

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 23 OF 2017

DENIS MOIRO AIKO.....APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING

Moiro Aiko, herein the Applicant, seeks a revision of an order made by the learned trial magistrate on 28th December, 2016 in Kibera Cr. Case No. 808 of 2015 in which he is charged with being in possession of wildlife trophy. The order in question denied the applicant in that case the right to recall a witness for further cross examination. He submits that this denied him a right to a fair trial. At the same time, he asks the court to order a retrial of the mini trial that was conducted on 29th November, 2016 in the absence of his lawyer, Mr. Muchiri.

The ruling dated 22nd December, 2016 forms the basis of this application. The ruling in question denied the Applicant an opportunity to recall PW1 for further cross examination. The Applicant's counsel submitted that the Applicant could not exhaustively cross examine the witness by himself. He submitted he was attending a CUC meeting as a result of which he was unable to attend court. The court on the other hand ruled that the defence counsel had on many occasions contributed to the delay of the case as a result of which the request to recall PW1 was declined.

I have perused the court's record. The trial was due for hearing for the first time on 25th February 2017. It was adjourned to 27th May, 2015 at the behest of the defence and thereafter there were intermittent mentions until 10th August, 2015 when the matter was set for hearing on 26th August, 2015. On this date the Applicant's advocate asked for a mention the following week. On 10th September, 2015 the matter was set for hearing on 25th January, 2016 but on the date in question the prosecutor was indisposed and the matter was adjourned and set for hearing on 27th April, 2016. On this date a new counsel came on record for the Applicant and since he needed time to familiarize himself with the matter the case was adjourned and set for hearing on 20th June, 2016. On this date the prosecutor lacked witnesses. A mini trial date for 4th August, 2016 was set. The same was not however conducted until 29th November, 2016.

This date is crucial as the Applicant was not represented. He elected for the mini trial to proceed. It was concluded and a ruling delivered. Hearing dates for the main trial were set as 1st and 5th December, 2016. On 1st December 2016 the Applicant's counsel was not present and the Applicant applied for adjournment. The application was denied and PW1 gave evidence and was cross examined by the Applicant, in person. The hearing date set for 5th December was never utilized.

The above chronology demonstrates that it is not only the Applicant or his counsel who have solely contributed to the delay in concluding the trial. Although clearly the defence counsel appears not to have been diligent in ensuring that the trial proceeds, it is only fair that the Applicant be accorded a platform for a fair trial. I say so because it not on record that the counsel informed the court that he was attending a CUC meeting. That issue only arose at the next hearing date. It is the duty of every counsel to facilitate the smooth business of the court. This includes, but is not limited to, giving accurate information on why he/she may not be in court. Failure to do so may, at the end of the day, prejudice his client as the court will conduct its business based on the available information.

Having observed that the defence counsel was not in court and gave a plausible account of his absence on the date PW1 testified, I shall rule in favour of the Applicant. This will accord with upholding an accused's right of being represented by a counsel of his choice.

In the upshot, in exercise of the revisionary powers conferred on this court, pursuant to Section 364 of the Criminal Procedure Code, I partially allow the application. I decline to order a repeat of the mini trial as the Applicant wholly conceded he was comfortable handling the same in the absence of his lawyer. Furthermore, the motor vehicle, subject of the mini trial was properly ordered detained by KWS. I however allow the recalling of PW1- No. 10084 Denis Gikundi for purposes of further cross-examination by the defence. Pursuant to the same this court orders that the file be placed before the learned trial magistrate for mention on 14th June, 2017 for taking of a hearing a hearing date. It is so ordered.

Dated and Delivered at Nairobi this 7th day of June, 2017.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. No appearance for the Applicant and his counsel

2. M/s Kimiri for the Respondent.