REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CR. REV. NO.40 OF 2012

FATUMA MUSUNGU ….. RESPONDENT

VERSUS

REPUBLIC ….. APPLICANT

RULING

1. On 2nd August, 2011, Fatuma Musungu (hereinafter *"the Respondent"*) was charged before the Principal Magistrate's Court at Webuye in Cr.Case No.1059 of 2011 with the offence of sending offensive text messages contrary to Section 29 (a) of the Kenya Communications Act of 2004. It was alleged that on diverse dates between 12/03/2011 and 01/08/2011 at Lugulu area within Bungoma East District of Bungoma County, with intent to annoy caused Rose Andanje Mswahili to receive offensive and provocative messages from mobile numbers 0723708644 and 0722459468 which lines belonged to the Respondent. The Respondent denied the charges and the case was set down for trial.

2. The trial commenced on 24/07/2012 when the complainant testified. On conclusion of her evidence, the prosecution applied for an adjournment on the grounds that the other witness, P. C. Mungasya had attended to an urgent assignment. The Respondent opposed the adjournment. Having considered the application and the objection thereto, the Court was not satisfied with the reasons advanced but nevertheless reluctantly granted the adjournment and marked the same as the last adjournment for the prosecution. The hearing was rescheduled for 04/09/12.

3. When the matter came up on 04/09/12, the trial court was not sitting and the hearing was rescheduled to 29/10/12. On the said 04/09/12, the prosecution applied for and was granted an order for the Liaison Officer Safaricom (K) Ltd to issue print outs for mobile numbers 0711693679, 0723708694 and 0722318828 respectively for the period March, 2011 up to the date of the application. The application was on the basis that the said print outs were to be used as exhibits in the case. That application was allowed.

4. When the matter resumed on 29/10/12 for further hearing, the prosecution applied for an adjournment on the basis that the Investigations Officer had only received documents from Safaricom the previous Friday and was still studying them. The application was objected to. The Court noting that a last adjournment had been given to the prosecution on 24/07/12, upheld the objection. The prosecution thereupon closed its case and the matter was fixed for submissions for 07/01/13.

5. On 30/10/12, the Complainant wrote a letter to ***"The Magistrate Webuye Law Courts"*** complaining against the trial Court. In the letter, she indicated that the Investigations Officer who was her only witness with exhibit ***".... was EMBARRASSINGLY barred and chased away by the***

Magistrate in Court one FROM GIVING EVIDENCE." The complaint was copied to amongst others, the office of the Director of Public Prosecutions. The same was however not copied to the Respondent.

6. On 13/11/12, the Director or Public Prosecutions (DPP), applied to the High Court praying that the order of the trial Court of 29/10/12 be reviewed. In his application, the DPP indicated that on 24/07/12 only one witness was heard despite the availability of other witnesses; that the Safaricom print out was received by the Investigating Officer on 28/10/12, a day to the hearing; that the trial Court had declined to allow the withdrawal of the Case under Section 87 (a) of the Criminal Procedure Code which was an error apparent on the record. The DPP therefore urged the Court to call for the trial Court file and review the proceedings of 29/10/12 upon satisfying itself with its correctness. The DPP also prayed that upon revision, the trial be conducted by a different court. The application by the DPP was not copied to the Respondent.

7. The High Court called for the record of the trial Court and in a ruling made on 30/11/12, the Court found that the adjournment sought should have been weighed against the Constitutional duty of the state to prosecute offenders and the rights of the accused in the Constitution in a more balanced manner. The Court also held the view that the trial court had not considered the orders made on 04/09/12. On those grounds, the Court reviewed the proceedings of 29/10/12 and directed that the trial do proceed before a different Court.

8. On application by the respondent, Gikonyo J set aside his order of 30/11/12 and directed that the DPP do serve the Respondent with the letters of 30/10/12 and 13/11/12 to which the Respondent was to respond. The DPP complied and the Respondent filed Grounds of Opposition and a Replying Affidavit sworn on 23/08/13. It is the revision application inherent in the letter dated 13/11/12 by the DPP that was argued before me on 21/1/14 and to which this ruling relate.

