lacks merit and is hereby dismissed. The trial court's file shall be returned to the trial court for the purpose of hearing and conclusion of the case. It is so ordered.

DATED AT NAIROBI THIS 7TH DAY OF DECEMBER 2018

L. KIMARU

JUDGE