



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**MISC. CRIMINAL APPLICATION NO. 51 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENNEDY KANGAYA ISINDU.....RESPONDENT**

**RULING**

1. The State has filed an application dated 9<sup>th</sup> July, 2019 seeking for orders that the order of the honourable court in Butali PMC's Criminal Case No. 124 of 2018 issued on 13<sup>th</sup> February, 2019 be set aside and for the court to grant leave to the applicant to amend and substitute the charges in Butali PMC Criminal Case No. 124 of 2018 as per the amended charge sheet dated 21<sup>st</sup> November, 2018.
2. The application is grounded on the supporting affidavit of Detective Joseph Mathenge sworn on 9/7/2019 to the effect that the trial court in its ruling dated 13/2/2019 declined to grant orders to the applicant to amend the charge. That only two witnesses have testified in the case. That the respondent retains the right to recall any witnesses who have already testified and even elect that the matter starts *de novo*. That it is in the interest of justice that the application be allowed as its refusal will severely prejudice the applicant. That the application is not an abuse of the court process.
3. The application was opposed by the respondent through his replying affidavit sworn on 24<sup>th</sup> July, 2019 in which he contends that the trial court rightly declined to grant the orders sought. That the applicant was granted leave to appeal the ruling of the court but never did so. That the charges intended to be amended and or substituted are tailor made and customized to circumstantially cover and seal the gaps brought out by the defence during cross-examination. That if granted the amendment will occasion injustice and prejudice to the respondent.
4. The application was urged in court by **Miss Kibet** for the applicant and opposed by **Mr. Shifwoka** for the respondent. Both counsels maintained the respective positions of their clients.
5. The respondent is facing before the lower court a charge of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the offence are that on diverse dates between 5<sup>th</sup> June, 2017 and 13<sup>th</sup> July, 2017, jointly with others not before court, at Butali within Kakamega North Sub-County in Kakamega County, being a Supervisor of Butali Sugar mills stole 155.08 tonnes of seed cane, valued at Ksh. 806,416/= the property of Butali Sugar Mills, which came into his possession by virtue of his employment.
6. According to the prosecution they wanted to substitute the charge with the following charges:-

***Count I: Making a false document contrary to Section 347 (d) (i) as read with Section 349 of the Penal Code Cap 63 Laws of Kenya.***

The particulars are that on the 8<sup>th</sup> July, 2017 at an unknown place within the Republic of Kenya, with intent to defraud and without lawful authority made a sugar cane farming and development contract form purporting it to be a genuine document from Butali Sugar Mills signed by Asman Namunyu Wambiria as a farmer applying to be supplied with seed cane from Butali Sugar Mills.

***Count II: Stealing by servant contrary to Section 281 of the Penal Code Cap 63 Laws of Kenya.*** The particulars are that on the 12<sup>th</sup> July, 2017, at Butali Sugar Mills, Kakamega North Sub-County in Kakamega County, jointly with others not before court being an employee of Butali Sugar Mills as a Supervisor stole 22.39 tonnes of seed cane valued at Ksh. 105,233/= (one hundred and five thousands, two hundred and thirty three shillings) which came into his possession by virtue of his employment.

***Count III: Making a false document contrary to Section 347 (d) (i) as read with Section 349 of the Penal Code Cap 63 Laws of Kenya.***

The particulars are that on the 27<sup>th</sup> March, 2017 at an unknown place within the Republic of Kenya, with intent to defraud and without lawful authority made a sugar cane farming and development contract form purporting it to be a genuine document from Butali Sugar Mills signed by Shalakhya Museve Kennedy as a farmer applying to be supplied with seed cane from Butali Sugar Mills.

**Count IV: Stealing by servant contrary to Section 281 of the Penal Code Cap 63 Laws of Kenya.** The particulars are that on the 5<sup>th</sup> June, 2017, at Butali Sugar Mills, Kakamega North Sub-County in Kakamega County, jointly with others not before court being an employee of Butali Sugar Mills as a supervisor stole 32.58 tonnes of seed cane valued at Ksh. 153,126/= (one hundred and fifty three thousands, one hundred and twenty six shillings) which came into his possession by virtue of his employment.

