



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CRIMINAL REVISION E035 OF 2021

THOMAS MUHORO NGATIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a notice of motion application dated 12th February 2021, the applicant has moved the court, pursuant to the provisions of; sections 150, 362, and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya (herein “the Code”), Articles; 50, 159(2), 165(6) and (7) of the Constitution of Kenya, 2010, the inherent jurisdiction of the court and all the other enabling provisions of the law. The application is supported by the grounds thereto, and an affidavit of the even date sworn by the applicant.

2. The applicant is seeking for orders as follows:

a) That, the Honourable court be pleased to recall the lower court file and revise the ruling entered on the 7th October, 2020 and on the 11th November, 2020 respectively, by; Hon M. K. N. Maroro (Principal Magistrate) in the Kibera Chief Magistrate’s court, criminal case No. 1411 of 2016 Republic vs Thomas Muhoro Ngatia, the same having been made despite the existence of the court order of; the 15th August, 2019, on recalling of PW4 and PW5 for cross-examination and therefore the order closing the prosecution case and the accused put on his defence had been made irregularly, incorrectly and is vitiated by impropriety and accordingly attracts revisionary powers of the court.

b) That, the Honourable Court be pleased to order reopening of the prosecution’s case to enable the witness PW4 and PW5 attend and be cross examined as earlier ordered by the lower court/trial court.

c) That, for avoidance of doubt, the prosecution witnesses PW4 and PW5 be recalled for cross-examination respectively on their evidence.

d) That, the Honourable Court be pleased to make such order or orders as it thinks fit and just in the circumstances of the case.

e) That, costs of the application be in the cause.

3. The applicant avers that; he is the accused person in the aforesaid criminal case number 1411 of 2016 at Kibera Chief Magistrate’s Court. That, on 15th August 2019, the trial court, on the defence application allowed the application for recall of (PW4) and (PW5), to testify on the 21st of October 2019. However, the witnesses were not recalled, instead on 7th October 2020, the prosecution closed its case, after the evidence of (PW6). The trial court then ruled that, he had a case to answer.

4. That, despite drawing the trial court’s attention to the order made on; 15th August 2019, the trial court ignored the same and refused to record anything. Thus, as the order of 15th August 2019, has not been vacated, discharged, and or set aside, the proceedings taken on 9th November 2020, are incorrect and/or improper.

5. That, in the given circumstances, his rights to a fair hearing under, article 50 of the Constitution of Kenya 2010, have been violated, and therefore, it is in the interest of justice that the application be allowed.

6. The application was served but the respondent did not file any formal response thereto. To the contrary, the applicant filed a further affidavit dated; 16th September 2021. However, I note that, there was no leave sought for the filing of that affidavit and therefore, I order it expunged from record.

7. Be that as it were, the application was disposed of through filing of submissions. I have considered the same herein, alongside all the other

materials placed before the court and I find that, first and foremost, the respondents have through the submissions filed on; 15th November 2021, conceded to the application being allowed. Therefore, unless the court finds otherwise, the application should be allowed.

8. However, evaluating the application on merit, I have gone through the lower court record and I find that, the applicant was charged on; 23rd March 2016, with the offences of; being in possession of wildlife trophy contrary to; section 95 of the Wildlife conservation and Management Act, 2013 in count 1, and dealing in wildlife trophy contrary to section 84(1) as read with section 92 of the Wildlife conservation and Management Act 2013 in count 2. He pleaded not guilty. The case proceeded to full hearing and by 14th May 2019, five (5) witnesses had testified.

9. On 15th August 2019, the learned Counsel, Mr Arusei, appearing for the applicant, sought for court's direction pursuant to the provisions of section; 200 of the Criminal Procedure Code, as the trial Magistrate had since changed, he further sought for, recall of two prosecution witnesses; (PW4) and (PW5). The parties agreed the case do proceed from where it had reached. Similarly, the prosecution did not oppose the application for recall of (PW4) and (PW5) and the same was allowed with orders that, summons issue for (PW4).

10. On 17th October 2020, the prosecution called (PW6), Charles Minoti, who testified before (PW4) and (PW5) were recalled. The prosecution closed its case on that date. The court then ordered for filing of submissions on whether, the accused had a case to answer. On 9th November 2020, the trial court ruled the accused had a case to answer. The matter was fixed for defence hearing on; 17th February 2021, but, before then, the applicant moved this court thereafter. The last hearing date is indicated as; 14th June 2021.

11. It is therefore clear from the aforesaid that, the order given by the court on 15th August 2019, is still on record and therefore ought to be complied with. The case cannot be concluded in the given circumstances, without compliance with that order. To do so, will prejudice the applicant's case and infringe on his right, to a fair hearing as provided for under; article 50 of the Constitution of Kenya 2010.

12. In that regard, and pursuant to the powers of this court under; section 362, as read together with section 364 of the Criminal Procedure Code, I find that, the proceedings taken after the evidence of (PW6) are incorrect, improper and illegal. I set the same aside and order that, (PW4) and (PW5) be recalled as per the court order of 15th August 2019. In that regard, I allow the application herein in terms of prayers (3) and (4).

It is so ordered.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 11TH DAY OF JANUARY 2022.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Kiget for the applicant

Applicant absent

Ms Akunja for the Respondent

Edwin Ombuna – Court Assistant