



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISCELLANEOUS CRIMINAL APPLICATION NO.92 OF 2017

PHILEMON KIOGORA MUNJURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application filed on 27th October 2017 emanates from Kiambu Chief Magistrate's **Criminal Case No. 794 of 2013 Republic Vs Philemon Kiogora Munjuri** which is partly heard. The application, expressed to be brought under Article 50 of the Constitution, Section 146(4) of the Evidence Act and Section 150 of the CPC sought two principal orders as follows:

“1.

2. THAT, the court do call for the lower court file and revise the orders given by the Chief Magistrate, HON. MRS. GICHOHI on the 25th September, 2017 disallowing an application to recall prosecution for cross examination.

3.

4. THAT, the Applicant herein be granted leave to re-call and further cross-examine three prosecution witnesses namely PW1, PW2 and PW3 respectively. (sic)”

2. The grounds supporting the application are on the face of the application. The Applicant and accused in the impugned proceedings swore an affidavit to support the application. The substantive portions of the affidavit are contained in paragraphs 8, 9, 10, 11 and 12. The gist thereof is that the Applicant ought to be allowed, and it is within his rights to have **PW1, 2 and 3** recalled for further cross-examination to **“help clarify their evidence and some parts thereof”**, else he will suffer prejudice in advancing his defence.

3. The lower court file having been called for, the application was canvassed interpartes on 29/5/18. Mr. Mburu who held brief for Mr. Kiogora for the Applicant submitted that the application is premised on Section 150 CPC. He asserted that the Applicant was not represented by counsel during the testimony of **PW1 to PW3** and that subsequently, the defence counsel advised that the witnesses ought to be recalled for cross-examination. In his view no prejudice will be occasioned by this request which is aligned to the Applicants' right to a fair trial.

4. Mr. Kinyanjui, representing the Director of Public Prosecutions opposed the appeal. He views the application as an act of mischief on the part of the Applicant, citing the numerous adjournments occasioned by him since the inception of the proceedings in 2013. Regarding proceedings before the trial court on 25/10/17, Mr. Kinyanjui states that the Applicant having previously been granted a last adjournment elected to proceed, without his counsel. Mr. Kinyanjui pointed out that **PW1 2 and 3** earlier testified in 2015 in the presence of the Applicant's counsel.

5. He submitted that no good cause has been shown to warrant the granting of the orders sought, pointing out that the power for recall under Section 150 of Criminal Procedure Code and section 164(4) of the Evidence Act is exercised through the trial court's discretion. He urged the court to consider that delays in the matter occasion injustice to the complainant.

6. Mr. Masaviru for the complainant, picking up that issue urged the court to review the proceedings of the lower court for evidence that the complainant has attended court for five years, and that the Applicant is responsible for delay in the matter. Citing Article 50 (e) of the Constitution and Section 9 of the Victim Protection Act, he argued for the complainant's right to a speedy trial. Like the Director of Public Prosecutions he views the instant application as intended to delay the determination of the case in the lower court, because the prosecution witnesses now sought to be recalled testified in the presence of counsel. He too urged that the court rejects the application.

7. In a brief rejoinder Mr. Mburu asserted that there was no proof of prejudice against the complainant and that exigencies of a speedy trial cannot override the or limit the right to a fair trial, pointing out that **PW2** testified in the absence of the Applicant's counsel. That there is no evidence that the stated witnesses are not available for recall.

8. The court has considered all the material canvassed as well as examined proceedings in the lower court case. There can be no dispute concerning the rights of an accused person to a fair trial as provided under Article 50(2) of the Constitution. Elements of what constituted a fair trial prescribed in the Article include the right of an accused person to be represented by an advocate of his choice, and to adduce evidence and to challenge evidence adduced by the prosecution. Article 50(1) provides generally that every person has the right to have any dispute that can be resolved through the application of the law decided in a fair hearing before a court of law.

9. Article 50(9) under which the Victim Protection Act of 2014 was enacted provides for the protection of victims of crime and their rights. Section 9 of the Act provides as follows:-

“ 9. (1) A victim has a right to-

(a) be present at their trial either in person or through a representative of their choice;

(b) have the trial begin and conclude without unreasonable delay;

(c) give their views in any plea bargaining;

(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law; 2014 Right to privacy and confidentiality. Rights during the trial process 2014

(e) 251 Victim Protection No. 17 be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;

(f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and

(g) be informed of the charge which the offender is facing in sufficient details.”

10. Thus both the accused person and the complainant herein are entitled to a fair trial, conducted without unreasonable delay. I have considered the application before me with the above provisions in mind. The history of the matter is relevant to the determination of the application.

