REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. REVISION NO. 4 OF 2016

STEPHEN MBURU KINYUA……..…….....ACCUSED

VERSUS

REPUBLIC …….....PROSECUTOR

(Arising from Various Rulings and Orders in Kiambu Chief Magistrate's Criminal Case No. 1166 of 2013 presided over by Hon.J. Onyiego, Chief Magistrate and Hon. J. Kituku, Principal Magistrate)

RULING

A. INTRODUCTION

1. The Applicant herein, Stephen Mburu Kinyua ("Applicant"), is the 3rdAccused Person in Kiambu Chief Magistrate Criminal Case No. 1166 of 2013. In that case, he is charged together with two other persons of obtaining money by false pretences contrary to section 313 of the Penal Code. It is alleged in the particulars of the charge that the Applicant and his three co-Accused jointly with others and with intent to defraud, obtained from Hussam Deeb a sum of Kshs, 2,340,000/= by falsely pretending that they had acquired a tender to supply sugar to Tuskys and Naivas supermarkets in Nairobi knowing that to be false.

2. All the three Accused Persons pleaded not guilty to the charge and the trial commenced. The Prosecution called six (6) witnesses and then closed its case. The parties made their submissions on no case to answer. On 28/04/2014, the Court ruled that all the three Co-Accused had a case to answer and placed them on their defence.

3. Consequently, the 1st and 2nd Accused Persons gave their sworn testimonies and closed their respective cases. On 16/03/2015, it was the Applicant's turn to testify. Like his Co-Accused, he opted to give sworn testimony. During cross-examination by the Prosecutor, the Applicant reiterated that they had Local Purchasing Orders (LPOs) from Tuskys and Naivas. The Prosecution persisted and asked the Applicant where the LPOs were. The Applicant responded that the LPOs were in the custody of the Investigating Officer in Mumias Principal Magistrate's Cri. Case No. 56 of 2013 where the Co-Accused are the Complainants.

4. At this point, the Prosecution made an application for the Applicant to be stood down as a witness so that he (the Applicant) could be given an order by the Court and time to produce the LPOs. That application by the State was vehemently opposed by the Applicant's lawyer joined by the lawyer for the 2nd Accused. The main objection was that ordering the Applicantto produce the LPOs would be self-incriminating and would, in essence, be an order that the Applicant perform a duty to assist the Prosecution to accomplish its task of successfully convicting him. Lastly, the Applicant complained that

the application by the State was a stunt aimed at delaying the case.

5. In a reserved ruling delivered on 18/03/2015, the Presiding Magistrate, the Honourable J. N. Onyiego (as he then was) rejected the Applicant's position and allowed the State's application for the Applicant to be stood down pending the production of the LPOs by the Applicant. In reaching the conclusion that it was proper for the Applicant to be required to produce the LPOs, the Learned Trial Magistrate reasoned thus:

Accused 3 [Applicant] like his colleagues had consistently stated that they had genuine local purchase orders from Naivas and Tuskys supermarkets which they used to source for financing and partnership from the complainant hence this case. I do not see anything self-incriminating. It all goes to the credibility of witness (sic). There is no prejudice for the Accused to produce a document in his possession to which he has no objection to availing for further cross examination.

6. With this order, the Applicant was stood down and ordered to produce the LPOs at the next hearing. During the next hearing, the Applicant could not produce the documents explaining that he had been unable to retrieve them from the Investigating Officer in Mumias despite his best efforts. At that point, the State applied to call three witnesses from Naivas and Tuskys supermarkets to rebut the defence case that the Accused Persons had any genuine LPOs to supply sugar to the two establishments. This was, of course, the substratum of the case against the Accused Persons. The case of obtaining by false pretences was that they had obtained money from the Complainant in the alleged guise that they had LPOs while, the Prosecution contented, they had none.

7. The application to call rebutting witnesses was made on 10/04/2015. It would appear that no objection was recorded to this application at the time it was made and it was allowed. A date was fixed for the rebuttal witnesses on 14/04/2015. On that day, the advocate for the Applicant objected to the three witnesses testifying arguing that to allow them to testify would be prejudicial to the defence case since the defence had already closed its case.

