



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU CRIMINAL REVISION NO. 5 OF 2016

ANDREW KIMANI NGARE APPLICANT

VERSUS

OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTIONS.....RESPONDENT

RULING ON REVISION

1. Andrew Kimani Ngari was presented before the Chief Magistrate’s Court at Thika charged with two counts of conspiracy to commit a felony contrary to Section 393 of the Penal Code and stealing goods in transit contrary to Section 279(c) of the Penal Code. He took plea on 18/07/2014 and pleaded not guilty to both charges.

2. A trial ensued with the Prosecution calling four witnesses. On 31/05/2016 after the fourth Prosecution witness testified, the Prosecution closed its case. The Learned Trial Magistrate directed parties to file Written Submissions on

“No Case to Answer” by 28/06/2016. He subsequently set a ruling on “No Case to Answer” for 09/08/2016. The

Defence duly filed their written submissions.

3. However, on the date scheduled for the ruling, and before the ruling was delivered, the Learned Trial Magistrate entertained and granted an application by the Prosecution to consolidate the Applicant’s case with a fresh criminal case (being Criminal Case No. 5454 of 2016). The Defence Counsel vehemently opposed the Application for consolidation arguing, as he does here, that it would be highly prejudicial to his client and against his fair trial rights for the consolidation to happen and the case to start a fresh.

4. On 01/09/2016, the Learned Trial Magistrate made the following ruling:

I have considered the application by the Prosecution to have this case consolidated with Crim Case no 5454 of 2016. I have also considered the objection raised by the Defence. Although this case has progressed to this stage, I find no prejudice to be occasioned to the Accused Person. I therefore allow the application as prayed.

5. Thus, the Prosecution’s application for consolidation was allowed. The Accused Person still feels that the ruling was a serious misdirection by the Learned Trial Magistrates. Through his lawyer, he wrote to this Court requesting that this Court exercises its supervisory powers under Sections 362, 364 and 367 of the Criminal Procedure Code to revise the order and ruling the by Learned Trial Magistrate.

6. When the letter was first brought to my attention, I made preliminary orders to the effect that the

Applicant's letter dated 8th September, 2016 appeared to raise plausible issues for potential exercise of the court's revisionary powers if the facts were borne out. Since the issue could irreversibly affect the trajectory of the criminal trial, the issue was urgent. At the same time, it seemed only fair that both parties should be given a fair opportunity to be familiar with the decision and order the Applicant was impugning before addressing the Court on the same. I, therefore, ordered that the Trial Court file be made available to the parties for perusal and that the parties prepare themselves to address me on the question of revision. The parties appeared before me on 13/06/2017 for hearing. During the hearing, Ms. Ngalukya conceded that the orders requested for were merited by the facts of this case.

7. The High Court will usually exercise its power to review or even exercise an appeal over an interlocutory matter before a magistrate's court only in exceptional circumstances. While difficult to determine with mathematical precision when the court will use this power, it is only be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), "grave injustice might otherwise result or where justice might not by other means be attained." As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below." Hence, the propriety of exercising revision power for interlocutory matters is decided on the facts of each case and with "due regard to the salutary general rule that appeals are not entertained piecemeal." (*Walhaus & Others v Additional Magistrate, Johannesburg & Another*, 1959 (3) SA 113(A) at 120D; *S. v Western Areas Ltd & Others* 2005 (5) SA 214 (SCA) at 224D.

8. With these principles in mind, I was persuaded that this was a proper case to exercise the Court's inherent powers for revision given the impact that the Trial Court's ruling, if incorrect, would potentially have on guilt or otherwise of the Accused Person.

9. The Applicant's lawyer cited for me R v Abdikadir Ahmed Mohamed (Garissa HC Crim. Case No. 10 of 2011) and Ruth Gathoni

10. *Gichuki v R* (Nyeri HC Const. App. No. 1 of 2013). In both cases, the Learned Judges were categorical that once the Prosecution has closed its case, the only time it can be allowed to re-open its case if the Accused Person in his defence has introduced a new matter which the Prosecutor could not have foreseen.

11. The cases cited by the Applicant are on point. The effect of the decision by the Learned Trial Magistrate is to allow the case against the Applicant to start afresh. This will, in turn, give the Prosecution another "bite at the cherry": an opportunity to re-fashion its case and plug any loopholes it had noticed in the first round. This is definitionally prejudicial to the Applicant as it violates his fair trial rights clearly enumerated in the Constitution.

12. Our jurisprudence and the evolving standards of fair trial are now clear that once the Prosecution has closed its case, the only time it can adduce any further evidence against the Accused Person is when the ex proviso rule kicks in: when the Accused Person raises new matter which no human ingenuity or reasonable diligence could reasonably have anticipated, or foreseen the possibility of its being adduced by the Defence.

13. Here, by applying for consolidation of the Applicant's criminal trial after the close of the Prosecution case with a fresh new case, the Prosecution will achieve the goal of adducing new evidence against the Applicant. Since this will violate the Applicant's fair trial rights, it simply is not permitted.

14. I will therefore allow the Application for revision and review the Trial Court's ruling/order consolidating the Applicant's criminal trial with Criminal Case No. 5454 of 2016. Instead, I substitute the order with an order that the Learned Trial Magistrate delivers his ruling on no case to answer.

Dated and delivered at Kiambu this 14th day of June, 2017.

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JOEL NGUGI

JUDGE