9. Mr Kibellion, Learned State Counsel submitted that the Order of 29/10/12 denied the prosecution an adjournment thereby locking out its witnesses. He further submitted that it is only on 24/7/12 that an adjournment was given at the instance of the prosecution. That adjournment is discretionally whereby the trial Court should have considered substantive justice vis a vis the interest of the parties. That the adjournment was sought to enable the prosecution consider the documents and supply them to the Respondent. That it was the Respondents right to receive the documents under Article 50 (i). (j) (k) of the Constitution. He observed that the continuing of the trial would not be prejudicial to the Respondent and urged the Court to revise the order of 29/10/12.

10. Ms Mumalasi, Learned Counsel for the Respondent opposed the application on the basis of the Grounds of Opposition and Replying Affidavit filed by the Respondent. She submitted that the application by the DPP dated 13/11/12 was premised upon the complainant's letter dated 30/10/12. That both letters were full of falsehoods and the replying Affidavit had set the record straight. That the power under Section 362 is limited to instances where the Court is satisfied with the correctness, legality, propriety of an order or irregularity of any proceeding. That the State had not shown how the law was not complied with in the order of 29/10/12. That the Respondent is entitled to a speedy trial under Article 50 (2) (e) of the Constitution. That to review the trial Court's order would be to interfere with its independence. That the allegations of bias were incorrect and the same should not be the basis of revision. She urged that the review be declined.

11. In a rejoinder, Mr. Kibellion observed that Article 160 (1) of the Constitution was not applicable. That the basis of the application was not the complainant's letter dated 30/10/12 as the same was addressed to the Webuye Magistrate and not this Court. He observed that the right of fair hearing under Article 50 of the Constitution is for both the prosecution and the accused. He urged the Court to allow the revision.

12. I have carefully considered the record and the submissions of Counsel. What is before Court is a revision under Section 362 of the Criminal Procedure Code. The issue is whether the state has advanced sufficient reason to warrant the grant of the revision sought. The first issue I wish to deal with is the contention by Ms Mumalasi that to grant the orders sought would be a violation of Article 160 (1) of the

Constitution. She was of the view that to grant the orders sought would amount to interfering with the independence of the trial Court. With due respect, I agree with Mr. Kibellion that that provision is not applicable as the interference contemplated in Article 160 is where a Court's exercise of discretion is interfered with by undue influence. Where a Court is not free to make a decision of its own due to interference by a 3rd force. In the Case before me, what the state has sought is the exercise of a power donated to this Court by law, to wit, Section 362 (1) of the C.P.C. I reject that contention.

13. Section 362 of the C.P.C. provides:-

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court <u>for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order</u> recorded or passed, and as to the regularity of any proceedings of any such subordinate court." (Underlining mine).***

14. From the foregoing, it is clear that this Court's power under that Section is to call for the trial Court's record to satisfy itself if any finding was correct, legal or as to its propriety. The power is also meant to beexercised for this Court to satisfy itself as to the regularity of any proceeding. In the Case before me, the order being complained of was made on 29/10/12 whereby the trial Court declined to grant the prosecution an adjournment. I propose to deal with the application on two levels. Firstly, on the basis of the letter that invoked the jurisdiction of the Court dated 13/11/12 and secondly, on the submissions of Mr. Kibellion, Learned State Counsel.

15. According to the letter of 13/11/12, the proceedings and order of 29/10/14 should be reviewed because the prosecution had a good reason to ask for an adjournment in order to provide evidence; that prior to 29/10/12 the prosecution had not caused any adjournment; that denial of the adjournment was likely to cause injustice to the complainant and finally that the trial Court denied the withdrawal of the case under Section 87 (a) and directed the prosecution to close its case.

16. At the beginning of this Ruling, I had set out in detail what the record discloses to have transpired in the trial Court. I agree with Ms Mumalasi that the application by the DPP has misleading information. Firstly, the record is clear that on 24/7/12 when the complainant was heard, the prosecution applied for adjournment on the basis that the Investigating Officer who had been in Court was attending to an urgent assignment. The adjournment was opposed by the Respondent but allowed by the Court. The letter by the DPP allege that only the complainant was heard despite the availability of other witnesses. Secondly, on 4/9/12 there was no attempt to produce any data from Safaricom by the prosecution which the defence counsel allegedly objected to as claimed in that letter. Indeed, on that day the defence Counsel did not attend Court and the prosecution made an application for the Liason Officer to issue certain print outs to be used as exhibits by the prosecution. Thirdly, whilst the DPP indicated that the data print out was received by the police on 28/10/2012 a day to the hearing of 29/10/2012, the record shows that on 29/10/12, the prosecutor told the Court that the bundle of documents had been received by the Investigating Officer on the Friday before that date. A look at the calender for that year, will show that 29/10/12 was a Monday and the Friday before that date was on 26/10/12. Obviously it cannot be a day before the hearing.