8. The Learned Trial Magistrate dismissed the objection ruling that he had already allowed the application and that it was too late to object since the order had already been given. In any event, the Learned Trial Magistrate reasoned, no prejudice would be occasioned to the Accused Persons since they will have an opportunity to cross-examine the three witnesses. Recalling that the Constitution acquits Courts to dispense justice without undue regard to technicalities, the Learned Trial Magistrate reminded the Defence that they had been given an opportunity to produce the LPOs and that they had failed to do so.

9. As fate would have it, the Learned Chief Magistrate Hon. J.N. Onyiego was subsequently transferred from the station and it fell on the Hon. J. Kituku to proceed with the case. The Accused Persons requested for a new trial but the Learned Magistrate declined – pointing out that one of the key Prosecution witnesses was no longer available to testify.

10. In this request for revision, the Applicant would like the Court to review and set aside the orders made by the Honourable J.N. Onyiego on 25/03/2015 (standing down the Applicant as a witness) and on 27/04/2015 (allowing the Prosecution to call three additional witnesses after the parties had closed their respective cases).

11. In a cross-request for revision, the Prosecution would like this Court to review and set aside the ruling by the Honourable Trial Court to decline to grant an adjournment to the Prosecution to give it time to call the three Prosecution witnesses.

B. THE PARTIES' SUBMISSIONS

12. Mr. Achillah appeared for the Applicant and made oral submissions. He argued that the Court should exercise its discretion and revise the orders here because the impugned orders are tainted with irregularity, illegality and partiality. Further, since more than one consequential order is complained against, it made sense to approach this by way of a request for revision as opposed to an interlocutory

appeal.

13. Mr. Achillah began by attacking the Learned Trial Magistrate's decision to stand down the Applicant so that he could locate and produce the LPOs. Asking an Accused Person to produce such documents which were not in his possession and which were the subject of a different criminal case in Mumias, Mr. Achillah insisted, was highly irregular and unprocedural. This irregularity was compounded, Mr. Achillah argued, by the fact that the Accused Person (Applicant) was asked to produce the documents after the Prosecution had already closed its case and the Applicant put on his defence. Indeed, two co-Accused had already testified and closed their case. This, Mr. Achillah argued, was tantamount to shifting the burden of proof to the Accused persons since the implication was that if the Applicant would be unable to produce the LPOs then the Court would draw a negative and prejudicial inference against him.

14. Mr. Achillah argued that while this order was highly prejudicial to the Applicant and his co-Accused Persons, the prejudice was further compounded by the additional order that the Prosecution was permitted to call three witness to prove that the LPOs did not exist even before the Applicant had been given sufficient time to locate the LPOs. In Mr. Achillah's view, the two orders by the Court, seen together, "diverted the issues that were before the Court" and "created a trial within a trial." Mr. Achillah further argued that owing to the irregular way in which the trial proceeded and the fact that the new Trial Magistrate declined to re-start the trial, and one new witness was called after the close of the Prosecution and Defence cases, the Defence is in a situation where, although it has been asked by the Learned Magistrate to make submissions, Counsel is unclear as to whether they have been invited to re-submit on a no-case to answer verdict typically made at the conclusion of the Prosecution case or a not-guilty verdict at the end of the Defence case.

15. Mr. Kinyanjui appeared for the ODPP at the oral hearing on the Applicant's motion for revision. He centred his submissions on section 150 of the Criminal Procedure Code arguing that the matter is quite plain: the section gives the Court the power to summon any witnesses at any time during the trial. Here, Mr. Kinyanjui argued, the Applicant stated during cross examination that he would be able to present the evidence of the LPOs given the chance; hence the application by the Prosecution for him to be stood down to produce that evidence was both logical and reasonable.

16. Mr. Kinyanjui argued that the Court was within its discretion – indeed duty – in allowing the Prosecution to call three more witnesses to prove the non-existence of the LPOs once the Accused was unable to produce them even after being time. It must be recalled, Mr. Kinyanjui reminded the Court, that a trial court is, above everything else, a truth finder. Here, the truth-finding Court merely requested the Accused Person to go and find the documents he had claimed existed and when unable to do so, still in the truth-finding mode, allowed the Prosecution to call evidence to rebut the testimony of the Accused. The rationale for this, argued Mr. Kinyanjui, was that this was a new matter presented by the Defence for the first time during the Defence case and so it was reasonable for the Trial Court to give the Prosecution an opportunity to produce its evidence.

