



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

MISC CRIMINAL APPLICATION NO. 36 OF 2019

VINCENT OTIENO OTIENO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(An application seeking stay of proceedings in CMCC SO No 83 of 2018,

Naivasha – R Mutua, RM)

JUDGMENT

Background

1. The applicant filed a motion under certificate of urgency seeking a stay of the lower court proceedings to allow recall of prosecution witnesses Nos 1, 2, 3 and 4, for further cross-examination. A similar application had been unsuccessfully prosecuted in the lower court, hence the present application seeking review of the learned Magistrate's ruling dated 28th March, 2019. The present application was certified urgent, and the lower court proceedings were, in the meantime, temporarily halted

2. Briefly, the background to the matter is as follows. The accused person is charged with the offence of defilement contrary to **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. He pleaded not guilty on 15th October, 2018. The prosecution availed four witnesses and closed its case on 14th March 2019. The learned trial magistrate ruled that there was a case to answer, and put the accused on his defence.

3. Upon being put on his defence, the accused asked for more time, and later on 14th March, 2019, a counsel appeared and sought to be placed on record for the defence. He stated that the defence would tender a sworn statement, and call 4 witnesses. Counsel also immediately sought the typed proceedings.

4. On 28th March, 2019 the accused's advocate made an oral request:

“...to recall the three witnesses who have testified under section 150 Criminal Procedure Code and Section 146(4) of the Evidence Act for he reason that the accused was not represented at the time of trial and he faces serious charges. Accused has statements which have now faded”

5. The state opposed the application stating:

“Accused was granted sufficient time and chance to cross-examine. The child is under and getting the child to testify would be repeated trauma...”

6. The trial magistrate dismissed the application on grounds that:

“The accused was granted sufficient time and provided with necessary documents to help him prepare for the trial and that the fact that he was unrepresented is not a sufficient reason for the trial to start de novo.

In my view, this is a delaying tactic by the defence and this application is hereby declined”.

7. This is the ruling which is the subject of the revision.

Analysis and Determination

8. The present application seeks that the court do exercise its revision discretion of the trial court’s ruling , and to grant two main prayers, namely, leave to the accused to recall of all four witnesses; and leave to the accused to be re-supplied with witness statements, medical reports, and post care rape form at his cost.

9. The applicant argues that the trial court must have misunderstood the accused’s application that to mean the case should start de novo. He also states that the accused was not informed of his legal rights to representation before trial and that the accused was a minor and semi-literate when he took plea since he was a class 6 drop out. He also points out that the accused is in remand and therefore the application is not a delay tactic.

10. The state argues that no valid reasons were given for recall; that the case is already at defence stage and therefore the application is a delay tactic; that the applicant fully participated in cross examination; and that the applicant should first appeal the ruling of the lower court.

Recall of Witnesses

11. In his application in the lower court, counsel for the accused sought recall of three witnesses. The court however understood the application as seeking to re-start the case de novo. This suggests that despite the request for recall of three witnesses, the court dealt with a situation where all four would be recalled. In the present application, the accused in fact seeks recall of all four prosecution witnesses.

12. **Section 146 (4)** of the **Evidence Act** provides:-

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

13. The above provision allows the court to allow recall a witness who has already testified. By the use of the word “may” full discretion is given to a court in an application to recall a witness to decide whether the recall is allowed. In my view, a court’s determination on its discretion will depend on the merits and circumstances of each case. If, however, it is shown that the purpose of the request to have a witness recalled is to delay the determination of the case then the court may peremptorily reject the application.

14. In this particular case, the plea was taken on 15th October, 2018 and the prosecution closed only five months later. From the proceedings, it appears that the accused was provided witness statements in court on 8th January, 2019, and was not ready for hearing. The hearing commenced on 6th February 2019, and the accused cross-examined all witnesses. This case was conducted commendably expeditiously by the prosecution. The accused was granted cash bail, but later this was suspended and substituted with bond of Kshs 300,000/= and a surety of similar amount. The accused was otherwise co- operative.

