



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL DIVISION
CRIMINAL APPEAL NO. 137 OF 2017

BETWEEN

OMAR AHMED GULED.....APPELLANT/APPLICANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the order of the learned Chief Magistrate Hon. B. Ochieng delivered on 14.11.2017 in Kakamega CMCR case no. 1259 of 2016)

R U L I N G

Application

1. The applicant, who is the accused in Kakamega CMCr. Case No. 1259 of 2016 filed his Notice of Motion dated 24.11.2017 on the 27.11.2017. The applicant seeks stay of proceedings in the above mentioned case that is pending before the Chief Magistrate. The main reason thereof being that the learned Chief Magistrate ordered the applicant's defence closed after declining to issue a warrant of arrest against the applicant's potential defence witness, one Amran Jama despite proof that she had been served with summons to attend court.

2. In his supporting affidavit dated 24.11.2017 and filed in court together with the Notice of Motion, the applicant alleges that, as stated at ground number 5 in support of the application, by ordering the defence case closed under the circumstances hereinabove stated, the learned trial magistrate violated the applicant's right to adduce his evidence and challenge the prosecution's case against him, thereby contravening the provisions of Article 50(2)(k) of the Constitution of Kenya, 2010. The applicant prays that his application be allowed so that his defence witness can be availed to testify. He deposes that without the evidence of his proposed witness, he stands to suffer an injustice as a result of violation of his right to fair hearing.

Response to the application

3. Though served, the respondent did not file any response to the application, though when the application came up for hearing on 19.12.2017, Mr. S. Ngetich from the ODPP told the court that the respondent would rely on the record of the trial court.

Background to the application

4. On the 14/06/2016, the applicant was arraigned before the Chief Magistrate's Court on one count of creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1)(b) of the Penal Code, the particulars being that on the 30th March, 2016 at Kakamega Township at Salama Hotel premises, in Kakamega Central District within Kakamega County, created a disturbance in a manner likely to cause a breach of the peace by uttering the following words in Kiswahili to Asha Gulet: "Nitakumaliza wewe na mali yako" which words translated to English meant, " I will finish you and your property."

5. The applicant pleaded not guilty and the case proceeded to hearing during which the prosecution called three witnesses, among them Aisha Gulet who testified as PW1. At the close of the prosecution case, the applicant was found to have a case to answer and he was put on his defence. He testified as DW1 and also called two witnesses, Twalib Abdi who testified as DW2 and Ibrahim Mohammed who testified as DW3.

6. On 23.10.2017, the applicant sought an adjournment and addressed the court thus:- "Accused: Remaining with one witness, by the name of Amran Jama apply for adjournment and summons to issue to her."

7. The trial court granted the adjournment and stood the case over to 14.11.2017 for further hearing. The order for summons was also issued.

8. When the case came up for further defence hearing on 14.11.2017, the applicant informed the court that the intended witness had refused to give evidence on the applicant's behalf. The applicant then told the court that he was now closing his case, which he did. He then asked for time to write his written submissions. The case was stood over to 28.11.2017 for filing of written submissions.

9. For reasons that are not disclosed on the trial court's record, the case came up on 29.11.2017. On that day, the applicant asked the court to issue summons to the witness who refused to testify on his behalf. The application was rejected by the trial court on the ground that the court cannot compel a witness to testify on behalf of the defence.

10. After his application was refused the applicant told the court that he had not prepared his written submissions and the case was adjourned to 18.01.2018 to give him the opportunity to prepare and file his written submissions.

11. In the meantime, the applicant filed the instant application under Certificate of Urgency, seeking stay of the proceedings until the court compels Amran Jama to attend court and testify on his behalf.

The Law

12. Article 50(2)(k) of the Constitution 2010 provides that:-

"(2) Every accused person has the right to a fair trial which includes the right:-

(a) – (j)

(k) to adduce and challenge evidence."

Issue for Determination

13. Having perused the lower court record, and upon a careful reading of the application together with the affidavit in support thereof, and upon consideration of the relevant provisions of the Constitution 2010, the issue that arises for determination is whether or not the applicant's right to adduce and challenge evidence was violated by the honourable trial court.

Analysis and Determination

14. From the record of the trial court, it is clear that after the applicant was found that to have a case to answer, he gave evidence in his own behalf and also called two witnesses who testified as DW2 and DW3. The record also shows that the applicant intended to call a third witness by the name Amran Jama. The applicant sought and obtained an adjournment and an order for summons to issue upon the said Amran Jama. This was on 23.10.2017. During further hearing of the defence case on 14.11.2017 the said witness did not show up despite having been served with the summons to appear. The applicant then stated to the court:-

“The remaining witness has refused to give evidence on my behalf. That will mark close of defence case. May I be allowed to file written submissions?”

15. On 29.11.2017 when the applicant was supposed to file his written submissions he made a request to the court to issue summons for the second time to the intended witness who had refused to testify on his behalf. The issue here is, did the trial court’s refusal to issue summons after the applicant had voluntarily closed his case on 14.11.2017, amount to violation of Article 50(2)(k)?

16. It is my considered view that there was no violation of the applicant’s right to fair trial in terms of Article 50(2)(k) as alleged by the applicant. The record clearly shows that the applicant exercised his right to testify in his defence. He also exercised his right to call witnesses, and the fact that one other witness whom he intended to call did not turn up does not mean that there was violation of his right to adduce and challenge evidence. The court in fact went out of its way to issue summons to the witness to attend and testify. It never is the duty of the court to compel witnesses to testify on behalf of the defence.

17. Secondly, when the applicant made his second application on 29.11.2017 for summons to issue to the witness, he gave no reasons for doing so especially after he himself had voluntarily closed his case after his two witnesses testified. In my considered view, the applicant’s application of 29.11.2017 was an abuse of the court process and the learned trial magistrate acted correctly in rejecting the said application

Conclusion

18. In the circumstances of this case, I find and hold that the applicant’s Notice of Motion dated 24.11.2017 is devoid of any merit and the same is accordingly dismissed. The original file of the Chief Magistrate is herewith returned to the Chief Magistrate’s Court for mention on 18.01.2018 for further orders as to conclusion of the hearing of the case.

19. Before I conclude this ruling and since the applicant’s appeal filed on 24.11.2017 is based on the very same grounds as appear on the face of the notice of motion and in the supporting affidavit, I hereby strike out the said appeal for being frivolous, vexatious and an abuse of the court process. The applicant will be at liberty to file an appeal, in case he is convicted, upon judgment being rendered by the learned Chief Magistrate.

It is so ordered

Judgment delivered, dated and signed in open court today at Kakamega on this 16th day of January 2018

RUTH N. SITATI

JUDGE

In the presence of

Present in person.....Applicant/Appellant

Mr. Jamsumba (present).....Respondent

Polycap Mukabwa.....Court Assistant