17. Additionally, Mr. Kinyanjui argued that the burden did not shift at all during the trial: the Accused Person said he had evidence and the Court merely told him to "bring the information" so that it could arrive at a just conclusion. The Prosecution was only allowed to bring rebuttal evidence and correctly so. Hence, Mr. Kinyanjui felt that the orders of 25/03/2015 and 27/04/2015 were not irregular and that the Learned Trial Court addressed itself to the issues before it and gave correct orders in the circumstances.

18. Finally, Mr. Kinyanjui would have the Court review the Court's order of 14/10/2016 where the Trial Court refused to adjourn the case to give the Prosecution an opportunity to call the remaining two witnesses to prove the non-existence of the LPOs. The Prosecution had not bonded the two witnesses since it was aware of the present application and thought it would have been a good idea to stay the lower Court's proceedings until this application was determined. It was, therefore, aggrieved when the Learned Trial Magistrate refused to adjourn the case and proceeded to declare the case closed and invited the parties to make their submissions.

C. THE QUESTIONS PRESENTED FOR REVISION

19. In my view, properly shorn of all the seemingly torturous facts, there are four issues presented here:

a. Whether it was appropriate for the Trial Court to stand down the Applicant during his sworn testimony and order him to present the evidence of the LPOs. Differently put, was the Trial Court order of 25/03/2015 legal and regular? Or, as Mr. Achillah would have it, did the Trial Court shift the burden of proof to the Accused and ordered him to tender self-incriminating evidence in violation of his constitutional rights?

b. Whether it was appropriate, legal and within the confines of fair trial for the Trial Court to permit, *vide* its ruling and order of 27/04/2015, the Prosecution to call three more witness in the circumstances of this case? Differently put did the Trial Court properly exercise its power under section 150 of the Criminal Procedure Code to permit the Prosecution to re-open its case by calling three more rebuttal witnesses?

c. Whether, in the circumstances of this case, the Trial Court should have ordered that the trial starts afresh as permitted by section 200(3) of the Criminal Procedure Code.

d. Whether, in the circumstances of the case, the Trial Court was wrong in refusing to exercise its discretion to permit the Prosecution an adjournment to give it an opportunity to call its two remaining rebuttal witnesses.

20. As the issues are listed above from the most substantial to the least so, I will address each of these four issues *in seriatim* below each under its own sub-heading.

D. WAS IT PROPER FOR THE TRIAL COURT TO STAND DOWN THE APPLICANT AND ASK HIM TO PRODUCE DOCUMENTARY EVIDENCE DURING THE DEFENCE CASE?

21. The first issue is a simple one: was the Trial Court justified to order the Applicant, in the face of the objections by his advocate, to be stood down in order to be "accorded a chance to avail the documents and have the prosecution go on with further cross examination"?

22. The Applicant's counsel feels that the order impermissibly shifted the burden of proof to the Accused and that, further, if implemented would facilitate the unconstitutional procurement of incriminating evidence. The Prosecution sees it as part of the Trial Court's truth-finding obligation. In its ruling, the Trial Court ruled thus:

23. What makes the case complex is the way the Trial Court phrases its ruling and order: It orders the Accused to be stepped down to permit the Prosecution to cross-examine him at a later date. However, the Learned Trial Magistrate ***does not*** order the Accused to produce the documents: instead, it "accords" him a chance to avail the documents.

24. It is easy to see that if the Trial Court had straightforwardly ordered the Accused to produce the documents, this would have run afoul the constitutional provisions prohibiting self-incriminating evidence (Article 50(2)(l) of the Constitution) and allowing an Accused to remain silent (Article 50(2)(i) of the Constitution). Does it make a difference that, here, the Court merely stood down the Accused and "accorded" him an opportunity to produce the documents so that cross-examination can proceed?

25. In my view, it does not change the character of the issue and evidence in question. The elementary principle is that it is for the Prosecution to prove each and every element of its case beyond reasonable doubt. An Accused Person has no obligation whatsoever in producing any documents at the pain of being saddled with an incriminating inference if they do not do so. This is perilously close to asking the Defence to fill in the gaps in the Prosecution case.

26. For sure an Accused Person can choose to produce documents in his defence – but the Court cannot compel him to produce any documents if such production would, in fact, run afoul the right against self-incrimination. The position holds if the Trial Court frames it, at the instance of the Prosecution, as

"according" the Accused Person an opportunity to produce the documents. The most that the Prosecution can do is to cross-examine the Accused Person on the absence of those documents and invite the Court to draw conclusions but not ask him, against his wishes, to produce the documents.