15. **Article 50** of the **Constitution** provides for fair hearing. Under Article 50 (2) an accused person has a right to fair hearing which includes: -

- (a) to be presumed innocent until the contrary is proved;
- (c) to have adequate time and facilities to prepare a defence;
- (g) right to choose and be represented by an advocate
- (k) to adduce and challenge evidence;

16. The accused is facing a serious charge. Based on the evidence, if found guilty he is liable to be sentenced to twenty years up to life imprisonment. He should be accorded all the available facilitation to enable him defend himself. It is clear that the accused was unrepresented when the witnesses testified. There is no indication that the accused was promptly informed of his **Article 50(g)** and **(h)** rights to have a counsel, or to be afforded counsel at state expense if, in the court’s view substantial injustice would otherwise result

17. The position of the state in opposing the application is, of course, understandable as it is expensive and takes time to have a witness attend court and testify. Once a witness has testified it takes great effort to convince such a witness to return to court and testify again. **Section 146 (4) Evidence Act** however allows the recalling of a witness who has already testified. Recalling a witness is part of the right to a fair hearing. The court should not appear as if it were shielding any witness from being recalled for further cross-examination. Unless serious prejudice would be occasioned to the state, or it can be shown that the request to have the witnesses recalled is based on ulterior motive, a court should generally be inclined to allow recall as serious administration of justice failure could be the consequence.

18. The issue of witness recall was dealt with in the case of **Moses Ndichu Kariuki v Republic Nyeri Criminal Appeal No. 228 of 2008 [2009] eKLR** where one of the grounds of appeal before the Court of Appeal was that the appellant was not accorded a fair trial under **Article 77 (2)** of the former constitution which is the equivalent of the new Article 50. The Court of Appeal upheld that ground and stated as follows:-

“In our determination, the right to cross-examine is the linchpin of the concept of a fair trial in that, it has a bearing on the principle of the equality of hearing and the equality of arms without which a trial cannot be said to have been conducted fairly. On our view, denial to cross-examine in turn means that the defence was not treated fairly and the two requirements of equality of hearing and equality of arms were not satisfied. Our view on this is reinforced by the marginal notes in Section (Article) 77 in that the entire provision is entitled the provisions to secure protection of law. Clearly, the failure to recall the complainant for purposes of further cross-examination by the appellant caused prejudice to the appellant.”

19. The circumstances pertaining in this case are already evident. The hearing of witnesses proceeded expeditiously having commenced in February and concluded in March. It cannot be argued that the witnesses will be difficult to find. Their memories will still be fresh; there is no question that evidential documents cannot be traced.

20. The fair administration of justice has such a critical and central place that the constitution mandates the High Court with supervisory jurisdiction under **Article 165(6)** and **(7)** of the constitution to:

“...call for the record of any proceedings before any subordinate court...and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”

21. Weighing the principle arguments against recall with the right to fair trial, I think this is a case in which recall should be allowed in the circumstances. There is no basis to argue that the application is a delaying tactic as the counsel was not present or on record when the witnesses to be recalled testified.

22. I would allow the application to recall the witnesses. I do not consider this to be a delaying tactic as the applicant was unrepresented, and is entitled by law to have them recalled, at the court’s discretion. No prejudice will be suffered by the defence.

Supply of Witness Statements

23. The applicant attached photocopies of the witness statements availed to the accused by the prosecution. They are hand-written and appear very faint and in many instances the writing is illegible.

24. The prosecution was obliged to provide clear statements to the defence. It is an imperative requirement of the right to a fair hearing that an accused person to be informed in advance of the evidence that he will face at the trial and to have adequate facilities to prepare his defence (Articles 50(2)(c)and (j)).

25. In my view, the prosecution is under obligation to provide clear and legible witnesses statements to the accused. The accused should not be placed in a disadvantageous position by any act of the prosecution that might prejudice his rights to fair trial. The prosecution did not advance any argument that prejudice would be suffered by the it or the complainant.

Conclusion

26. In the result, I hereby set aside the orders of the trial court.

27. I order that the prosecution witnesses may be recalled, and that the prosecution shall supply clear and legible witness statements to the accused.

28. Orders accordingly.

Dated and Delivered at Naivasha this 29th Day of May, 2019.

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Koima for the State
2. Chelangat holding brief for Momanyi for Applicant
3. Applicant - not present
4. Court Clerk - Quinter Ogutu