



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC. CRIMINAL APPLICATION NO. 15 OF 2019

CHARLES OYALO MOTANYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. Before me is a Miscellaneous Criminal Application brought by **CHARLES OYARO MOTANYA**, the Applicant herein under **Section 146 Evidence Act, 150, 302, and 362** of the **Criminal Procedure Code, Article 3, 20, 22(1), 23, 25, 50(a), (c) (g) and k** of the Constitution seeking the following:

i. That PW5 and PW6 be recalled for cross-examination by counsel for the applicant.

ii. That the lower court file be called by this court for purposes of reviewing lower court's orders issued on 27th February, 2018.

iii. Costs.

The grounds are;

a) That the applicant is 1st accused in Chuka Chief Magistrate's Court Criminal Case No. 546 of 2016.

b) That he faces the following charge;

i. Breaking into a building and committing a felony contrary to Section 306(a) of the Penal Code.

ii. Stealing by person employed in the Public Service contrary to Section 280 of the Penal Code with an alternative charge of neglect to prevent a felony contrary to Section 392 of the Penal Code.

(c) That on 27th February 2018, the first accused was absent as he was indisposed and that his counsel requested another counsel to seek an adjournment on that ground.

(d) That the application for adjournment was declined and the hearing proceeded where two prosecution witnesses (PW5 and PW6) were heard.

(e) That on 27th February 2018 when PW5 and PW6 testified, a Warrant of Arrest was issued against the 1st accused which was however lifted on 15th March 2018 when the 1st accused tendered evidence to prove that he was sick on 27th February, 2018.

(f) That the Applicant's counsel applied to have PW5 and PW6 recalled but the application was declined.

(g) That his right to fair trial has been infringed and unless this court intervenes the applicant stands to suffer prejudice.

(h) That it is the interest of justice to allow this application.

3. The Applicant has relied on a Supporting Affidavit sworn on 13th May 2019 reiterating the above grounds adding that he was prejudiced as the trial went on in his absence and that of his counsel. He claims that his right to fair trial was violated as his application to have witnesses also testified to have witnesses who rejected testified in his absentia was rejected by the trial court.