27. Indeed, "according" an Accused Person the opportunity to produce documents and ordering him to stand down from the witness stand in order to do so raises the spectre that if he does not produce the documents an adverse inference will be drawn against him. This would directly militate against the constitutional prohibition against making adverse inferences when an Accused Person chooses to exercise his right to remain silent. Differently put, the inducement provided by the Court to the Accused in this case amounts to compulsion within its constitutional meaning and makes the order by the Court improper.

E. WAS IT PROPER FOR THE TRIAL COURT TO ALLOW THE PROSECUTION TO CALL THE THREE REBUTTAL WITNESSES?

28. The next question posed by this request for revision is whether the Trial Court acted properly within its powers to call three new Prosecution witnesses after the Prosecution had closed its case and after two of the Accused Persons had already closed their defence cases.

29. The law applicable and which the Prosecution relied on in making its application to call the three witnesses is section 150 of the CPC. It provides as follows:

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

30. The Trial Court relied on this provision to grant the Prosecution's request to call three witnesses to prove that the LPOs did not exist as the Applicant had alleged. There has been some debate whether section 150 of the CPC only applies when the Court decides on its own motion to call witnesses or whether it can, also, be invoked by any of the parties to a criminal trial. Since the issue was not urged before me and since both the State and the Applicant appeared to share the view that the section covers both the Court acting *suo motto* and an invocation by either the Prosecution or the Defence, I will not go into this aspect of the issue any further. Perhaps that will await an appropriate case where the issue is sharply developed for resolution.

31. Once we accept that section 150 of the CPC can be invoked by the Prosecution in an appropriate case, this obviates the need to deal with another wrinkle presented by this section: whether different legal considerations apply to the two parts of the section. This layer of complication arises because the section appears to bifurcate the ***first part*** which states that "A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined…" from the ***second part*** which reads "…and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case."

32. Several authorities have suggested that the first part clothes the Trial Court with discretion to call a witness while the second part creates an obligation on the Trial Court to call the witness if that person's evidence appears essential to the just decision of the case. For example, in ***Kulukana Otim v R*** **[1963] EA 257**, the Court of Appeal, in considering section 148 of the Ugandan Criminal Procedure Code which is, word for word, the same as our section 150, stated that:

It will be seen that the first part of the section confers a discretion, but under the second part, if it appears

to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself….

33. This is important because it would appear that the second part is triggered when the Court itself forms the opinion that the evidence to be called is essential to the just decision of the case. Section 150 implies that once a Trial Court comes to that conclusion, the duty to call that witness is triggered. This is not the situation we have here. The Trial Court did not make any assessment or finding that the evidence of the three witnesses it permitted to be called were essential to the just determination of the case. Instead, the Trial Court acquiesced to the Prosecution's request to call the three witnesses. We must therefore conclude that the Trial Court acted pursuant to the first, discretionary part of section 150 of the CPC.

34. Indeed, both the context and the application for the Prosecution makes it plain that the Prosecution intended the three new witnesses as rebuttal witnesses: they were meant to rebut the claims by the Applicant that the Accused Persons had authentic LPOs. Indeed, the Prosecution expressly comprehended the three witnesses purely as rebuttal witnesses.

35. Why is this important? It is because unlike the obligation of the Court to call a witness who the Court finds necessary for the just determination of a case (as required by the second part of section 150 of the CPC), the right of the Prosecution to call witnesses after it has closed its case and the Accused has already been put on his defence is heavily circumscribed. It is my view, from the reading of existing decisional law and the evolving standards of fair trial in international human rights as seen against the standards in the Constitution of Kenya, 2010, that where a Trial Court has not made a specific finding that the evidence of a witness is essential to the just determination of the case, the Prosecution can only call further evidence after the close of their case to rebut matters arising *ex improviso* which no human ingenuity could foresee.

36. This rule has a long genealogy, finding its most famous statement in the iconic paragraph by Avory J. in ***R v Harris* (6) (1927), 20 Cr. App. R. 86, 89**:

There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown. That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the judge after the case for the defence is closed, and that the practice should be limited to a case where a matter arises *ex improviso*, which no human ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensue.…

37. While there may be room to believe that Avory J. perhaps states too stridently the limitation of the rule when applied to a situation where the Trial Court calls a witness and it certainly appears so in the Kenyan context in view of the second (mandatory) part of section 150 of the CPC, the rule announced by Avory J. is a good guide to the discretionary part of section 150 of the CPC. There are at least three grounds for believing so.

