



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC CRIMINAL APPLICATION NO E023 OF 2021

ROBERT NYAGWETH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. In his Notice of Motion application dated 16th February 2021 and filed on 17th February 2021, the Applicant sought that an order do issue to vacate and set aside, alter or reverse the orders that were given by Hon Rashid on 28th January 2021 declining to allow the Investigating Officer to testify.
2. His said application was supported by an Affidavit of his advocate, James Aggrey Mwamu who was watching brief of his case **Winam Criminal Case No 549 of 2017 Republic vs Samuel Ouko Omolo & 2 Others**. The said Affidavit was sworn on 16th February 2021.
3. He stated that seven (7) witnesses had testified and that the matter was scheduled for 28th January 2021 for further hearing where the remaining witness, the Investigating Officer was to tender his evidence.
4. He contended that on the said date, he asked his colleague in the same firm, Javan Aduwo Advocate to place the matter aside to 10:30am as he was engaged in other matters listed earlier before Kisumu High Court, which were to proceed virtually. He added that through a counsel who was holding his brief, the Accused person's advocates had also requested that the matter be placed aside as he was also engaged in another matter before Hon Mitei of Winam Law Courts.
5. He added that before 10.30am reached, counsel who was holding brief for the Accused person's advocate and the Prosecutor requested a Ruling date with the Investigating Officer testifying. The Trial Court then reserve a Ruling on whether or not the Accused person had a case to answer for 18th February 2021.
6. He pleaded with this court to consider the fact that the Trial Court ought to have considered the prejudice parties (Accused and Complainant) would suffer if the Investigating Officer failed to tender his evidence.
7. He invoked Article 159 (2) (d) of the Constitution of Kenya and further argued that if Article 50(2)(c) and (j) were to be construed in a restricted manner then it would be a mockery of Section 150 of the Criminal Procedure Code which he asserted, donated to the court the power of continuity in disclosure of evidence.
8. It was his contention that the decision made by the Trial court was unreasonable as documentary evidence had been marked for identification and awaiting production by the Investigating Officer and hence, the said decision threw out of the window, the aforesaid evidence.
9. It was his contention that it was incumbent upon this court to invoke the provisions of Article 165(6) and (7) of the Constitution of Kenya and Section 362 and 364(1)(b) of the Criminal Procedure Code and quash the orders made by the Trial Magistrate where she closed the prosecution case before the Investigating Officer had testified despite the Prosecution having indicated that the said officer was on leave. He added that this court was vested with mandate to ensure the fair administration of justice.
10. It added that where the rights of the victim were taken into account, its constitutional mandate overrides the said rights as it has control over all criminal conduct in the Republic. It was its contention that the Applicant had failed to demonstrate the prejudice and or any

miscarriage of justice that had been occasioned on him by leaving out the evidence of the investigating officer in the matter. It added that Section 150 of the Criminal Procedure Code empowers the trial court at any stage of the trial to summon a witness to testify in a matter before court if the evidence appears to be just decision of the case.

11. It contended that the Applicant had created a technicality contrary to the spirit of the provisions of Article 159 (2)(d) of the Constitution. It added that the Advocate for the Applicant always appeared for the Applicant herein and actively participated throughout the trial proceedings and cannot purport to invoke the provisions of Article 50 (2) (j) of the Constitution on lack of disclosure of evidence by the prosecution.

12. In an Affidavit sworn by Javan Aduwo Derek, an Advocate practicing in the firm of Aggrey Mwamu & Company Advocates on 16th February 2021, confirmed that indeed he briefed the counsel who was holding brief for the advocate for the Accused on the material date to place the matter aside to 10.30am but that the said counsel and the State proceeded to request the court to close the prosecution case and grant a ruling date for a case to answer without the Investigating Officer testifying. He was apprehensive that it was in the interest of justice that this application be allowed.

13. Teddy N. Omondi, an Advocate in conduct of the matter, practicing in the same firm also swore an affidavit on 16th February 2021 reiterating the averments made by the said Aggrey Mwamu and Javan Aduwo Derek.

