



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

REVISION CASE NO.128 OF 2017

REPUBLICAPPLICANT

VERSUS

PATRICK MUTHENGI KIMANZIRESPONDENT

RULING OF THE COURT

1. **JACKLINE ABUGA (Mrs)** the Learned Senior Principal Prosecution Counsel has made an Application on behalf of the office of the Director of Public Prosecution Machakos vide a letter dated 16th June, 2017 seeking to move this Court for orders pursuant to Article 165 (6) and (7) , 50(1) of the Constitution of Kenya 2010 and Section 362 of the Criminal Procedure Code that this Honourable Court do call for and examine the record in **Machakos Chief Magistrate's Court Traffic Case Number 751 of 2015 (Republic =Vs= Patrick Muthengi Kimanzi)**.

2. The Applicant's case is that the trial court on the **13/06/2017** ordered the Prosecution's case closed in the absence for the Prosecution Counsel and proceeded to reserve the matter for Ruling. The Applicant therefore felt aggrieved by the Court's decision since they have been denied a chance to conclude their case after having called five (5) witnesses leaving only a Doctor and the Investigating Officer. It is the contention of the Applicant that the trial court failed to give legality to the session as it failed to adhere to the tripartite nature of the composition of the court which takes into account the Judicial officer, the accused person or his Advocate, the Prosecution Counsel and the Court Assistant for logistics and interpretation purposes. The Applicant finally contends that there has been a miscarriage of justice which now warrants this court to revise the orders of the trial court and order the Prosecution's case be re-opened.

3. The Respondent Patrick Muthengi Kimanzi opposed the Applicant's request and raised the following grounds:-

- (i) That the matter had come up for hearing on several occasions but that the Prosecution has always been seeking to adjourn the same for one reason or another.***
- (ii) That the Prosecution Counsel failed to attend court on 13/06/2017 whereupon the trial court ordered the Prosecution's case closed and reserved the matter for ruling on the 20/07/2017.***
- (iii) That the Applicant had been aware of the hearing date but chose not to send any representative.***
- (iv) That the Applicant is not serious in prosecuting the case.***
- (v) That the Respondent stands to be prejudiced if the request is allowed as the Applicant would***

get a second chance to re-open their case thereby prolonging the litigation.

(vi) That the Application is bad in law and an abuse of the court process and should be dismissed.

Submissions

4. Mr. Machogu learned counsel for the Applicant submitted that the trial court was not properly constituted in the absence of the trial Prosecutors and which was therefore grossly irregular and if allowed will cause miscarriage of justice. He further submitted that the trial Prosecutor was unwell on the material date and that the trial court handled the matter without the presence of any other Prosecutor despite the clear provisions of Article 157 of the Constitution which allows the Prosecutor to close their case. He finally submitted that the trial court's orders be revised and case be re-opened.

5. Mr. Muthama Learned Counsel for the Respondent submitted that granting the Application would amount to the Prosecution having their cake and eating it. He submitted that the Prosecution had been delaying the case and since the hearing date had been agreed by consent the Prosecution's case was ordered to be closed when the trial prosecutor failed to turn up for the case. Defence Counsel submitted that the Respondent is entitled to speedy trial without undue delay under Article 50(2) (c) of the Constitution. As far as the Respondent is concerned the trial court was right in ordering the Applicant's case closed as there was no Prosecutor at the time and therefore the lower Court's order should be upheld and that a reversal would amount to allowing the Applicant get a second bite of the cherry.

6. I have considered the Application and the oral submissions by Learned Counsels for the Applicant and Respondent. The issue for determination is whether the Applicant is entitled to the order for revision as sought pursuant to Article 165 (6), (7) of the Constitution as read together with Section 362 and 364 of the Criminal Procedure Code. The matter pending before the trial court and which is the subject of this Application for revision orders involves the Respondent herein who had been charged with four (4) counts of causing death by dangerous driving contrary to Section 46 of the Traffic Act Cap 403 Laws of Kenya. Both Learned Counsels for the parties herein have confirmed that the trial Court had received evidence of five (5) witnesses before it ordered the Applicant's case closed on the 13/06/2017 and reserved the matter for ruling on the 20/07/2017. The relevant provisions of the law on revision are as follows:-

(a) Article 165(6)(7) of the Constitution provides as follows:

(6) "The High court has supervisory jurisdiction over the Subordinate Court's and over any person, body or authority exercising judicial or quasi judicial function but not over a superior court.

(7) For the purposes of clause 6 the High court may call for the record of any proceedings before the subordinate Court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of Justice."

(b) Section 362 Criminal Procedure Code provides as follows:-

"The High Court may call for and examine the record of any Criminal proceeding before any subordinate Court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court."