17. Finally, there is the allegation that an application to withdraw the Case under Section 87 (a) was declined. The record is clear that once the adjournment was declined, the prosecution immediately closed its case and no such application was made. It was with such misleading information, that Gikonyo J was all willing to review the proceedings of 29/10/12 as earlier on stated. If the application for revision was only based on the letter of 13/11/12, I would have dismissed the application peremptorily. However, there are Mr. Kibellion's submissions on record which should be considered.

18. Mr. Kibellion's submissions were that the trial Court exercised its discretion wrongly. That the right to a fair hearing under Article 50 was violated as the right applies to both the prosecution and accused. I have on my part reviewed the proceedings for 29/10/12. I note that the trial Court was not

satisfied that there was any merit in the application by the prosecution for more time to study the subject documents. The trial Court felt that having been given the last adjournment on 24/07/12, the prosecution's application for another adjournment was not merited. Thequestion is, was the trial Court right in denying the adjournment sought?

19. From the record, PW1 testified on 24/07/12. She was extensively cross-examined about the ownership of the mobile phone numbers the subject of the charge. She denied having any documents or evidence from Safaricom to prove her allegations. At the close of her evidence, there was no application to obtain the Safaricom data. That application was made on 04/09/12 and was allowed. Those documents were in the possession of the prosecution on 29/10/12 the only issue was that the Investigating Officer had not studied the same to present them to Court in a coherent manner and supply them to the accused.

20. It should be noted that, the Respondent was charged on 2nd August, 2011. It is assumed that as at the time the State, through the police, decides to charge and arraign a subject in Court, it has evidence in its possession to support the allegations it levels against him/her.The Case had been in court for more than 14 months. When called upon to put its second witness in the dock, the prosecution was not able to do so because it had not yet studied the evidence obtained from Safaricom three or four days prior. The question that begs an answer is, on what basis the Respondent had been charged on 02/08/11 if that evidence was not available? Was the prosecution on a fishing expedition after what had emerged from the cross-examination of the complainant on 24/07/12? Mr. Kibellion urged me to look at the ruling of my brother Gikonyo J of 30/11/12. In that ruling, the Court was of the view that the trial Court had not balanced the constitutional mandate of prosecuting offenders and the accuseds rights for a fair trial.

21. Article 50 (2) (c) (e) (j) requires that an accused person be given adequate time and facilities to prepare a defence, to be tried without delay and to be given access to the evidence the prosecution is to rely on in advance. An accused is able to mount his defence if all the necessary evidence is availed to him before trial commences so that he/she can test it as against each and every prosecution witness, where necessary. The evidence which the prosecution wanted to be given time to study on 29/10/12 had not been availed to the defence before PW1 testified on 24/07/12. The adjournment sought would obviously have delayed the trial. What was being sought by the prosecution would have been in my view, contrary to Article 50(2) (c) (e) (j) of the Constitution.

22. From the foregoing, it is obvious that the trial Court exercised itsdiscretion properly and I see no ground on which to interfere with it. The trial Court having allowed the prosecution an adjournment on 24/07/12, which was opposed by the Respondent, would have violated the Respondent's rights had it allowed a second adjournment (also opposed) on 29/10/12. It would have been so especially for the reasons it was sought.

23. In any event, for a revision to issue under Section 362, it must be shown that the order or determination or proceeding complained of was either irregular, not in accordance with the law or was so unreasonable in the circumstances of the case as to be unjust. This has not been shown in this Case. See **Wahome -vs- Republic [1981] KLR 497.**

24. In the circumstances, I decline to review the order of the trial Court of 29/10/12.

Dated and Delivered at Bungoma this 10th day of March, 2014.

A. MABEYA

JUDGE