REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 151 OF 2018

PAUL MUUO.....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

1. Paul Muuo, hereafter the Applicant filed the present application by way of a Notice of Motion dated 11th April, 2018 in which he sought orders that; (i)this Court be pleased to issue a stay of proceedings in Criminal Case No. 1334 of 2012 at Chief Magistrate Court, City Court pending the hearing and determination of the application, (ii)this court be pleased to revise the order of Hon. M. W. Njagi issued on 6th April, 2018 dismissing an application dated the same day, (iii) the court orders that the application be heard before the defence hearing, (iv) the court be pleased to issue such orders as may be fair and just to secure the Applicant's rights to a fair and just trial and (v) the cost of the application be in the cause.

2. The application was premised on the grounds that the trial court dismissed the Applicant's application dated 6th April, 2018 stating that the prayers sought in the Application have been overtaken by events. That the magistrate erred by stating that the prosecution witnesses cannot be ordered for purposes of further cross examination and that the Court had no powers to summon potential witnesses. Further, that the Applicant was denied fundamental human rights relating to the principles of a fair hearing while attending trial at the lower court. That during the prosecution hearing the Applicant was not represented by an advocate but had since exercised his right to retain an advocate to act on his behalf who deemed it imperative to cross examine the prosecution witnesses to avoid a miscarriage of justice. That if such orders were granted the Respondent would suffer no prejudice whatsoever and it was therefore only just and fair that the orders sought are granted to enable the Applicant exercise his right to challenge the evidence.

3. The application was further supported by an affidavit sworn by Elias Kibathi, the Applicant's advocate in which he reiterated the grounds set out in the application. He also swore that the trial court had demonstrated open bias and overstepped its mandate as a neutral arbiter by dismissing the application dated 6th April, 2018 and finding that the prayers sought had been overtaken by events. He concluded by stating that it was in the interest of justice that the orders sought are granted.

4. The application canvassed before me on 15th October, 2018 with Mr. Kibathi acting for the Applicant while Ms. Atina held brief for Ms. Sigei for the Respondent. Both parties gave oral submissions. Mr. Kibathi additionally relied on the cases of **Francis Kipngetic Kiprop *v.* Republic[2017] eKLR, Republic *v.* Raphael Muoki Kalungu[2015] eKLR, Republic *v.* Salim Mohamed[2016] eKLR** and **Joseph Ndungu Kagiri *v.* Republic[2016] eKLR.** His submission basically supported the ground upon which the application is premised.

5. Ms. Atina opposed the application. In summary she averred that the application and the supporting affidavit had been overtaken by events considering the stage at which the proceedings had reached. That from the pleadings before this court it was clear that the Applicant was charged on 30th August, 2012 and the application was being made six years down the line after the prosecution had closed its case. She submitted that the Applicant's advocate had not indicated when he started acting for the Applicant. She was of the view that given the age of the trial and the fact that the Applicant ably cross examined the witnesses the present application was an afterthought intended to delay the trial.

6. She submitted that the trial court had already ruled that the Applicant had a case to answer and reopening the case meant that another ruling would have to be made which would be tantamount to the court sitting on an appeal of its own decision. Further, that the matters being raised were matters that could be raised in the submissions or the defence. She submitted that the defence could not compel the prosecution to call particular witness and the application was therefore unmeritorious. She averred that the other accused persons would be prejudiced if the application was allowed as it would lead to the matter taking longer to be finalized. She urged the court to balance the interest of all the parties in the trial and dismiss the application as it lacks merit, is intended to delay justice and is a waste of the court's time.

7. In reply, Mr. Kibathi, submitted that he came on record on 21st March, 2018 when a ruling on whether there was a case to answer had

already been made. Furthermore, the Applicant had not delayed the matter as he never sought an adjournment throughout the trial. Further, that there would be no prejudice to any of the co-accused as four were acquitted and the other pleaded guilty thus only the Applicant would proceed with the defence. She differed with the learned State Counsel that if the orders were granted it would amount to reopening the prosecution's case as the witnesses shall be recalled purely for further cross-examination by the defence. He cited the witnesses as PW3 to PW9. He underscored the fact that the cross examination is intended to disclose evidence that could impact on whether the Applicant would be convicted or not.