(c) Section 364 (1) of the Criminal Procedure Code provides as follows:-

(a) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge.

(b) In the case of any other order other than an order of acquittal alter or reverse the order.

(2) No order under this Section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.”

7. From the above provisions it is quite clear that the High Court has jurisdiction to supervise subordinate Courts in order to ensure that the fair administration of justice is properly adhered to. Hence an aggrieved party is at liberty to move the High Court and seek the appropriate redress especially when matters requiring revision are needed. This revisionary power is crucial in that it helps to keep tribunal or subordinate Courts in check and to ensure that they operate according to the procedure established by law and principles of justice. In exercising such powers, the High Court being a Court of justice is also obligated to ensure that the person who is likely to be adversely affected by the revision orders would be given an opportunity to be heard or if not by his legal Counsel before any decision is reached.

8. The complaint herein has been raised on behalf of the trial Court Prosecutor. The Applicant's complaint is that the trial Court ordered the Prosecution's case closed and reserved the matter for ruling on whether or not the Prosecution will have established a prima facie case against the Respondent. The Applicant's main grouse is that the trial Court proceeded to conduct its proceedings in the absence of the Applicant yet its presence was paramount as it could ensure that the coram was complete so as to give or clothe it with a tripartite entity or appearance comprising of the Judicial Officer, Accused/Defendant, the Prosecutor or Private Prosecution Counsel, the Defence Counsel where appropriate and the Court Assistant who handles interpretation and other logistics. The Applicant further complains that its Constitutional role pursuant to Article 157 of the Constitution was denied by the trial Court when it unilaterally ordered the Applicants' case closed in its absence without according it the benefit of presenting its remaining witnesses or being given a chance to elect as to whether to close their case or seek for another date. Article 157 of the Constitution provides as follows:-

“The power to institute and undertake criminal proceedings against any person before any court other than a Court martial in respect of any offence alleged to have been committed, rests with the Director of Public Prosecution.”

9. The trial Court Prosecutor plays an integral role in the criminal justice system especially where a criminal trial is to be instituted before a court. In most cases the Prosecutor plays his role during plea taking, pre-trial conferences, mentions, main trial, conviction participation, sentencing, hearings until the final order of the Court.

10. The Applicant cited the case of **ELIREMA & ANOTHER =VS= REPUBLIC CR. APPEAL NO.67 OF 2002** where the Court of Appeal held thus:-

“In Kenya, we think and we must hold that, for a criminal trial to be validly conducted within the provisions of the Constitution and the Code there must be a Prosecutor either public or private who must play the role of deciding what witnesses to call, the order in which these witnesses are to be called and whether to continue or discontinue with the Prosecution. These roles cannot be played by the trial Court for if it does so there would be serious risk of the Court losing its impartiality and that would violate the provisions of the Constitution namely Article 50”.

11. The above authority is quite persuasive in that a properly constituted court should entail all actors in the trial and if one of the key actors are missing then it can rightly be said that the coram was not complete. It has been confirmed by the Respondent's Counsel that indeed the trial Court Prosecutor was not present when the Court ordered the Applicant's case closed. Clearly there was an irregularity or incorrectness or illegality which warrants intervention by this Court by dint of this Court's supervisory and revisionary powers donated by Article 165 (6) (7) of the Constitution and further by Section 362 and 364 of the Criminal procedure Code. Even though the Respondent is entitled to a speedy trial the procedure in which the matter was brought to a closure was quite irregular. The trial Court could have deferred the matter to another date and ensure the requisite notice was issued to the Applicant. The trial Court could only order the Applicant's case closed in the presence of the Applicant. I am not persuaded

by the Respondent's Counsel Submissions that the Applicant is likely to get a second chance to re-open their case since the matter in which the same was closed was quite irregular. The Applicant as an integral part of the proceedings was entitled to be present before the orders could be made since its role could not be usurped by the court or any other party for that matter. The trial Court's order to close the Applicant's case denied it a chance to ventilate its case by availing its remaining witnesses and there was clearly a miscarriage of justice. The Applicant's request for reversal of the trial Court's orders are merited. The Respondent will not suffer any prejudice since he shall be given the opportunity to challenge the Prosecution's evidence in the usual manner through cross-examination of witnesses.

12. In the result, it is the finding of this court that the Applicant's Application is merited. Consequently I review the lower Court's record namely **Machakos Chief Magistrate's Court Traffic Case No. 751 of 2015** made on the **13th June, 2017** and hereby quash and or set aside the order closing the Prosecution's case. I direct that the Prosecution's case be re-opened and be heard to conclusion.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **19TH** day of **JULY** 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Muthama for Respondent

Mogoi for Applicant

C/A: Kituva