REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL REVISION NO.21 OF 2017

BEATRICE THIGARI WANGARI.....APPLICANT

- V E R S U S –

REPUBLIC.....RESPONDENT

REVISION ORDER

On 5/5/2017, the **Hon. S.M. Mwangi SRM**, read a ruling in Cr.C.570 of 2014, after the close of the prosecution case. The ruling was based on the charge of ***Stealing Contrary to Section 275 of the Penal Code*** which had been received in court on 12/3/2014, when the accused first appeared before the court for plea. However, the magistrate came to realize that there was another charge in the file in which the accused was charged with the offence of ***Abuse of Office Contrary to Section 101 as read with Section 102A of the Penal Code*** and the second count of ***Obtaining Money by false pretences Contrary to Section 313 of the Penal Code*.**

I have perused the court record and note that on 15/1/2015, the prosecution made an application to amend the charge sheet and substituted the charge sheet with one of the two counts. The said charge was however not signed and dated by the magistrate. The magistrate should have cancelled out the 1st charge dated 12/3/2014 and indicated that it had been substituted which he did not do.

I also note that on 30/6/3017, when **S.N. Mwangi** took over this matter, it was drawn to her attention that there had been an amendment and substitution of the charge and so she should have been keen to know on which charge sheet the trial had proceeded. Through the oversight of Hon. **S.N. Mwangi,** she wrote the ruling based on the wrong charge. At this stage, I must call on the trial court to always read the whole proceedings before writing a ruling or judgment to avoid such mistakes. In my view, this is a mistrial because the ruling is not based on the correct charges. I hereby declare the proceedings a mistrial. Where there is a mistrial, the court may order a retrial.

In this case, can the court order a retrial?

The case of "***Fetahali Manji v Republic 1966 EA 343***, the East African Court of Appeal set out the principles that the court should consider before making an order for retrial. The court said:

> ***"In general, a retrial will be ordered only when the original trial was illegal or defective: It will not be ordered when the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."***

In the case of ***Muiruri v Republic (2000) KLR 552***, the court ordered a retrial in the subordinate court after observing that;

> ***"Generally, whether a retrial should be conducted or not must depend on the circumstances of the case:***
>
> > ***1. It will only be made where the interest of justice requires it and it is unlikely to cause injustice to the appellant. Other facts include illegalities or defects in the original trial, length of time having elapsed since the arrest, and arraignment of the appellant; whether the mistakes leading to question of the conviction were entirely the prosecution's making or not."***

In this case, the accused was arraigned in court on 12/3/2014 about 3 years ago. I have read the ruling of the trial court in which the accused had been acquitted of the charge. By the time the prosecution was forced to close its case on 23/2/2017, one witness had so far testified, that is three years after the charges were preferred. Three years having elapsed, it is my view that ordering a retrial will be prejudicial to the accused.

Mwangi v Republic (1983) KLR 522, the court said:

> ***"……a retrial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result."*** (***Braganza v Republic (1957) CA***.

In the instant case, so far only one witness has testified after a period of 3 years. Eleven other listed witnesses had never been bonded. If the prosecution were unable to get their witnesses within 3 years, how much more time will they need to call the rest, if an order of retrial is made. I think that this case would take much longer than the three years already spent thus further prejudicing the accused person for justice delayed is justice denied.

For all the above reasons, I find that this is not a suitable case for the court to order a retrial. The accused had been acquitted by trial magistrate. A retrial will not serve any useful purpose. I hereby uphold the trial court's decision and order accused set at liberty forthwith unless otherwise lawfully held.

Signed and Dated at NYAHURURU this 5th day of June 2017.

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R.P.V. Wendoh

JUDGE