



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CRIMINAL APPLICATION NO. 86 OF 2018

SUSAN BUKOSHE OMBUNYAAPPLICANT

VERSUS

REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS

RULING

1. The application for determination is a Motion dated 5th November 2018. It seeks one principal prayer, that the defence case in Kakamega CMCCRC No. 1165 of 2014 be reopened to enable the applicant call her witnesses.

2. In her affidavit in support of the Motion, the applicant, Susan Bukoshe Ombunya, sworn on 5th November 2018, avers that she is the accused person in Kakamega CMCCRC No. 1165 of 2014. She was an executive director of a non-governmental organization known as Balm Kenya Foundation. The complainant in Kakamega CMCCRC No. 1165 of 2014 had supplied the organization with foodstuffs, and various cheques were issued in payment for the foodstuffs. She was arrested and charged with the offence of issuing bad cheques. During the course of the proceedings there were efforts to settle the matter out of court, with a view to have the matter withdrawn from court, since the issue really centered around reconciliation of accounts. The negotiations collapsed and the matter went for full trial. At the close of the prosecution's case, she indicated to the court that she would call four witnesses. However, when the matter came up for hearing on 24th October 2018, the court closed her defence and set the matter down for mention on 7th November 2018 for submissions. She states that the complainant would not be prejudiced by the reopening of her case.

3. The court file in Kakamega CMCCRC No. 1165 of 2014 has been availed. I have perused it. It indicates that the applicant took plea on 7th May 2014, when she denied all the offences that faced her. The hearing commenced on 9th April 2015. The prosecution called three witnesses. The State case was closed on 3rd January 2018, after the prosecution was unable to secure the attendance of their last witness, after several last adjournments.

4. The applicant was put on her defence, in a ruling that was delivered on 25th January 2018. The defence case was set for 25th April 2018. The applicant indicated that she would give a sworn statement, and call four witnesses. The matter did not proceed on 25th April 2018, as the applicant was absent, and a warrant was issued for her arrest. The same was later lifted on 9th May 2018, after the applicant and her advocate explained why they did not attend court. The defence hearing eventually happened on 23rd May 2018, when the applicant took to the stand and gave her sworn statement, and was cross-examined.

5. After her testimony, her advocate addressed the court and said he was to call two more defence witnesses. The matter was marked for further defence hearing on 16th July 2018. Come 16th July 2018, the matter was adjourned, after the advocate for the applicant indicated to court that he was recently bereaved, and had just buried his father the previous week, and needed an adjournment to prepare for hearing. The matter was put off to 23rd August 2018.

6. On 23rd August 2018, the defence case did not proceed, as the advocate for the applicant informed the court that they had one witness remaining, who was not able to attend court on that day, and he asked for more time. The application was allowed, with the court adding that it was an old matter. It was fixed for hearing on 24th September 2018. The court marked the adjournment as the last.

7. On 24th September 2018, the applicant did not avail her one witness. Her advocate informed the court that she was unable to avail witnesses. It was indicated to the court that the applicant was keen on depositing the sum of Kshs. 600, 000.00 that was in contention. The advocate pleaded for a mention date to enable the parties reconcile. The matter was fixed for mention on 24th October 2018. It was marked as the final adjournment.

8. Come 24th October 2018, the matter had not been reconciled. The applicant appeared in court without her advocate, and she informed the court that she was closing her case, and would inform her advocate to file written submissions. The matter was fixed for mention on 7th November 2018 to receive written submissions.

9. On 7th November 2018, the advocate for the applicant was in court. He had not filed written submissions. He said he had been unwell, and needed two weeks to file his submissions. His plea was granted, and the matter was marked for mention 21st November 2018. On 27th November 2018, no submissions had been filed, and the applicant pleaded with the court to allow her advocate more time to file submissions. Mention was fixed for 29th November 2018. Come 29th November 2018, no written submissions had been filed, instead the applicant served documents relating to orders that she had obtained in this cause staying the criminal case in Kakamega CMCCRC No. 1165 of 2014.

10. The application before me is premised on Article 50 of the Constitution, which states the fair trial principles. These include the right to be afforded an opportunity to present a defence, to adduce evidence, to call witnesses, amongst others.

11. From the material on record, it is clear that the applicant was afforded an opportunity, after the prosecution closed its case, to present a defence case. The matter was adjourned several times, at the behest of the applicant and her advocate, to accommodate her interests. It was towards the tail end that the trial court gave her a last adjournment and a final adjournment. Despite the court bending backwards to accommodate her, she was still unable to call the persons she desired would testify in her defence. It cannot be said that the court violated Article 50 of the Constitution in any way. The applicant was treated fairly, but, despite all the accommodation, she was still unable to avail witnesses. Contrary to what is averred in her affidavit, it was not the court which closed her case. She is recorded as closing her case on the day that had been appointed for reconciliation. The matter of reconciliation arose after she was unable to avail her witnesses, and had exhausted her final adjournments. Curiously, when she was granted time to file written submissions, she did not, and the matter kept on being adjourned to accommodate her.

12. It is trite that there must be an end to litigation, both civil and criminal. A case ought not to drag on endlessly. Something as to give in at one point or other.

13. In view of what I have stated above, it is my finding that there is no merit in the Motion dated 5th November 2018. The same is for dismissal, and I hereby do dismiss the same. The stay orders that had been granted herein previously are hereby vacated. The court file in Kakamega CMCCRC No. 1165 of 2014 shall be returned to the Chief Magistrate's court for the trial court to finalize the trial. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH , 2021

W MUSYOKA

JUDGE