



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**HIGH COURT CRIMINAL REVISION NO. 15 OF 2013**

SEBASTINE CHIKWENDU ELOCHUKWU .....1<sup>ST</sup> APPLICANT

IKENNA CHARLES MOSES ONWUGHALU.....2<sup>ND</sup> APPLICANT

VERSUS

.REPUBLIC .....RESPONDENT

**RULING**

1. This is a revision application by the two applicants, which originated by way of a letter dated 22<sup>nd</sup> March, 2013. In it they seek revision of the trial magistrate’s ruling in **Kibera Cr. Case 1836 of 2011**, delivered on 14<sup>th</sup> March 2013, to enable them call in an independent expert chemist/analyst to carry out a preliminary test in court on the samples of the seized substance, and to carry out a confirmatory test in the laboratory, and submit a report to the trial magistrate.
2. The two applicants were charged with the offence of trafficking in Narcotic drugs contrary to **section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1944 in count 1**, the 2<sup>nd</sup> applicant was also charged with the offence of assaulting a police officer while in due execution of duty contrary to **Section 253(b) of the Penal Code**.
3. I am in agreement with the learned trial magistrate that the application has come too late in the day, and appears to be an afterthought. The applicants should have objected to the production of the substance and the Government Chemist’s report before it was produced in evidence and before the prosecution closed their case.
4. **Article 50(2)(c) of the Constitution** upon which the applicants seek to rely provides that:

**“Every accused person has the right to a fair trial, which includes the right to have adequate time and facilities to prepare a defence.”**
5. **As to whether the defence was given adequate time and facilities to prepare their defence I note firstly that** this case has been pending in court for more than two years which is more than adequate time for the applicant to prepare their defence.
6. Secondly, the applicants were present during the weighing and sampling of the exhibits and each signed the relevant sampling certificate. At that point they had the opportunity to request for the presence of their independent Analyst. It has been argued that they were unrepresented and may not have known how to go about making such a request. They were however represented during the trial and their Advocate could have made their request known at the earliest moment. During the hearing of the prosecution’s case and the cross-examination thereof, the defence gave no indication that they required a second opinion on the contents of the recovered substance. This was not raised even after the Government Analyst had testified.
7. On the scale of justice the court leans towards the liberty of the individual as opposed to the

convenience of the prosecution especially in a case such as this where the applicants are still held to be innocent since the case has not been determined and they have not been convicted. However, the court process should be used to advance the course of justice and not to obstruct it. The exhibits in this case were produced in evidence and the prosecution's case closed without any protest from the applicants. To allow this application at this late stage in the trial means that the prosecution cannot call any witness to rebut that evidence should they wish to do so, since they have closed their case.

For the foregoing reasons I decline to grant the application sought.

**SIGNED DATED and DELIVERED** in open court this **2<sup>nd</sup>** day of **October 2013**.

**L. A. ACHODE**

**JUDGE**