



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. E155 OF 2021**

**SAMMY ODINGA AMBUTSHI.....APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**R U L I N G**

1. The Appellant Sammy Odinga Ambutsi filed application dated 26<sup>th</sup> July 2021 seeking for orders that the trial court file Msa CR. Case No. 96 of 2020 be called and orders made on 28<sup>th</sup> June 2021 be revised and that PW 1 be recalled as defence witness under Article 50 of the constitution, Section 150 of the Criminal Procedure Code and Section 146(4) of the Evidence Act.
2. The application was supported by the affidavit of Hithcliff N. Oyas Advocate shown on 26<sup>th</sup> July 2021. The application was opposed by the grounds of opposition dated 3<sup>rd</sup> August 2021. The Application was canvassed by way of written submission which this court has considered together with the ruling delivered b Hon. R. Amwayi RM on 28<sup>th</sup> June 2021 denying the Applicants application to recall.
3. PW 1 as defence witness for the reasons that the purpose intended by the defene to recall PW 1 is same one reserved for cross examination that is to elect evidences support of a party's case to cast doubt onto underline opponent witnesses evidence so as to weaken their case and undermine the credibility on the veracity of the evidence tendered and to layout a party's case, case theory and challenge the disputed evidence.
4. It was held that the 12 years old child required courts protection to minimize trauma by being made to testify all and over again. Hon. Amwayi said no application for recall has been made and same cannot be allowed. The application was dismissed as an abuse of the court.
5. Section 150 Criminal Procedure Code provides as follows:-

**“Account my 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: provided that the prosecution on the advocate for the prosecution on the defendant on his advocate shall have the right to cross examine any such person, and the court shall adjourn the case for such time as it thinks necessary to enable the cross examination to be adequately prepared if, on its opinion, either party may be prejudiced by the calling of that person as a witness”.**

6. In **Kilukana Otim vs Republic (1963) E.A. 257** the Uganda Court of Appeal stated:-

**“It will be seen that the 1<sup>st</sup> part of the section confers a discretion but under the 2<sup>nd</sup> part, if it appears to the judge that the evidence of a person is essential to the just decision of a case there is a mandatory duty on the judge (if the witness has not been called) to call him himself”.**

7. What is the evidence that the Appellant wants PW 1 who had testified as the complainant to give? Is the alleged evidence essential? Was the alleged evidence arise in improvise, which no human ingenuity could foresee on the part of the Applicant?

**“Whereas a trial court has the discretion to summon a fresh witness a recall a witness who has testified, this discretion should be exercised with caution so as to ensure that the prosecution does not use the opportunity to clean up its act. Much**

**greater caution is called for when the court decides to act suo moto”.**

8. As the trial Magistrate opined the Applicant had the opportunity to discredit the prosecution’s evidence in cross examination of PW 1. The applicant in cross examination had the opportunity to test the credibility of PW 1 and develop own defence. This court has not been told of the nature of circumstances that are alleged to have changed. The court has not been told that there is evidence which is essential that it is only PW 1 who can give.

9. In the circumstances, I do find that the trial Magistrate declined to grant the application in exercise of her discretion and there is nothing raised by the Applicant to warrant the orders to be revised.

10. The application is dismissed. Applicant referred back to the trial court to defend himself.

**Dated, signed and delivered in Open Court this 30<sup>th</sup> day of November, 2021**

**HON. LADY JUSTICE A. ONG’INJO**

**JUDGE**

**In the presence of:-**

*Turuki – Court assistant*

*Ms. Karanja for State*

*Applicant– No appearance*

*Mr. Obonyo Advocate for Applicant- No appearance*

***Hon. Lady Justice A. Ong’injo***

***Judge***

**COURT**

*Mention – 16/12/2021 in trial court for directions.*

***Hon. Lady Justice A. Ong’injo***

***Judge***