4. In his written submission through counsel the Applicant contends that **Section 150 of Criminal Procedure Code** gives the trial court discretion to call or recall any witness for re-examination or cross-examination.
5. He has further defended himself against accusation leveled against that he delayed in bringing this application stating that he made an oral application to have witnesses recalled on 15th March 2018. He however does not state what caused the delay until May this year when he filed the instant application.
6. The applicant has further contended that he could not include other co-accused persons as he was the one aggrieved as the others were present and cross-examined the said witnesses.
7. He has urged this court to exercise its power under **Section 362** and revise the order issued by the lower court. He has further insisted that he has a right to approach this court through revision rather than appeal and has cited the decision in **Denis Nyakundi –vs- Republic [2016] eKLR** to back up his claims. In that case the High Court found merit to revise a lower court's decision to recall a witness and substituted the order with an order to recall the witness under **Section 364** of the **Criminal Procedure Code**.
8. The Respondent (Director of Public Prosecution) has opposed this application vide a Replying Affidavit learned prosecuting counsel Mr. Erick Momanyi sworn on 15th October 2019.
9. The Respondent contends that the application is vague as it does not indicate which lower court file he seeks orders of revision and recalling of witnesses. It is contended that the reliefs sought should be specific and clear but the application before this court is broad and too general.
10. The State further contends that it only after one goes to the body of the application that one can discern that the applicant refers to **Chuka Chief Magistrate's Court Criminal Case No. 546/2016** and that even then the prayers sought are frivolous, vexatious and abuse of court process. According to him they are only remaining with the investigating officer whose evidence is slated for 31st October, 2019.
11. According to the Respondent this application should have joined the other people charged with the application as the reliefs sought is likely to cause delay which is contrary to the provisions of **Article 50** of the court which provide for expeditious trial.
12. The Respondent asserts that the Applicant slept on his rights and wondered why it took more than a year for this application to be filed after substantial number of witnesses have been heard stating that the matter has taken four years in his view the application has been brought with unreasonable and unjustifiable delay.
13. The Respondent has contended that the applicant should have appealed against the orders issued on 27th February 2018 rather apply for review.
14. The Respondent has contended that the witnesses PW5 and PW6 were difficult witnesses who had failed severally to turn up in court and that their failure to turn up suggested that there was an attempt to defeat justice. The Respondent has further deponed that PW5 and PW6 were to testify on 19th February 2018 and that the witnesses were present but at 11 o'clock when the trial was to start, PW6 had conveniently disappeared and PW5 refused to testify and was remanded until 27th February 2018 for him to agree to testify.
15. The Respondent has further deponed that the hearing date (27th February 2018) was taken by consent but that on 27th February 2018, the Applicant and his counsel were absent without any explanation as no Advocate was present holding brief for Applicant's counsel.
16. The Respondent has further contended that the prosecution applied to proceed under **Section 206** of the **Criminal Procedure Code** and the trial court allowed them because the Applicant forfeited his right to participate in the proceedings.
17. The Respondent has further alleged that the Applicant attempted to include the witnesses PW5 not to come and testify with a view to sabotaging the case.
18. That PW6 also testified and informed the trial court he had been also induced with 100,000/- not turn up in court and that when he turned up he was threatened with dire consequences. The Respondent contends that it took a stern warning from the trial court which included cancelling applicant's bond that the matter proceeded for further hearing
19. The Respondent feels that it would not be fair to recall the same two witnesses whom the Applicant tried to interfere with in order to derail or frustrate his trial.
20. This court has considered this application and the response made. It is true that the application before me is asking for recall of witnesses (PW5 and PW6) for cross-examination but really it does not state in which case. Similarly it has asked this court to call for the lower court file without really mentioning the court file. It is also true as advanced by the State that one has to look at the body of the application to really know what the application is all about. The application is made by learned counsel and he really ought to have done better in terms of drafting the actual prayers or reliefs sought. But having said that, this court is inclined to determine matters based on merit or substance rather than technicalities because **Article 159(d)** states so. There is no doubt that notwithstanding the fact that the Applicant did not clearly state in his prayers that this application was in respect to **Chuka Chief Magistrate's Criminal Case 546 of 2016**, his main complaint hinges on his trial vide **Chuka Chief Magistrate's Criminal Case No.546** of 2016. I am not persuaded that the applicant made a mistake by not including other co-accused in his application.
21. The State has however pointed out, rightly so, that the Applicant has slept on his rights for far too long. The order sought to be reviewed

was given on 27th February 2018. His attempt to recall the witness who testified in his absence was done on 15th March 2018. The Applicant brought this application on 13th May 2019 which is more than a year. He has not given any explanation to explain that inordinate delay and this court would have disallowed this application on the ground of laches but for the apparent illegality of the order issued on 27th February and 15th March 2018 by the trial court.

22. The reasons are fairly simple and straight. This court upon being called upon to revise the order made on 27th February 2018 did call for the lower court file pursuant to the provisions of **Section 362** of the **Criminal Procedure Code**. This court in the exercise of its revisionary powers is required to satisfy itself on the correctness, legality and/or propriety of the said order. I perused through the proceedings and noted that the trial had indeed stalled several times owing to various factors which included lack of co operations of prosecution witnesses and adjournments caused by the defence but I will come back to that issue shortly. What is glaring in the proceedings of 27th February 2018 is that the 1st accused and his counsel were absent and this was after the case had been adjourned on 19th February 2018 when the said witnesses (PW5 and PW6) turned hostile and uncooperative respectively. I however note that on 27th February 2018, contrary to Respondent's assertions that the Applicant was not represented, Mr. Kijaru Advocate held brief for Omaso Advocate for the Applicant informed the trial court that the 1st accused (Applicant herein) was unwell. The prosecution then made an application to proceed in the absence of the 1st accused under the provisions of **Section 206** of the **Criminal Procedure Code** and the trial court agreed and directed the matter to proceed and that in my view was a misdirection given the nature of the charge facing the Applicant and other co-accused persons.