7. In her submissions before this court Miss Kibet stated that Section 214 of the Criminal Procedure Code allows the prosecution to amend a charge before closure of its case. That in the matter herein only 2 witnesses have testified. That the defence will have the opportunity to have witnesses who have testified re-called for further cross-examination. That there is no prejudice to be occasioned to the defence by the amendment of the charges. That failure to amend will lead to a miscarriage of justice.

8. Mr. Shifwoka on his part responded that 2 critical witnesses have testified and cross-examined in the case. That the amendments are being sought on the basis of admission of witnesses in cross-examination. That the amendment is meant to defeat what came out in cross-examination. That the application is an abuse of the court process by the office of the Director of Public Prosecutions (DPP).

9. Further that the prosecution was granted leave to appeal the decision of the lower court. That they did not do so but instead filed the current application. That the application was filed after 8 months. That the application is an abuse of the process of the court.

10. Counsel further submitted that even if the defence has opportunity to cross-examine the witnesses who have testified, it will be prejudicial to the respondent as the prosecution will purge up the evidence.

11. In declining to grant the application the trial magistrate agreed with the defence submission that the intended amendment was meant to fill in the gaps disclosed by the defence during cross-examination. That if allowed the amendment will prejudice the accused.

\*12. I have considered the application and the arguments raised by both sides. Section 214 (1) of the Criminal Procedure Code allows for amendment of a charge at any stage before closure of the prosecution case. The Section provides that:-

***“Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:***

***Provided that—***

***(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;***

***(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.***

13. I have gone through the evidence of the two witnesses who have testified before the lower court, PW1 and PW2. I have also keenly looked at the intended charges as annexed to the application. The present charge against the respondent is theft of 155.08 tonnes of seed cane valued at Ksh. 808,416/=.

14. PW2 in his evidence testified that they identified several farmers (or fake names of farmers) whose names were used to defraud the company of cane seed. He named two of them as Asman Namuyu Wambiria and Kennedy Shalakh. In the case of Asman Wambiria he referred to a contract of cane agreement between the company and the said person that was used to defraud the company of cane. He referred to some delivery and debit notes to show the cane allegedly stolen by the use of the name of the said person. He also referred to some delivery and debit notes made in the name of Kennedy Shalakh.

15. Section 214 (1) of the Criminal Procedure Code allows amendment of a charge where it is apparent to the court that there is variance between the charge and the evidence adduced in court. In the case before the trial magistrate, the evidence of PW2 showed that there was variance between the charge and the evidence that was in possession of the prosecution. In my view, the intended charges were meant to align the charges with the evidence of PW2. Instead of the respondent being charged with stealing a total of 155.08 tonnes (for which may be the prosecution does not have evidence) they proposed to charge him with two separate counts of theft of 22.39 tonnes and 33.58 tonnes of seed cane and further charges of making false documents. I do not see anything wrong with the intended charges. It is apparent that the present charge was defective in form in that it did not capture all the offences purported to have been committed in the course of the transactions.

16. The evidence adduced by PW2 was based on documentary evidence that he referred to in court. The intended charges are based on those documents. There was then no basis for the trial court to hold that the amendment was intended to fill in the gaps left in the prosecution case.

17. Section 214 of Criminal Procedure Code grants an accused person the option to elect to recall witnesses who have testified for further cross-examination or for the case to start *de novo*. Only two witnesses had testified in the case. Amendment of the charge at the stage the case had reached would not have occasioned prejudice or injustice to the respondent in any way. It is the prosecution that will be prejudiced by a denial of amendment/substitution of the charge as some offences will be left out of the charge. There is no abuse of the court process in the application. The intended amendment was legally tenable.

18. In the foregoing this court finds that the trial court erred in declining to grant the application by the applicant to amend the charge. In the premises, the ruling of the trial court dated 13/2/2019 is set aside. This court grants leave to the applicant to amend and substitute the charge in Butali PMC Criminal Case No. 124 of 2018 as per the amended charge sheet dated 21/11/2018.

**Delivered, dated and signed in open court at Kakamega this 29<sup>th</sup> day of January, 2020.**

**J. NJAGI**

**JUDGE**

In the presence of:

Mr. Mutua for Applicant

Mr. Shifwoka for Respondent

Respondent - absent

Court Assistant - Polycap

14 days right of appeal.