REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 163 OF 2017

REPUBLIC.....APPLICANT

VERSUS

MARTIN KIBOR & 2 OTHERS.....RESPONDENT

RULING

1. Through a letter dated 18th January, 2017 the applicant (prosecution) applied to this court to exercise the powers conferred upon it by Sections 362, 364 and 365 of the Criminal Procedure Code, Cap 75 laws of Kenya so as to satisfy itself as to the correctness, legality and propriety of the rulings and orders pronounced by the Hon Mr. Kiambya, SPM on 15th July, 2017.

2. The reasons advanced for the application are whether;

a. The learned magistrate correctly/properly exercised its discretion under Section 150 of the Criminal Procedure Code.

b. the learned magistrate properly exercised the powers of the court to compel attendance of a witness.

c. the learned magistrate ought to have considered whether a miscarriage would be visited on any or both parties before granting or denying to grant the application and adjournment.

3. The applicant seeks to have the magistrate's ruling and orders setting down the matter for submissions on a case to answer set aside and to order that;

a. the witness summons to compel attendance of BEATRICE MURIUKI do issue as prayed.

b. summons to OCS, Mariakani to attend and produce arms register to issue.

c. an appropriate hearing be fixed before the trial magistrate.

d. pending the hearing and determination of this application the ruling that submissions on a case to answer proceeds on the 21st August, 2017 be stayed.

e. the court makes such orders that are meritable and just in the circumstances of the case.

4. The accused persons are charged with obstruction contrary to Section 66(1) (a) as read with Section 66(2) of the Anti Corruption and Economic Crimes Act NO. 3 of 2003. The particulars being that;

"On the 15th August, 2015 at Mariakani Weighbridge without lawful excuse jointly obstructed and threatened EACC investigators from searching them by drawing firearms and shooting at them while the said investigators were executing lawful arrest under the Economic Crimes Act No. 3 of 2003."

5. That the prosecution called a total of 12 witnesses, being PW1, to PW12 who testified from 14th January, 2016. The accused persons were at all material times officers of the National police service and so were some of the witnesses including one crucial witness by the name Beatrice Muriuki, who is reluctant to testify.

6. The prosecution made the following applications on 15th July, 2015 which the trial magistrate declined to grant and marked the prosecution's case as closed;

a. There was an application to compel the attendance of witness Beatrice Muriuki (The then armourer in charge of the daily issuance of arms and ammunition) where in considering the same, the trial magistrate higlighted the facts of a last adjournment already granted to the prosecution and the court having issued summons to Beatrice Muriuki who was now not in court and denied the same on grounds that no sufficient reason had been provided.

b. an application for summons to issue upon the OCS Mariakani Weighbridge to produce an arms register under Section 150 of the Criminal Procedure Code. For that, the trial magistrate held that the investigator had clearly stated that he had called the OCS to avail the register in vain and in any case the said witness was not part of the case and neither had his statement had been supplied to the defence.

c. an application to adjourn the case under Section 283(1) of the Criminal Procedure Code and for stay orders to enable the prosecution move to the High Court. And here the trial magistrate held that it had no jurisdiction to grant such stay.

7. The powers of this court when exercising its supervisory jurisdiction over the subordinate court is very restricted. The Sections are designed as such so as to avoid overlapping since revision is distinct from an appeal.

8. The controlling words under the provisions for revision are correctness, legality and propriety. They are so inter conected whereby one weaves into the other.

9. I have read through the original proceedings of the trial court and a series of the applications and counter applications where the primary arguments were made in the said court. I have also looked at the prosecution's application and the reasons advanced for the same in this request for revision of the trial magistrate orders of 15th July, 2017. I further listened to the arguments that were advanced before this court with regard to the said application by either party.

10. What this court has been asked to do is to consider whether the trial court acted within the law in rejecting the applications made before it by the prosecution under Section 150 and 283(1); both of the Criminal Procedure Code.

11. Section 150 of the Criminal Procedure Code provides as follows;

"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

12.The power to re-call or summon a witness under Section 150 of the Criminal Procedure Code is the sole discretion of the court and arises from the testimony before it. The power is not shared by the parties before it but arises from clear implication of evidence tendered before a court.

