

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.388 OF 2008

(An Appeal arising out of the Ruling delivered on 4th March 2008 by of MRS. M.W. MURAGE - SPM in Nairobi CM. CR. Case No.1253 of 2008)

SHEILA KINYA MAINGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Sheila Kinya Maingi is facing several charges before the Magistrate’s Court. The charges arose out of a business transaction between the Appellant and Matrix Technologies Limited. She has been charged for **obtaining goods by false pretences** contrary to **Section 313** of the **Penal Code** on allegation that she defrauded the said company the sum of Kshs.4,194,395.20. She faces several counts of **issuing bad cheques** contrary to **Section 316A(1)** of the **Penal Code**. The Appellant pleaded not guilty to the charges. The prosecution has already closed its case. However, on 27th February 2008, the Appellant applied to recall some witnesses who had already testified. It was apparent from the record that on the particular day that the witness testified, although the Appellant was present in court, her advocate was absent. The Appellant did not cross-examine the particular witnesses. It was in that regard that when the advocate re-appeared on record, he sought to have the said witnesses recalled. The application was objected to by the prosecution. It was apparent from the submission made by the prosecution that the Appellant’s counsel had earlier made similar applications for the recall of witnesses but after the same applications were allowed, the said counsel failed to take advantage of the recall. After considering the application, the trial magistrate declined to grant the order sought. It is this refusal to allow the Appellant leave to recall the particular witnesses that provoked this appeal. In essence, this is an interlocutory appeal.

In the “memorandum” of appeal (it ought to have been a petition of appeal), the Appellant raised several grounds of appeal challenging that Ruling. Some of the grounds advanced in the appeal touch on the merits of the case. This court shall not address those grounds in this Ruling because to do so would prejudice the pending trial before the trial magistrate’s court. This court shall only address that part of the grounds of appeal raised that is germane to the Ruling that led to the filing of this appeal. The Appellant was aggrieved that by failing to give her a chance to recall PW4 and PW5 to be cross-examined by her counsel, her constitutionally guaranteed right to be accorded fair hearing was infringed. Mr. Naikuni for the Appellant reiterated these grounds of appeal in the submission that he made before court. Ms. Aluda for the State opposed the appeal on the grounds that the same was not made in good faith because the Appellant had earlier been given the opportunity to have the particular witnesses recalled but failed to take advantage of the same when the particular witnesses appeared before court.

This court has carefully considered the rival arguments made by counsel in that regard. As stated earlier in this judgment, the Appellant raised issues in her appeal that touch on the merit of the case. Being an interlocutory appeal, this court cannot in the circumstances comment on those issues. The Appellant shall be at liberty to raise the same during submission, and if convicted, can raise the same in a substantive appeal to be lodged at the High Court. This court is of the view that the only issue for determination by this court is whether, by denying the Appellant the chance to recall the two witnesses for the purpose of

cross-examination, the Appellant's right to fair trial was infringed. **Article 50(2)(k)** of the **Constitution** guarantees the Appellant the right to adduce and challenge evidence that is produced in court. It was clear from the proceedings that the Appellant and her advocate did not conduct themselves in a manner that assisted the court to effectively and efficiently try the case. On several occasions, counsel failed to appear before court. On other occasions, counsel sought to recall the prosecution witnesses who had already testified for the purpose of cross-examination. Such applications were allowed but on the material dates in question, counsel failed to take advantage of the presence of the recalled witnesses. This court cannot fault the trial magistrate for reaching the decision that she did taking into consideration the conduct of the Appellant and her counsel.

Although the prosecution justifiably opposed the interlocutory appeal, this court is of the considered opinion that for the interest of justice, the said two witnesses should be recalled for the purpose of the Appellant's counsel to cross-examine them. However, this court is concerned that the Appellant's trial has been delayed on account of this interlocutory appeal. In criminal cases, it is good practice that an accused person who is aggrieved by an interlocutory decision made during trial should await the conclusion of the trial, and if convicted, challenge that decision in a substantive appeal to the High Court. Interlocutory appeals from decisions of trial courts have justifiably been discouraged because if they were to be entertained, then it would infringe on the accused person's constitutional right to fair trial under **Article 50(2)(e)** of the **Constitution** that behooves the court to begin and conclude the trial of such an accused person without unreasonable delay. In **Thomas Patrick Gilbert Cholmondeley –Vs- Republic [2008] eKLR** the Court of Appeal held, in regard an interlocutory appeal which had been filed to the court during the pendency of a criminal trial:

“We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practicing at the Criminal Bar will appropriately advise their clients so as to avoid unnecessary delay. We would add that in future if such appeals are brought, the court may well order that the hearing of the appeal be stayed pending the conclusion of the trial...”

This court is aware that this decision was made on the basis of the old **Constitution**. The rights of accused persons in our current **Constitution** have been expanded. Many constitutional petitions have been filed by accused persons to this court alleging the infringement of one right or other under the **Constitution**. Usually such constitutional petitions are filed to this court at the beginning of the trials. Whereas an accused person has a right to challenge an interlocutory decision during trial, such right should not be exercised with a view to frustrating the pending trial. It is in that regard that the Court of Appeal, correctly in the view of this court, observed that interlocutory appeals from decisions made during trial should be discouraged as it has the effect of delaying the trial before the court hearing the criminal case. That was the case in this appeal.

In the premises therefore, this court will allow the Appellant's for the recall of the said two witnesses for the purpose of cross-examination. This court notes that it may be possible that the court which tried the case is no longer sitting within the jurisdiction of this court. This case is therefore referred to the Chief Magistrate, Nairobi for the purpose of taking appropriate action to expedite the trial. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF JUNE 2016

L. KIMARU

JUDGE