

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.167 OF 2016

REPUBLIC.....APPLICANT

VERSUS

JACQUELINE GACHERI MUGAMBI & 2 OTHERS.....RESPONDENT

RULING

The Director of Public Prosecutions was aggrieved by the decision of the trial court in **Milimani Chief Magistrate’s Court Criminal Case No.641 of 2014 Republic –Vs- Jacqueline Gacheri Mugambi & 2 Others**. On 13th September 2016, the trial court ordered the prosecution to close its case. According to the prosecution, this was despite the fact that the prosecution had two witnesses who were in court and were ready to testify. The only issue that prevented them from adducing their testimony was the absence of exhibits which could not be traced within the time that the trial court had scheduled for hearing. It is the prosecution’s case that it should be given time to present the said witnesses with the said exhibits. In that regard therefore, the prosecution has prayed that this court revises the decision of the trial court. Ms. Kajuju for the Applicant reiterated these facts in her submission before court. She added that, other than revising the particular order, the court should order the case to be heard and concluded by another magistrate’s court.

Mr. Nyamweya for the Respondents opposed the application. He submitted that the prosecution was given the necessary opportunity to present its witnesses before the court. The excuse that the prosecution gave to the effect that they did not have exhibits in court was untenable because the defence was willing to supply the prosecution with the copies of exhibits to enable the trial to proceed to hearing. He disputed the assertion by the prosecution that there were prosecution witnesses in court at the particular time the matter was called for hearing. He was of the view that the prosecution was not ready to proceed with the case on the particular day and was using the excuse of the non-availability of exhibits to secure an adjournment by the backdoor. Learned counsel urged the court not to upset the decision of the trial court as it was made after all the circumstances of the case had been taken into consideration.

As stated earlier in this Ruling, the Applicant invoked this court’s jurisdiction under **Sections 362 and 364** of the **Criminal Procedure Code**. Under the said sections, this court has jurisdiction to call for and examine any criminal proceeding pending before a magistrate’s court with a view to establishing its correctness, propriety or legality. In the present application, it is the prosecution’s case that the trial court did not properly exercise its discretion when it ordered the prosecution’s case closed before the prosecution had been given opportunity to call all its witnesses. On the other hand, it is the Respondents’ argument that the prosecution had been given all the opportunity to present its case but failed to do so when it was unable to avail witnesses in court on the appointed date that the case had been scheduled for hearing. It was conceded by both the Applicant and the Respondents that the hearing of the case was earlier scheduled for 12th and 13th of September 2016. Unfortunately, the hearing did not proceed on 12th September 2016 because the day was declared a public holiday. That meant that the only day available for hearing was 13th September 2016. The trial magistrate ordered the prosecution to close its case after it failed to avail exhibits upon which the prosecution witnesses were to rely upon when they adduced evidence in court. While it was understandable that the trial court was justifiably concerned that the prosecution was not diligent in the preparation of its case for hearing, taken in context, the trial court should have taken into account the fact that the case had been scheduled for hearing for two days, and

therefore, the prosecution had been denied an extra day on which to present its case due to events beyond its control. The declaration of 12th September 2016 as a public holiday was not within the contemplation of either the prosecution or the defence. The trial court was also in the same position.

For the above reasons therefore, this court is of the considered view that the prosecution has made a case for this court to revise the decision of the trial court made on 13th September 2016 closing the prosecution's case. That decision is set aside and substituted by a decision of this court granting the prosecution one more chance to present its witnesses before the trial court. In that regard, the trial court shall be at liberty to fix an appropriate date for receiving of the evidence of the remaining prosecution witnesses. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF OCTOBER 2016

L. KIMARU

JUDGE