



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 301 OF 2018**

**DENNIS MWITI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON REVISION**

1. The applicant was called as a prosecution witness (PW3) in the **Meru CMCR. Case No. 355 of 2017 Republic v. Nancy Kendi & 6 Others**. When he took to the dock on 15<sup>th</sup> May, 2018, he was sworn and when led in his evidence in chief, he told the court that he did not know what took place on 14<sup>th</sup> February, 2017.

2. The prosecutor then applied to be allowed to cross-examine the applicant. The trial court acceded to that application and the applicant was cross-examined by the prosecutor. On concluding the cross-examination, the prosecutor is recorded as telling the court:-

***“The witness has completely denied his statement as he recorded with the police”.***

3. It is then that the trial court invoked **section 152 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya (hereinafter “the Act”)** and remanded the applicant in custody for 8 days. The trial was then adjourned to today 22<sup>nd</sup> May, 2018.

4. On 17<sup>th</sup> May, 2018, by a Motion on Notice, the applicant applied to this court for revision of the order of the trial court that had declared him a refractory witness. He also sought that in the meantime, the proceedings before the trial court be stayed.

5. The grounds for the application were contained in the body of the Motion and the Supporting Affidavit sworn by Raphael Marete, Advocate on 17<sup>th</sup> May, 2018. These were that; the applicant was not a refractory witness as he had answered all the questions put to him; that it was wrong for the trial court to remand him in order to force him admit the contents of a statement that had been forced on him by the police and that he was apprehensive that he might again be remanded in custody when the matter comes up for hearing.

6. I have called for the trial court record and carefully examined the same. The relevant parts of **section 152 of the Act** regarding a refractory witness provides:-

***“152 (1) Whenever a person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence-***

***a) refuses to be sworn; or***

***b) having been sworn, refuses to answer any question put to him; or***

***c) refuses or neglects to produce any document or thing which he is required to produce; or***

***d) refuses to sign his deposition,***

***without offering sufficient excuse for his refusal or neglect, the court may adjourn the case for a period not exceeding eight days, and may in the meantime commit that person to prison, unless he sooner consents to do what is required of him.***

***(2) If the person, upon being brought before the court at or before the adjourned hearing, again refuses to do what is required of him, the court may again adjourn the case and commit him for the same period, and so again from time to time until the person consents to do what he is required of him”.***

7. From the foregoing, it is clear that a refractory witness is one who, when summoned to appear or while in court and is required to give evidence, refuses to be sworn, or after being sworn refuses to answer questions put to him, or refuses to produce a document or exhibit that is required of him. If such witness offers no sufficient reason, the consequences set out in **section 152 of the Act** will attach.

8. At the beginning of this ruling, I set out what the record of the trial court shows took place on the 15<sup>th</sup> May, 2018. It is clear that when first asked to testify, the Applicant told the court that he could not recall what happened on the 14<sup>th</sup> February, 2017 at about 6.00pm. On feigning ignorance, the prosecution applied for leave to cross examine him which the court granted. He was fully cross-examined by the prosecution and he answered all the questions put to him.

9. The prosecution should have first applied for the applicant to be declared hostile before being allowed to cross-examine him. Nevertheless, having allowed the applicant to be cross-examined, the trial court had in effect declared him a hostile witness. The effect of evidence of a hostile witness is well known.

10. In the case of **Batala v. Republic (1974) EA. 402** the court held that:-

***“The giving of leave to treat a witness as hostile is equivalent to a finding that the witness is unreliable. It enables the party calling the witness to cross-examine him and destroy his evidence. If a witness is unreliable, none of his evidence can be relied on, whether given before or after he was treated as hostile and it can be given little, if any, weight”.***

11. As already stated, the record of the trial court shows that the applicant answered all the questions put to him in cross-examination. The only problem the prosecution had with him was that he recanted what he had stated in his statement to the police. With respect to the trial court, that did not make him a refractory witness but a hostile witness and he should have been treated as such.

12. In the case of **Elly Otieno Ogwang v. Republic (2018) eKLR** while dealing with a similar situation, Majanja J held:-

***“PW1 was not a refractory witness as she was able to answer the questions put to her. The complaint by the prosecutor was that she was retracting the statement she had earlier made to the police. In substance, she was a hostile witness thus the trial magistrate therefore erred in remanding her in custody. The trial magistrate ought to have declared her a hostile witness. Once the witness was declared hostile, the prosecutor was entitled to cross-examine the witness by putting to her the previous statement she recorded with the police in accordance with sections 153, 154, 161 and 163 of the Evidence Act (Chapter 80 of the Laws of Kenya)”.***

13. In view of the foregoing, I am satisfied that the applicant was not a refractory witness and the trial court erred in declaring him as such and consequently remanding him in custody.

14. Accordingly, I set aside the order declaring the applicant a refractory witness and direct that he be set forth at liberty unless otherwise lawfully held.

Orders accordingly.

**DATED and DELIVERED at Meru this 22<sup>nd</sup> day of May, 2018.**

**A. MABEYA**

**JUDGE**