38. First, the decisional law clearly distinguishes situations when a Trial Court calls a witness pursuant to the mandatory part of section 150 of the CPC (which has not counterpart in English law) and when a witness is called pursuant to the discretionary part of it. See, for example, ***Manyaki d/o Nyaganya v R [1958] E.A. 495*** and***Mangatinda Ole Dusiat (13) (1934) 15 KLR 112***). The position unmistakably emerging from these cases is that when a Trial Court is exercising its discretion under the first part of section 150, it is bound by the *ex improviso* Rule consolidated by Avory J. in the *R v Harris* case. This limitation applies with even greater force when the discretion is, as here, applied at the instance of the Prosecution.

39. Second, this rule of relatively ancient vintage has now been adopted and codified by various recent international instruments and decisions by various international Tribunals – and, in particular those dealing with international criminal law. For example, the Special Court for Sierra Leone, in a decision handed down on 14/11/2006 in ***Prosecutor v Alex Timba Brima& 2 Others (Decision on Confidential Motion to Call Evidence in Rebuttal) (Case No. SCSL-04-16T)***, defined what rebuttal evidence and adumbrated the contours and conditions upon which such rebuttal evidence can be admitted after the Prosecution has closed its case.

40. In this decision of November 14, 2006, the Special Court first defined rebuttal evidence as "evidence to refute a particular piece of evidence which has been adduced by the defence." The Court said that this type of evidence "must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated" and not "merely because its case has been met by certain evidence contradicting it." The judges said that "only highly probative evidence on a significant issue in response to Defence evidence may be led as rebuttal evidence and not evidence which merely reinforces or fills gaps in the Prosecution case-in-chief."

41. Further, the Court stated that before the Prosecution could be allowed to adduce rebuttal evidence, it will have to establish two elements:

> (i) "that the evidence sought to be rebutted arose directly *ex improviso*[suddenly] during the presentation of the Defence case in-chief and could not, despite the exercise of reasonable diligence, have been foreseen; and
>
> (ii) that the proposed rebuttal evidence has significant probative value to the determination of an issue central to the determination of the guilt or innocence of the Accused."

42. A few other cases from the international criminal tribunals have applied this rule as well. See, for example, ***P. v. Delalic, Case No IT-96-21-T, Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998***. Suffice to say that the *ex improviso* rule appears to have now risen to a generally recognized rule of international law and practice and represents best practice in international law. The *ex improviso* rule is also the governing rule in many countries such as Canada (see, for example, ***R. v. G. (S.G.), [1997] 2 S.C.R. 716)*** and **R. v. P. (M.B.), [1994] 1 S.C.R. 555**.

43. Finally, I am of the view that the fair rights provisions enshrined in the Constitution of Kenya, 2010 seen in context lead to the unmistakable conclusion that the discretionary power donated by section 150 of the CPC to the Trial Court to call or permit the calling of Prosecution witnesses must be constrained and not expanded to the bare needs of justice in each particular case. In particular, in interpreting the proper limits of section 150 of the CPC, one must have in mind the very strident and categorical right that in Article 50(2(j) of the Constitution that every Accused Person has a right to "be informed in advance of the evidence the Prosecution intends to rely on, and to have reasonable access to that evidence." It follows that this right can be severely restricted when the Prosecution calls witnesses after the Defence has already responded to the Prosecution's case. A proper reading of the section 150 of the CPC would, therefore, be one that restricts it reach.

44. With this in mind, I therefore adopt the *ex improviso* rule announced by various international tribunals as the one most in consonance with the scheme of rights enumerated in Article 50 of the Constitution. Consequently, drawing from international best practices and our existing decisional law as analysed above, I am of the view that the Prosecution can only call rebuttal witnesses where the following conditions are satisfied:

> i. Such evidence must have arisen *ex improviso* to the extent that no human ingenuity or reasonable diligence could reasonably have anticipated, or foreseen the possibility of its being adduced by the Defence;
>
> ii. The evidence must have probative value in the determination of the issue or issues under consideration, and in particular, in the process of assessing the innocence or culpability of the

Accused;

iii. It must relate to a significant issue arising from the Defence case for the first time;

iv. The Prosecution must demonstrate that:

