REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CRIMINAL CASE NO 47 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

AKK.....ACCUSED

RULING

1. Pursuant to article 50 of the 2010 Constitution of Kenya, the accused seeks the following orders from this court.

> *1 THAT this honourable court to be pleased to order that the DNA Report amended on 6th of February, 2020 by Susan Wanjiru Ngugi, Prosecution witness No. 8 and produced as Prosecution Exhibit 9 be expunged from the record of proceedings.*
>
> *2 THAT this honourable court be pleased to issue permanent injunctive orders barring and/or restraining the amendment and/or alteration of the DNA Report dated 5th of February, 2019 prepared by M.W. Maina, Government Analyst.*
>
> *3 THAT the costs of this Application be provided for.*

2. The application is supported by 13 grounds that are set out on the face of the Notice of Motion. It is also supported by a 24 paragraphs supporting affidavit of the accused.

3. Furthermore, the accused through his counsel (Mr. Gordon F. Ogola) has filed written submissions in support of the application.

4. Mr. Mong'are, counsel for the respondent has opposed the application by filing 10 grounds of opposition to the application. The major grounds are as follows; First, the amendment of the DNA Report was brought about due to a bonafide omission and commission or an error apparent on the face of the record; hence no amount of prejudice and/or injustice was occasioned to the accused person. Secondly, he has stated that the accused did not raise any objection to the amendment of the DNA Report and its subsequent production. Thirdly, it is proper for an expert witness to correct and amend an obvious error apparent on the face of the record, since such amendment is minor and does not go to the credibility of the evidence.

5. He has also filed written submissions in opposition to the application. In his written submissions, he has pointed out that the DNA Report was amended on 6/2/2020 by Susan Wanjiru Ngugi (PW8): who then produced the said report as prosecution exhibit 9.

Issues for determination

6. I have considered the application of the accused in respect of the orders sought and the grounds upon which it is based. I have also considered the grounds of opposition filed by the prosecution counsel.

7. I find that the application raises a fundamental issue in respect of the trial process in a criminal case. And the issue raised is whether a trial court is entitled to expunge a document which has been admitted into evidence before either the close of the prosecution case or the close of the defence case.

8. It is clear from the record of proceedings that the prosecution had not closed their case in terms of section 306(2) of the Criminal Procedure Code (Cap 75) Laws of Kenya. I also find that the procedure adopted by the accused is not proper. I further find that this court (Muriithi, J) admitted the DNA Report as exhibit 9. The appropriate stage to challenge the procedure involved in the production of the report as an exhibit should be at the close of the prosecution case or at the close of the defence case.

9. It should always be borne in mind that the trial of an accused in a criminal case must be conducted and concluded expeditiously. This is clear from article 50(2)(e) of the 2010 Constitution which reads as follows.

> *"(e)To have the trial begin and conclude without unreasonable delay."*

10. Interlocutory application of this nature are generally discouraged in the interests of a speedy trial. It is for this reason that at the close of the prosecution case, the trial court whether upon application by the accused or not, has to make a determination whether or not the accused has a case to answer in terms of section 306(1) of the Criminal Procedure Code, which reads as follows.

> *"306(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty."*

11. The provisions of these sections are intended to protect an accused from frivolous or vexatious prosecutions. It is for this reason that applications such as these have to be made at the close of prosecution case. Furthermore, it is for the same reason that the court is authorized to act on its own motion or initiative (*suo motu*) to acquit even without the accused making a submission of no case to answer.

12. A criminal trial involves the production of oral evidence and a judgment is primarily determined upon such evidence. In a civil trial, determination of issues in dispute may be determined on documentary evidence which may not be possible in a criminal case. Furthermore, in a civil trial, it is rare for a party to make a submission of no case to answer following the closure of the plaintiff's case. A party who makes such submission may not have the opportunity to produce evidence in his defence. It is important to point out that in a civil trial, the court is not authorized to act on its own motion to determine whether a case has been made out or not by the plaintiff.

13. I have made the foregoing observations to show that interlocutory applications in criminal trials of this nature may only be made at the close of the prosecution case or at the close of the defence case.

14. Additionally, I have pointed out the differences between the trial procedures in criminal and civil trials, because counsel for the accused appears to have imported (borrowed) the practice that is followed in civil trials into the criminal trial, which is not authorized by law. The said practice is unauthorized and unprincipled. The practice in civil trials is dilatory and is therefore unsuitable in criminal trials.

15. Furthermore, the application is also bad in law as it invites the court to review its order of admitting into evidence the DNA Report as an exhibit. Stated differently, the accused was inviting this court to review its order as if it is a court of appeal.

16. In the premises, I find that the instant application is not competent. It is also not allowed by any of the provisions of the Criminal Procedure Code. The citation of article 50 of the 2010 Constitution as the basis of the application does not assist the applicant. That provision has not ousted the provisions of the Criminal Procedure Code, that govern the procedure to be followed in a criminal trial. It is equally important to point out that where a prosecution is brought by either a public or private prosecutor the proceedings are in fact brought on behalf of and in the name of the crown (now the Republic), and the common law principle is applicable that no costs should be allowed unless exceptional circumstances are shown. See Municipal Council of Dar es Salaam v. Almeida & 3 others (1957) EA 244. Again the prayer of counsel that costs be provided for, clearly shows that counsel had imported the practice in civil trials into the criminal trials, which is unsound and unauthorized in view of the fact that the application arose out of a murder trial, in which counsel had been appointed by the court to act for the accused, since this was a probono brief. A question may be asked as to where will the accused get money to pay as costs, since he was unable to hire an advocate to defend him.

17. In the premises, I find that the application is incompetent with the result that it is hereby struck out with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KABARNET THIS 26TH DAY OF MAY 2021.

J M BWONWONG'A

JUDGE

In the presence of:

Mr. Kemboi Court Assistant.

Mr. Mong'are for Respondent.

Mr. Nanda Advocate present for the accused person.