13. Another aspect of the Section is that a court can examine a person who is already before it but has not been called as a witness, or recall and re-examine a person already examined, and his evidence if tendered will lead to the just decision in the matter and summon or recall such person. The law does not share the right of the court to take that decision to act under the said Section with anyone or that it be prompted by parties before it.

14. The mischief the law is preventing is the unnecessary resort of parties to situations that can result to obstructions to smooth trials and to avoid parties surprising others in the course of a trial. The policy is to ensure certainty in trials so that the defendants and prosecutors alike do not surprise each other to the detriment of justice.

15. The trial court observed that it had granted summons and adjournments before which the prosecution had not taken advantage of. The reason the prosecution advanced was that the primary witness, who was the office-holder had been suspended and or left employment and therefore become a hostile witness to be compelled by court. Section 150 prevents such situations where a court becomes the one assisting parties before it to gather witnesses and evidence.

16. Section 283(1) of the Criminal Procedure Code provides as follows;

"If, from the absence of witnesses or any other reasonable cause to be recorded in the proceedings, the court considers it necessary or advisable to postpone the commencement of or to adjourn a trial, the court may from time to time postpone or adjourn it on such terms as it thinks fit for such time as it considers reasonable, and may by warrant remand the accused to some prison or other place of security.

17. From the literal meaning that commends itself from the section 283 (1) of the Criminal Procedure Code, that power again rests with the

court and the terms to be imposed when granting an adjournment is the sole discretion of the court. A party cannot complain that when a court grants the first and last adjournment it is acting outside the law. A first adjournment can be a last adjournment where a court wishes to achieve a smooth trial and prevent delay at the behest of a party wishing to take advantage over the other.

18. A trial court has to take total control of the case management so that justice is dispensed timely for the parties to satisfy public interest and so that the public has confidence in the justice process dispensed through the courts. To do this, a court has to manage and balance many competing interests.

19. In doing all these, courts endeavor to satisfy the requirement of Article 50 of the Constitution of Kenya which protects fair trial. One of the elements of fair trial protection is found at Article 50(2) which provides as follows;

> **"Every accused person has the right to fair trial which involves the right to have the trial begin and conclude without unreasonable delay.**

The court may have had this in mind and to avoid being drawn into turf wars, opted for a speedier trial. The court had to balance this requirement with what parties were competing for.

20. There is a complaint the court failed to apply its powers under Sections 144 to 149 of the Criminal Procedure Code. Section 144 aids a court to obtain evidence in the possession of a party which will aid it to do justice, but the party may not offer his/her/it/self to testify. The court will intervene in such circumstances and in obtaining that evidence for the party. For this, I say No more to the witnesses whom the court declined to summon and made an observation.

21. It all comes to the question as to whether the court can interfere, under the powers donated to it under Section 362 of the Criminal Procedure Code and satisfy itself as to the correctness, legality and or propriety of the finding and regularity of the proceedings of the 15 th July, 2017 before the trial court.

22. I have said much on what transpired and set out the Sections of the law that the court is alleged to have violated and or overlooked. The court rendered itself on revisionary jurisdiction as the old case of **Republic –versus- Abeid (1990) KLR 569,** where the Honourable Githinji J. as he then was rendered himself as to where a court makes a finding of fact;

> **"Where a lower court makes a finding of fact which is not appealed against, it is difficult for a court exercising its revisionary jurisdiction to fault the lower court on such a finding of fact."**

23. I find that the court after taking into account the evidence of several witnesses, found as a fact that, as at the time the OCS testified, the same question would arise from his/her and the fact that the prosecution had not acted on the summons earlier issued when they were not carried out.

24. In my own view, I find the court did not act illegally, incorrectly or unprocedurally and therefore that its decision to proceed with the trial was correct. The application for revision has dwelt too much on the merits of the evidence which arguments can only be raised on appeal.

I therefore accordingly dismiss the application for revision and make the following orders;

a. The application for witness summons to compel the attendance of Beatrice Muriuki is hereby declined.

b. The application for summons to issue upon the OCS Mariakani to attend court and produce the arms register is declined.

c. The trial magistrate to proceed and deliver the ruling pending before court on an appropriate date.

Ruling DELIVERED, DATED and SIGNED this 3rd day of December, 2018.

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D. CHEPKWONY

JUDGE.