Republic v Kamau & 5 others (Criminal Revision E116 of 2022)
[2023] KEHC 21098 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21098 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL REVISION E116 OF 2022

LM NJUGUNA, J

JULY 26, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

PATRICK KIBUNYI KAMAU ..... 1ST RESPONDENT

JOHN NJOROGE MBURU ..... 2ND RESPONDENT

KENNETH KIMATHI ..... 3RD RESPONDENT

BENJAMIN THURI KAGIO ..... 4TH RESPONDENT

CYRUS MURIMI MUCHIRA ..... 5TH RESPONDENT

ESTHER WACERA MAINA ..... 6TH RESPONDENT

(Arising from Embu Criminal Case No MCCR 618 of 2018)

RULING

1. The applicant, Director of Public Prosecutions, being dissatisfied with the decision of the trial court in Embu Criminal Case No MCCR 618 of 2018, prefers revision of the order dated December 9, 2021 to recall a witness to testify. The application seeks:

    a. That this court orders stay of proceedings in Embu Criminal Case No MCCR 618 of 2018 pending hearing and determination of this application;

    b. That this court be pleased to call for the record in Embu Criminal Case No MCCR 618 of 2018 for purposes of satisfying itself on the correctness, legality and propriety of the orders of the trial court on 08th and December 9, 2021; and

    c. That the court issue other orders that it may deem fit.

2. In the supporting affidavit filed with this application, the prosecution counsel stated that the prosecution had asked to stand down Mr. Jackson Kibunyi Gerald Wainaina who is PW1, to later recall him to testify and identify documents being held by the investigating officer. That the trial magistrate denied the prosecution and the victim's advocate the opportunity to interrogate these documents which are voluminous. That the prosecution was intending to have the documents identified and thereafter produced as evidence, being fully aware of their obligation to disclose the same. She stated that the defense would also have a chance to cross-examine the witness once PW1 is recalled. That without recalling the witness and having the documents produced, the prosecution's case stands prejudiced.

3. The 2nd respondent filed a replying affidavit on behalf of the 3rd, 4th 5th and 6th respondents wherein he stated that the orders sought by the prosecution should not be granted because the application was brought as a delaying tactic. That the prosecution has not been keen to complete the matter timeously and has always sought several unnecessary adjournments caused by the indolence on its part. That prior to the orders by the trial court, the prosecution had been ordered to present its bundle of documents but they failed to do so and they have since the year 2018, delayed in complying with many of the other court directions and orders. That they ought to have prepared their case well in advance and that they had sufficient time to do so.

4. The respondents further averred that the witness sought to be recalled had already testified and was being cross-examined when the applicant made an application to stand down the witness. Further, that the application herein lacks clarity as to whether the applicant is seeking to introduce new evidence or to recall the witness. That the applicant is not bound to suffer prejudice if this revision is not allowed.

5. The court directed that the parties dispense with this application by way of written submissions. The record reflects that only the applicant filed its submissions.

6. The applicant submitted that the disclosure of evidence is a continuous process as long as the accused person has not been put to his defense. In making this point, they relied on the cases of *Thomas Patrick Gilbert Cholmondeley vs. Republic* (2008) eKLR, *Thuita Mwangi & 2 others v Ethics & Anticorruption Commission and 3 others* (2013) eKLR and *Republic v Thomas Kipramoi* (2018) eKLR. It further relied on Section 146(4) of the *Evidence Act* to support their argument that the court can, at any stage in the trial recall a witness to testify and that the respondents will have a chance to cross-examine such a witness.

7. In my view, the main issue for determination is whether or not the trial court's denial of the prosecution an opportunity to recall PW1, was justified.

8. I have perused the record of the trial court as well as the ruling of the court dated December 9, 2021. From these, I take note that when the prosecution called PW1, he testified and was cross-examined by all the defense counsels and then the application to stand him down was made. The trial court in its ruling noted that the evidence sought to be produced was not new evidence but rather, information that was within the prosecution's access and in the custody of the investigating officer since the pre-trial conference, but it did not appear to be useful at the time. The trial court noted that the timing of the application was right by law as it was made before the defense case was closed, but the learned magistrate questioned the motive of the application, having been made only after PW1 had been cross-examined.

9. This court shall address the issue set out above by citing the following provisions of the law. Section 150 of the *Criminal Procedure Code* provides:

> " 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."