23. The proceedings from the lower court indicates that the Applicant and the other three accused persons were charged with the offence of breaking into a building and committing a felony contrary to **Section 306 (a) (b)** of the **Penal Code**. The Applicant also faced another count of stealing by person employed in public service Contrary to **Section 280** of the **Penal Code**.

24. The provisions of **Section 206(1)** of **Criminal Procedure Code** provides as follows;

“ If, at the time and place to which the hearing or further hearing is adjourned, the accused person does not appear before court which made the order of adjournment, the court may, unless the accused is charged with felony, proceed with the hearing or further hearing as if the accused were present and if the complainant does not appear may dismiss the charge with or without costs” (Emphasis added). The above provisions shows that only cases where an accused person has been charged with misdemeanor, can proceed in appropriate instances where an accused is absent.

25. The Applicant herein was charged with 2 counts which in my view are felonies. Section 4 of the Penal Code defines a felony as;

“ an offence which is declared by law as a felony or if not declared to be a misdemeanor, is punishable without proof of previous conviction, with death, or with imprisonment for 3 years or more.”

The 1st accused (Applicant) was charged with an offence in the 1st count which is clearly described by law to be a felony and in the 2nd count the penalty provided is 7 years which means that both counts in law are felonies. The import of that fact undeniably shows that the order directing the case to proceed in the absence of the 1st accused who was indisposed was tainted with an illegality. The trial court correctly resorted to issuing warrant of arrest as provided under **Section 206(4)** of the **Criminal Procedure Code** but it should not have lifted the warrant of arrest if it was not satisfied that there was good cause.

26. It is trite as per **Article 50 (2)** that an accused person's right to fair trial includes to be present when he is being tried unless the accused makes it impossible for the trial to proceed. The State has not stated that the Applicant made it impossible for the trial to proceed. If it is true that he attempted to induce witnesses not to testify or threatened them, Why did the State either not take action because it is a crime to induce, threaten or bribe witnesses or apply that his bond cancelled on grounds of interference of witnesses? Surely in the face of such criminality and derailment of justice, the Director of Public Prosecution should have acted swiftly if the claims or allegations were substantiated or well founded.

27. This court is cognisant of the fact that one of the elements of a fair trial enshrined under **Article 50**, is expeditious trials. Time is of essence in trials but is certainly it is not too heavy a price to pay in the interest of justice to grant accused persons chance to cross-examine witnesses who testify against them. The trial court found that the claims of indisposition by the Applicant on 27th February 2018 were merited that is why it lifts warrants it had issued against him otherwise he would have been in custody awaiting trial.

28. This court finds that recalling the two witnesses (PW5 and PW6) would not prejudice the prosecution in any way since if it feels or has reasons to believe that the Applicant has interfered or has bribed them as it claims to frustrate trial, it has the liberty and the right to move the trial court for appropriate orders and the trial court is well seized of the matter and can issue any order to avoid any attempts to frustrate further hearing and the finalization of the trial.

In the foregoing I am inclined to allow this application as I find basis to revive the orders issued on 27th February 2018 and substitute it with the following orders for the interest of justice.

i. PW5 and PW6 shall be re-called for purposes of cross-examination by the Applicant under **Section 150** of the **Criminal Procedure Code**.

ii. This order shall not prejudice the trial scheduled for 31st October 2019 unless the trial court finds it fit and just to adjourn the hearing for whatever reason.

iii. The trial court shall fix the case for purposes of order (i) above at its convenience.

iv. The witness travel expenses for PW5 and PW6 to attend court shall be paid by the Applicant.

Dated, signed and delivered at Chuka this 29th day of October, 2019.

R. K. LIMO

JUDGE

29/10/2019

Ruling signed, dated and delivered in open court in presence of Kijaru holding brief for Omao for Applicant and Momanyi for Respondent.

R.K. LIMO

JUDGE

29/10/2019