I. The calling of evidence in rebuttal is not a ploy to reopen its closed case with a view to curing certain perceived defects or shortcomings in the Prosecution case;

II. That the rebuttal evidence is not being called to merely confirm or reinforce the Prosecution's case or to respond to contradictory evidence adduced by the Defence;

III. That the rebuttal evidence is not being called on a collateral issue related to the credibility of the witness.

v. That the granting of permission to adduce the evidence in rebuttal will not in any wayviolate the principles that underlie the doctrine of equality of arms between the Prosecution and the Defence, or otherwise do violence to the doctrine of fundamental fairness or unduly delay the proceedings thereby compromising the Constitutional obligation of ensuring a fair and expeditious trial without unduly jeopardizing the rights of the Accused Person.

45.Applying these principles to the case at hand makes it plainly clear that the Prosecution was ***not entitled*** to call rebuttal witnesses in this case. In my view, the case turns on three issues. First, it is hardly possible to make the claim that no human ingenuity or reasonable diligence would have made the Prosecution anticipate that the Defence was going to adduce evidence that it had Local Purchasing Orders (LPOs) as a defence to the charges. Indeed, the charges plainly state that the Accused Persons "obtained from Hussam Deeb a sum of Kshs, 2,340,000/= by falsely pretending that they had *acquired a tender* to supply sugar to Tuskys and Naivas supermarkets in Nairobi knowing that to be false." If these are the charges, the having or not having a tender as exhibited in an LPO is a critical matter to be proved or disproved by the Prosecution in order for its case to succeed. It cannot, therefore, be said to be a matter *ex improviso* which no human ingenuity would have expected.

46. Secondly, it is difficult to look at the circumstances and context here and not conclude that the Prosecution is not merely seeking to shore up its case. For a charge of obtaining by false pretences where the false pretence is that the Accused Persons had a tender from two leading supermarkets, it seems to me that if the Prosecution closed its case without proving beyond reasonable doubt that no such tender in fact existed, it would be an exceptional second chance to permit the Prosecution another opportunity to "prove the negative" by calling rebuttal witnesses.

47. Third, in view of my finding above about the relative unfairness of the situation of the procedural posture that resulted in the decision to call rebuttal witnesses in the first place, it is not possible to be certain that the doctrine of fundamental fairness is not being violated.

48. For these reasons, I would therefore conclude that this was **not** an appropriate case to allow the Prosecution to call rebuttal witnesses

F. SHOULD THE TRIAL COURT HAVE ORDERED THE TRIAL TO BEGIN AFRESH?

49. The next issue to consider is whether the Trial Court (the Learned Honourable J. Kituku) was justified and within the law to acquiesce to the Applicant's request for the trial to start afresh when the Learned Hon. Kituku took over the matter from the Honourable J. N. Onyiego (as he then was). Upon complying with the provisions of Section 200(3) of the CPC, the Applicant's counsel requested the Court to order that the trial starts afresh. His arguments before the Learned Honourable J. Kituku were, essentially, the arguments he has made here. The Prosecution objected to the application to have the trial start *de novo*.

50. On 28/04/2016, Hon. Kituku ruled that this was an appropriate case for the case to start afresh. He

considered that the matter had dragged in the courts since 2013 – a period of more than 3 years – and that throughout the trial, the Accused Persons had been represented by Counsel. He therefore concluded that starting the trial *de novo* would constitute undue delay in finalizing the case and violate the provisions of Article 50 of the Constitution which, among other things, requires that a criminal trial must be started and concluded without undue delay. In reaching that conclusion, the Learned Magistrate relied on ***Ndegwa v Republic (1981) KLR 543***. That case held that a succeeding magistrate needs to make a determination on whether to start a case afresh when demanded by the Accused Person in accordance with the particular circumstances of the case. In the case, the Court of Appeal guided, pointedly guided that section 200 of the CPC should be used sparingly and "only in cases where the exigencies of the circumstances are not likely but will defeat the ends of justice if a succeeding magistrate is not allowed to adopt or continue a criminal trial started by a predecessor."

51. I begin by pointing out that the Learned Magistrate was, clearly, well acquainted with the legal principles enunciated in our emerging jurisprudence on the question of when it will be appropriate for a succeeding magistrate to order trial to start afresh. Our case law has now made it clear that while section 200(3) makes it mandatory for the succeeding magistrate (or judge) to inform the Accused Person of his or her rights to request for a *de novo* trial, the succeeding magistrate or judge is not bound by the position taken by the Accused Person on whether to request for a *de novo* trial or not. The succeeding magistrate or judge must exercise his or her judicial mind to the issue and decide if, in the totality of circumstances, the case is an appropriate one for an order that it starts afresh.