14. On its part, the State opposed the Applicant's application vide Grounds of Opposition that were dated 16th June 2021 and filed on even date. It contended that the said application was frivolous, vexatious and an abuse of the court process.

15. It argued that under Article 157 of the Constitution the mandate to undertake state powers is exclusively vested with Office of the Director of Public Prosecutions in that it could not be compelled to produce a specific number of witnesses to prove the same point in a criminal trial.

16. The 1st Accused person in **Winam Criminal Case No 549 of 2017 Republic vs Samuel Ouko Omolo & 2 Others**, which was the subject matter of the present application filed a Replying Affidavit on 25th February 2021. He swore the same on 25th February 2021.

17. He stated that he had been excluded from the present application yet the same related to him. He added that the said application had been filed after the Prosecution's case had closed and the file retained by the Learned Trial Magistrate for the writing of the Ruling. He pointed out that the impugned record and/or file had not been availed to this court.

18. He added that his counsel was in court on 28th January 2021 when the Prosecution closed its case as the Investigation Officer was not present. He was emphatic that Article 157(10) of the Constitution of Kenya, 2010 and Section 6 of

the Office of the Director of Public Prosecutions Act 2013 give the Office of Director of Public Prosecutions mandate to institute criminal proceedings and hence the present application was contrary to the said provisions of the law.

19. The Applicants Written Submissions were dated 27th July 2021 and filed on even date while those of the State were dated 26th July 2021 and filed on the same date. Parties relied entirely on their Written Submissions. The 1st Accused person did not file any Written Submissions in the matter herein but instead associated himself with the Written Submissions that were filed by the Respondent herein. This Ruling is therefore based on the said Written Submissions.

LEGAL ANALYSIS

20. Taking into consideration the Applicant's application, the various Affidavits in support of the said application, Grounds of Opposition and rival Submissions, this court found that the question that arises before it for determination was whether or not the evidence that was purportedly not tendered would destroy the Prosecution's case in totality.

21. The Applicant submitted that closing of the prosecution case without hearing the testimony of the investigating officer was irregular and illegal and that the orders of the Learned Trial Magistrate fell short of the standard required to establish the allegations of the said matter.

22. It was his contention that the court ought to have drawn an adverse presumption against the Prosecution for failure to call the Investigating Officer to testify. He placed reliance on the case of **Bukenya vs Uganda, (1972) E.A 549** in which it was held:-

“It is well established that the Director has a discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence that is inadequate and it appears that there were others witnesses who were not called, the court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case”

23. He invoked Article 50 (1) and (2) of the Constitution of Kenya 2010 and argued that the right to fair trial cuts across the board and is applicable to the prosecution and accused person in the same manner. He added that failure to call the Investigating Officer as a witness amounted to gross violation of the guiding principles provided under Section 4 and Section 14(5)(c) of The Office of Director of Public Prosecutions Act which advocates for absence of impartiality and total lack of public confidence in the integrity of the office of prosecution.

24. He concluded by asserting that failure to call the said Investigating Officer to tender vital information that would guide the court in making a fair ruling, offended the spirit and intent of the Constitution in administration of Justice.

25. On its part, the State reiterated its grounds of opposition by submitting that it has powers vested on it by Article 157 of the Constitution to close a prosecution case at any point it felt it had presented enough evidence and raised reasonable doubt against an accused person. It argued that the Applicant had failed to demonstrate the prejudice and or any miscarriage of justice that has been occasioned to him without the evidence of the Investigating Officer.

26. In this regard, it placed reliance on the case of **Alfred Bumbo and Others vs Uganda Criminal Appeal No 28 of 1994**, the Supreme Court stated thus:

“While it is desirable that evidence of a police investigating officer and of arrest of an accused person by the police, should always be given, where necessary, we think that where other evidence is available and proves the prosecution case to the required standard, the absence of such evidence would not, as a rule, be fatal to the conviction of the accused. All must depend on the circumstances of each whether police evidence is essential, in addition to prove the charge.”