11. The Applicant was first arraigned in court on 25th April 2013. It was not until 2 years later that the hearing commenced. It is fair to say, based on the record of proceedings, that majority of the adjournments prior to that date were caused by the defence, on several grounds, including the absence of defence by counsel and absence by the Applicant. Eventually, a last adjournment was granted to the Applicant paving the way for the trial to commence on 13/5/15. Even so, **PW1** had to be stepped down after his evidence-in-chief as the trial court once more gave time for the Applicant to call his counsel who was absent at the time. Despite being granted time, the defence counsel failed to show up and the Applicant conducted his own cross-examination of **PW1** and **PW2**.

12. Unfortunately the first trial magistrate ceased to exercise jurisdiction subsequently and the Applicant demanded before the succeeding magistrate (Oganyo, Chief Magistrate) that the matter proceeds *de novo*. There followed several adjournments sought by the defence as the Applicant instructed new counsels, at different times and also absented himself on trial dates. No witnesses were heard before Oganyo Chief Magistrate (as she then was). Two further witnesses were heard before the second trial court (**PW3** and **PW4**). Again the said trial magistrate was transferred before conclusion of the trial. At the moment Gichohi, Chief Magistrate is seized of the matter, and an election was made before her on 17/3/17 to proceed from where the preceding trial magistrate had stopped.

13. The Applicant's counsel who had been present when the hearing date was taken was absent during the next scheduled hearing date on 31/8/17. The trial court therefore rejected his application for adjournment made through another advocate. The Applicant elected to proceed in person. Further directions were given that, in light of the previous non-compliance by the said trial court with section 200 (3) of the Criminal Procedure Code witnesses, **PW3** and **4** testifying before the said trial magistrate (Oseko Principal Magistrate,) be deemed to be **PW1** and **PW2** in light of the previous order by Oganyo (then Chief Magistrate) to hear the matter *de novo*. Eventually **PW2** and **Vincent Mwenda Gitonga PW3** testified on 31/8/17, the Applicant indicating to the court he had no questions at the end of their evidence-in-chief.

14. On the next hearing dated (25/9/17) the court rejected an application by Mr. Kiogora for the Applicant for the recall of **PW1** and **PW2**. The complainant then testified as **PW4**. He and a further witness **Alice Nduru Kamunge (PW5)** were cross-examined by Mr. Kiogora. At the close of the day's proceedings, counsel renewed his application for the recall of **PW1, 2** and **3**. The rejection of the said request prompted the present application. Subsequent to the filing of the application the hearing in the lower court has proceeded. Presently, a ruling in respect of **PW6** is pending.

15. From the record, it is evident that when **Jacob Oduor** (then **PW3** and now re-assigned as **PW1**) testified on 25th July, 2016, the Applicant was represented by Mr. Chege Kamau who cross-examined the witness. **Joseph Mwachanga (now PW2)** who had also testified on that date as **PW4** and was equally cross-examined. This witness was recalled and testified again on 31/8/17, the Applicant electing to put no question to **PW2** and **PW3** after him. In the circumstances the Applicant must show good cause to justify the recall **PW1** and **PW2** who testified in the presence of Mr. Chege, the advocate then representing the Applicant. **PW 2** and **PW3** subsequently testified after the court

rejected the application for adjournment by the defence, in my own view for good reason.

16. The Applicant has not been keen, as the record clearly demonstrates, to have the matter heard to completion. An order to have **PW1, 2** and **3** recalled is equivalent to re-opening this old trial all over again. There has been numerous delays occasioned by the defence, partly due to late change of representation and the absence of counsel and sometimes the Applicant at the trial. With regard to the proceedings of 31/8/17 when **PW2** and **PW3** testified, Mr. Kiogora had been present when the date was taken on 29/6/17 but on trial date, it was claimed that his vehicle had broken down at Sagana, which echoes a ground raised before me on 29th May 2018 in seeking the adjournment of the instant application.

17. In my own view, it will be a travesty of justice for this court to grant the Applicant's request at this late juncture in a 5 year old trial. The reasons given for the recall are not firmed up by substance; it is not enough to allege likely prejudice or vague evidential matters that require 'clarification' as the Applicant has stated in the supporting affidavit. Besides, as the Director of Public Prosecutions has observed Section 150 of the Criminal Procedure Code reserves the power of the court, on its own motion, to call for witnesses to give evidence. It is not relevant in the instant case.

18. The Applicant is seemingly hell-bent on delaying this matter as long as possible. Upon my own review of the proceedings, I am satisfied that the trial court was justified in rejecting the recall and further cross-examination of **PW1, 2** and **3** in the circumstances of this case. The present application is frivolous and cannot stand in light of the history of the matter. The same is dismissed. I direct that the lower court file be returned and placed before the trial magistrate on 29th June, 2018 for fixing of priority hearing dates so that the trial can be concluded without any further delay.

Delivered and signed at Kiambu this 26th Day of June, 2018.

C. Meoli

JUDGE

In the presence of:

Non-appearance for the Applicant

Mr. Kinyanjui for the Director of Public Prosecutions

Non-appearance for the Victim.