52. We can cull some of the considerations that a Court considering the issue should have in mind from our case law (principally the Court of Appeal guidelines in the ***Ndegwa v R*** case as well as in ***Joseph Kamau Gichuki v R*** case) as well as our emerging jurisprudence based on the Constitution of Kenya, 2010 as well as new legislative enactments governing criminal trials aimed at animating the Constitution. Some of these considerations that a Court considering the issue should have in mind include:

a. Whether it is convenient to commence the trial *de novo*, that is, the difficulty in mounting a new trial;

b. How far the trial had proceeded;

c. The availability of witnesses who had already testified;

d. Possible loss of memory by the witnesses given the passage of time;

e. The time that has lapsed since the commencement of the trial taking into consideration the constitutional requirement that criminal trials should commence and be concluded without undue delay;

f. The prejudice likely to be suffered by either the Prosecution or the Accused if a new trial is ordered; and

g. The interests of the victims of the crime and witnesses – including the impact a new trial will have on them balanced against the benefits of a new trial.

53. In looking at these factors, the circumstances of this case and the reasoning of the Learned Trial Magistrate in his ruling of 28/04/2016, one cannot say that the Learned Trial Magistrate was wrong in concluding that this was not an appropriate case to grant the Accused Persons' wishes for a new trial. The Learned Trial Magistrate correctly considered that the case had come very far along – with the prosecution case closed and, at the time, only some rebuttal witnesses remaining to testify – and that the case had already been in the court system for more than three years. The magistrate was also correct in assessing any likely prejudice to be suffered by the Accused Persons through the lens of the fact that they had been represented by counsel throughout the trial. To this list of factors militating against the grant of an order that trial starts afresh, the Learned Trial Magistrate could have added an important factor that became clear during arguments before the High Court: the key Prosecution witness – the Complainant –

has since relocated from Kenya and might no longer be available to testify.

54. I therefore easily conclude that the decision by the Learned Trial Magistrate to adopt the proceedings of the previous presiding magistrate in the case was a proper one and requires no review.

G. SHOULD THE TRIAL COURT HAVE ACQUISCED TO THE PROSECUTION'S REQUEST FOR AN ADJOURNMENT?

55. The final request put to me by the Prosecution was to review the Learned Trial Magistrate's decision refusing to adjourn the case to give the Prosecution time to call the two rebuttal witnesses. At this point, I can only point out that the request is moot given this Court's decision above that the Trial Court's order calling the rebuttal witnesses was improper anyway and that it should be reversed. I will, therefore, not reach the question.

H. CONCLUSIONS, DISPOSITION AND ORDERS

56. The outcome of this revision is, therefore, as follows:

a. It was not proper, in the circumstances of this particular case, for the Trial Court to stand down the Applicant during his defence case and require him to produce the Local Purchase Orders (LPOs) which he mentioned during his examination-in-chief. That order and direction by the Trial Court dated 25/03/2015 is therefore set aside. The practical impact of this is that the Applicant shall be returned to the witness box and the Prosecution shall be permitted to continue cross-examining him to the extent permissible based on his testimony given in examination-in-chief.

b. It was improper, in the circumstances of this particular case, for the Trial Court to permit the Prosecution to call rebuttal witnesses to demonstrate the non-existence of the LPOs. The order of the Learned Trial Magistrate dated 27/04/2015 to this effect is, therefore, set aside. The effect of this decision is that the evidence of the one rebuttal witness who has already testified in the case shall be expunged from the record and shall not be taken into account in arriving at a decision in the case. The remaining two rebuttal witnesses shall not testify in the case.

c. It was proper for the Learned Trial Magistrate to refuse the application by the Applicant to start the trial afresh.

57. The criminal matter is sent back to the Trial Court to proceed with the trial in accordance with this ruling.The Deputy Registrar is directed to send back the Trial Court file in Criminal Case No. 1166 of 2013 and a copy of this ruling to the Honourable Magistrate to complete the criminal trial

Dated and delivered at Kiambu this 15th day of November, 2016.

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JOEL NGUGI

JUDGE