

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 41 OF 2013

PETER MAINA GACHERU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The trial court file No. **1263 of 1999 – Republic vs Peter Maina Gacheru** was forwarded to this court by the trial magistrate Hon. D.O. Ogembo, Chief Magistrate with a view to reviewing the order made by Hon. Justice N.R. O. Ombija on 25th February, 2011. The Hon. Judge ordered that the trial continues from defence hearing pursuant to Section 200 of Criminal Procedure Code at the time Hon. P. M. Ndwiga, then SRM was in conduct of the trial. However, after the file reverted to the Magistrate's court, it was noted that the trial had not reached defence hearing. Accordingly, the then chief Magistrate Hon. Kiarie Waweru Kiarie (now a Judge) wrote a letter dated 5th March, 2013 to the Deputy Registrar requesting that the file be placed before a judge for purposes of reviewing the order of Hon. Justice Ombija upon noting that the matter had not reached defence hearing.

Forwarded to this court are two volumes of the trial court file. One is marked Volume 2 and the second is not numbered. The unnumbered volume bears the recent proceedings dating from 10th December, 2013. The file marked volume 2 is recorded from 5th March, 2010. Volume 2 is paginated in hand from 345 to 444. Thereafter, the next page is paginated 45 and runs to 58. The subsequent pages are not paginated. The unnumbered volume is paginated in hand up to page 20. The subsequent proceedings by Hon. Ogembo have not been paginated. It is not therefore clear whether there exists another volume running from pages 1 to 344 which precedes the record of volume 2.

Be that as it may, volume 2 only records proceedings of PW1. The evidence of the witness was recorded by Hon. Ndwiga. Ultimately therefore, there existed no other no other recorded testimony of subsequent witnesses after Hon. Ndwiga ceased the conduct of the matter. It would appear at that stage, the matter moved to the High Court for a revision that culminated into the ruling of the Hon. Judge, Justice Ombija dated 25th February, 2011. I opine that either there was a misconception or the court was given the wrong information that the matter had reached defence stage. I base my finding on the information given by then Chief Magistrates, Kiarie Waewru Kiarie(now judge) and Hon. Ogembo. I believe in their request for the revision, they must have consulted all the parties to the trial and arrived at the conclusion that in deed the trial had not reached the defence stage. As such, when the file was remitted back to the trial court, the trial could not proceed as the judge had ordered the same to proceed from defence hearing.

In the circumstances, it is important that I point out that ordinarily, only the judge who made the order would revise it unless in very special circumstances. In the present case, Hon. Justice Ombija is no longer with the Judiciary. The trial should not be stalled because any other judge can make necessary orders in the interest of justice. The interest of justice in this case demands that the order made by Hon. Justice Ombija on 25th February, 2011 be set aside which I hereby do in so far as it relates to the direction that the trial was to proceed from defence hearing. I substitute the same with an order that the trial proceeds from where it reached. The trial court file shall be remitted back to the trial court for purposes of taking a hearing date. The matter shall proceed from where it had reached upon compliance with Section 200(3) of the Criminal Procedure Code. The same will be mentioned in Court 1 on 16th November, 2016 for

appropriate directions or orders. It is so ordered.

DATED and DELIVERED this 15th day of NOVEMBER, 2016.

G.W. NGENYE-MACHARIA

JUDGE