Section 146(4) of the *Evidence Act* provides:

> " The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."

10. It is important to note that the respondents were yet to be put to their defence before the issue herein arose. Having noted that, the intention of the above-cited sections of the law is that there is room for re-examining testimony and possibly producing additional documents at any stage of a trial process. However, the courts have cautioned against application of this principle on the basis of timing. That is, at what point in the trial is the application to recall a witness being made? I shall explain; if the prosecution's case has already been closed and the respondents have been put to their defense, and in such defense a new piece of evidence arises, then the prosecution would be correct in applying for recalling of a witness to help in interrogating the new evidence after close of the defense case or to introduce new rebuttal evidence. However, the piece of new evidence ought to be something that no reasonable man would have foreseen. In the case of *Clement Maskati Mvuko v Republic* [2018] eKLR the court held that:

> "
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> " 18. Apart from the prejudice that would have been occasioned by the recall of PW1, I am also of the opinion that the power of the court to recall a prosecution witness after the close of the prosecution case should be exercised in line with the ex improviso rule which allows the calling of evidence by the prosecution after the close of the defense case only for the purpose of rebutting the evidence of the defense that raised a new matter that the prosecutor could not by the exercise of reasonable diligence have foreseen. The rule is found in Section 212 of the CPC which states that:
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> "If the accused person adduces evidence in his defense introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.""

11. In the present revision, the prosecution did not intend to produce new evidence but rather evidence that they already had but had not been disclosed at the pre-trial conference. It is trite law that the prosecution ought to disclose the evidence they will be relying on at the start of their case. The

assumption is that the prosecution ought to be well prepared to prove their case beyond reasonable doubt. Section 42A(1) of the *Criminal Procedure Code* states:

> "Pursuant to Article 50(2)(j) of the *Constitution*, the prosecution shall inform the accused person in advance of the evidence that the prosecution intends to rely on and ensure that the accused person has reasonable access to that evidence."

However, nothing stops neither the prosecution from moving the court nor the court from acting *suo moto* in recalling a witness at any stage of the proceedings according to section 150 of the *Criminal Procedure Code*. These were the sentiments in the case of *Clement Maskati Mvuko vs Republic* (*supra*) where the court held:

> "23. It is my considered view that whereas a trial court has the discretion to summon a fresh witness or recall a witness who has testified, this discretion should be exercised with caution so as to ensure that the prosecution does not use the opportunity to clean up its act. Much greater caution is called for when the court decides to act suo moto. It is always better to let the parties present their cases in the manner they think best. The prosecution should be left to identify the witnesses it wants to call."

12. In explaining the extent of application of the ex improviso rule, the court in the case of *Stephen Mburu Kinyua vs Republic* [2016] eKLR held:

> "I am of the view that the Prosecution can only call rebuttal witnesses where the following conditions are satisfied:
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> 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 Defense;
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> 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;
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> iii. It must relate to a significant issue arising from the Defense case for the first time;
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> iv. The Prosecution must demonstrate that:
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> 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;
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> 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 Defense;
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> III. That the rebuttal evidence is not being called on a collateral issue related to the credibility of the witness.
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> v. That the granting of permission to adduce the evidence in rebuttal will not in any way violate the principles that underlie the doctrine of equality of arms between the Prosecution and the Defense, 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."

13. The prosecution made the application to stand down PW1 and recall him later but before closing of the prosecution's case. In my view, this is in order and does not offend application of sections 150 of the *Criminal Procedure Code* and Section 146(4) of the *Evidence Act*. If the application had been made after closing of the respondent's case, Section 212 of the *Criminal Procedure Code* would have come into play and the whole argument on ex improviso rules would have been merited.

14. The respondents took issue with the fact that the prosecution has been employing delaying tactics through unnecessary adjournments, in a bid to stall the expeditious conclusion of this matter. In the spirit of article 50(1) of the *Constitution of Kenya 2010*, it is my considered view that this is an old matter that deserves to be concluded as soon as possible. Continued delay will amount to infringement of the respondents' constitutional right under Article 47(1) of the *Constitution of Kenya 2010*.

15. Having regard to the foregoing, I do find that there was no justification on the part of the trial court to deny the prosecution an opportunity to recall PW1.

16. In the end, I do order that PW1 be recalled.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the applicant

.....for the respondent