27. It urged the court to dismiss the application for lack of merit and to allow the magistrate give a ruling on the matter since the prosecution cannot be compelled to produce a specific number of witnesses to prove the same point in a criminal trial.

28. Article 50 (1) of the Constitution of Kenya 2010 grants every person the right to a fair hearing. The same provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.”

29. Article 50 (2) spells out the right to fair trial. Article 50 (2) (j) grants an accused the right to be informed in advance of the evidence the prosecution intends to rely on and to have **reasonable access to that evidence** (emphasis court).

30. The Applicant pointed out that there was documentary evidence that was marked for identification by the Trial Court and which was to be produced by the Investigating Officer. The State did not rebut this averment.

31. Section 6 of the Office of the Directorate of Public Prosecutions Act, it is provided that:-

“Pursuant to Article 157(10) of the Constitution, the Director shall not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law...”

32. This provision is underpinned in Article 157(6)(a) of the Constitution of Kenya that states that:-

“The Director of Public Prosecutions shall exercise State powers of prosecution and may institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

33. It is evident from the aforesaid provisions that the independence of the office of the director of public prosecutions is jealously guarded both by the Constitution of Kenya and Statute. In this regard, this court fully associates itself with the holding of **Alfred Bumbo and Others vs Uganda**(Supra) that the Prosecution cannot therefore be directed on how to conduct its case. It decides on who to call as witness and the number of witnesses to testify in a case.

34. While this court had due regard to the case of **Bukenya vs Uganda** (Supra) that was relied upon by the Applicant herein where the Court of Appeal stated that there was a duty on the director of public prosecution to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent, this court also took cognisance of the fact that in the same case, it was held that a court could draw negative inference on the failure by the prosecution to call a crucial witness at the time of writing its judgment.

35. Going further, failure to call crucial witnesses is an issue to be determined after judgment on appeal. If the appellate court were to find that a crucial witness was not called to prove a fact, then it may acquit the accused person. If it were to find that the trial court ought to have called a witness but it did not call such witness, the appellate court could also order a retrial of the case if it were to find that the trial court did not exercise its discretion judiciously.

36. However, it is important to point out that the trial court is a neutral arbiter and is under no obligation to summon a witness to testify in a matter. Summoning of a witness on its own motion is a power that ought to be exercised with a lot of restraint and with caution to avoid the trial court descending into the arena of the dispute.

37. Notably, the power to summon a witness whose evidence appears to it essential to the just decision of the case as Section 150 of the Criminal Procedure Code is discretionary and not mandatory. The said Section states that:-

A court may (emphasis court), 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.”

38. Indeed, no party ought to be compelled to call a witness who he did not think was crucial to prove his or her case. Be that as it may, where a party feels that crucial evidence has been left out which could impede the fair determination by the court, he or she is at liberty to point that to the court before close of the prosecution case. **Section 146(4) of the Evidence Act** of the Evidence Act Cap 80 (Laws of Kenya) states that:-

“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 a right of further cross-examination and re-examination respectively.”

39. It is this provision that the Applicant ought to have proceeded under. He ought to have made an application before the Trial Court and if the same was refused, he could then have come on appeal for the appellate court to establish and/or determine whether or not the Trial Court had exercised its discretion judiciously.

40. It did appear to this court that the present application was premature because it was not even known whether or not the 1st Accused person would have been found to have had a case to answer. Supervisory powers as stipulated under Article 165(7) of the Constitution of Kenya are not intended to stifle and micromanage trial courts. The calling of records must be within the channels allowed by the law. These could be by way of appeals and/or revisions.

41. Accordingly, this court was not persuaded that this was a suitable case for it to intervene as the discretion of the Trial Court to set aside its order reserving a date for ruling of whether or not the 1st Accused person was found to have had a case to answer was not tested.

DISPOSITION

42. For the foregoing reasons the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 16th February 2021 and filed on 17th February 2021 was not merited and the same be and is hereby dismissed. The interim order that were issued herein be and are hereby vacated and/or set aside.

43. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE