Omolo v Republic (D.P.P.) (Criminal Revision E006 of 2022)
[2022] KEHC 14348 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14348 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL REVISION E006 OF 2022

PJO OTIENO, J

OCTOBER 27, 2022

BETWEEN

ELIJAH MBEKA OMOLO ..... APPLICANT

AND

REPUBLIC (D.P.P.) ..... RESPONDENT

RULING

1. This file was placed before the court pursuant to the letter dated October 11, 2022 by Onyango Otunga & Co. Advocates. The letter invokes the court's jurisdiction in revision pursuant tosection 364 (b) *Criminal Procedure Code*.

2. The order sought to be revised was made on the July 29, 2022 by which the court rejected an application for adjournment and the prosecution was then forced to close its case. The adjournment application was based on the allegations by the prosecution that the clinician was bereaved. It was also said that the clinical officer was not made aware of that date.

3. The application was opposed by the defence counsel and the court while rejecting the request for adjournment noted that the prosecution had been granted a last adjournment and that there was no reason advanced why the doctor was not bonded. The court then deemed the prosecution's case closed.

4. On the September 15, 2022, a Counsel called Mr Onyango attended court, inferably for the complainant, and made an application that the case be opened to enable the clinical officer, whose evidence he termed crucial, be called to give evidence. He added that no prejudice would visit the accused by such evidence and relied on section 151 to permit the admission of evidence by the court at any stage of the proceedings by any person whose evidence appears essential for the just decision of the case. He underscored that the P3 form the Clinician was to produce had been given to the defence.

5. The request was opposed by the defence counsel on the basis that the matter was an old one and article 50 (2) was cited together with the decision in *Murimi v Republic* [1997] eKLR for the proposition that

calling a witness for the prosecution after the closure of its case is prejudicial to the defence. Counsel added that the request to reopen the case should have been made on July 29, 2020 when they spent the whole day in court.

6. The court in rejecting the request was guided on the decision in *Clement Maskati Mvuko v Republic* [2018] eKLR for the proposition that calling a witness after close of the prosecution's case prejudices on accused person.

7. I have perused the court file and discern the only issue for determination to be whether or not the threshold prerequisites for revision have been met. In doing so, I have appreciated that the law is that justice must not only, be done but must equally be seen to be done, not only to the accused but equally to the victim of crime. The participation of a victim in a trial including the liberty to assist the prosecution with tracing and facilitation of witnesses to attend court voluntarily and within their means and should not be seen to be incompatible with the mandate of the prosecution nor the rights of the accused under the bill of rights.

8. In this matter when Mr. Onyango appeared before the trial court and requested that the court reconsiders the closure of the prosecution's case, he did so in the presence of the prosecutor Ms. Kosgey. At that time the defence was equally presented by Counsel. It ought to be noted that the prosecution's case, had been closed without the evidence of the doctor to highlight the injuries, if any, suffered by the victim of the traffic offence.

9. In declining the application the court relied on the decision of the High Court in *Clement Maskati Mvuko v Republic* for the proposition that to call a witness after the closure of the prosecution's case prejudices the accused and the trial of the case.

10. The facts of that case must be put into perspective. I read the decision to reveal the facts to have been the prosecution having closed its case, and the defence having offered its submissions on a case to answer it was appreciated and understood that evidence of a child of tender years had been taken without conducting a voir dire. In coming to the conclusion it did, the court said:-

> " In the case at hand, the trial magistrate stated that he was making a recall so as to avoid failure of justice. It is noted that the decision by the trial court to recall the witness was reached after submissions by counsel for the applicant that the evidence adduced could not sustain a conviction. This is indicative of the fact that the trial court had appreciated the whole case and the evidence before it and may have taken cognizance of the effect of the failure to conduct a voir dire examination before the testimony of the complainant was recorded. It must be appreciated that the applicant had submitted at the close of the defence case that in the absence of a voir dire examination the testimony of PW1 was rendered unusable.
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> In my view, the decision reached by the court was going to be prejudicial to the applicant and the opportunity to cross-examine the witness would not have cured the prejudice for the reason that the court reached its conclusion after the applicant had pointed out the weaknesses of the prosecution's case. Whereas the trial magistrate was driven by the need to do substantive justice in the matter, he failed to appreciate the fact that his action was not aimed at further clarification of the evidence but the curing of a defect occasioned by the mistake of the court. It is necessary to stress that had all the parties been vigilant, the error could not have occurred. It was indeed the duty of the initial trial magistrate to conduct a voir dire examination of PW1 once the age of the child was disclosed. Equally, the prosecution had a duty to request the court to conduct a voir dire examination of the child."

11. In the instant case, submissions on a case to answer had not been offered by the time the request to reopen the case was made. No material was placed before the court on what prejudice would be visited upon the accused if that particular witness was called. In any event, it is the appreciation of this court, that witness' evidence would only assist the court in establishing basic facts of the case. I see no prejudice that awaits visit upon the accused if the witness was to give the intended medical evidence.

12. In fact the court was under a duty to form an opinion whether the evidence was essential or not essential.

13. No such opinion was expressed and therefore this court finds that the court failed in its duty under section 150 of the Act. For that failure, this court determines that the court did not properly direct itself on the law when it declined the request to recall a witness.

14. For that error, the proceedings of 15/9/2022 are hereby revised and the order by the trial court declining the request to call the medical evidence is set aside with directions that the said witness be called at the earliest opportunity to enable the matter be progressed towards closure. The request for revision is thus allowed as prayed.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 27TH DAY OF OCTOBER 2022.

PATRICK J. O. OTIENO

JUDGE