DETERMINATION

8. The present case involves the recalling of witnesses for further cross-examination. Two statutory provisions may guide the court in making a determination under this head. The first is **Section 146(4) of the Evidence Act** which states:

> **"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 a right of further cross-examination and re-examination respectively."**

9. The second provision is **Section 150 of the Criminal Procedure Code** which states:

> **"A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:**
>
> **Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."**

10. Section 146 of the Evidence Act makes it clear that the court may allow for a witness to be recalled in all cases. This is clearly a procedure that can be initiated by any party unlike under Section 150 of the Criminal Procedure Code which appears to be in its nature subject to a *suo moto* direction by the court in its bid to satisfy itself that it is versed with all the essential evidence in the case. In my view though, even under this provision nothing stops the court from granting an order for a recall of a witness(es) made by any party to a matter provided that the other party shall be accorded a right to either cross examine or re-examine the witness(s) as the case may be. The order must also not prejudice any party to the case.

11. The then East African Court of Appeal in **Juma Ali *v.* The Republic[1964] EA 461** whilst referring to Section 151 of the Tanganyika Criminal Procedure Code which is equivalent to Kenyan Section 150 of our Criminal Procedure Code held that:

> **"…under the first part of s. 151 the court has a general discretionary power to call or recall witnesses, a power which must be exercised judicially and reasonably, and not in a way likely to cause prejudice to the accused. Under the second part of the section, once the court forms the opinion that certain evidence is essential to the just decision of the case, the court is under a duty to call a witness or witnesses to give that evidence, whatever its effect is likely to be."**

12. The High Court in **Republic *v.* Salim Mohamed[2016] eKLR** stated that:

> **"Recalling a witness is part of the right to a fair hearing. It should not be felt that the court shielded the witness from further cross-examination unless it can be shown that the request to have the witness called is based on ulterior motive."**

13. In the present case, an application was made before the trial court on 6th April, 2018 seeking to recall all prosecution witnesses for further cross-examination. The prosecution closed its case on 18th January, 2018 and a ruling on whether the prosecution had established a *prima facie* case delivered on 14th March, 2018 whereupon the Applicant was placed on his defence alongside another. **Section 211 of the Criminal Procedure Code** was explained to the Applicant on the same day and he chose to give a sworn statement of defence with the defence hearing set for 21st March, 2018. On 21st March, 2018 an advocate came on record for the Appellant who sought an adjournment as he needed time to prepare for the defence hearing. A hearing was set for 6th April, 2018 on which day the Applicant made the application against which the present revision proceedings are brought. The Applicant's advocate sought to have the application heard first to which the prosecution replied that they had just been served with the application in question. The court then pronounced itself as follows:

> **"Court: I have perused the application dated 6/4/18 and supporting affidavit. Court finds that some of the prayers are overtaken by events considering where the proceedings are, while others can be addressed during the hearing of defence and/or final submissions. As such the hearing of the application aforesaid is dispensed with. Case to proceed to defence hearing. File set aside to await Accused 3 from custody."**

14. In exercising its supervisory role in revision proceedings, this court must correct any irregularity occasioned to proceedings. The dismissal of the Applicant's application was clearly not regular and violated the Applicant's right to a fair trial as set out in **Article 50(1) of the Constitution**. By failing to consider the application and summarily dismissing the same after merely perusing the application was irregular as the learned trial magistrate did not seize to herself the opportunity to appreciate the gist of the application itself. She appeared already determined that the application was unmeritorious before appreciating the basis on which the Applicant wished to recall the witnesses.

15. Further, her finding that the prayers were overtaken by events was clearly erroneous as **Section 146(4) of the Evidence Act** and **Section 150 of the Criminal Procedure Code** clearly indicate that such an application can be made at any point at which point the magistrate was required to exercise her discretion judicially and reasonably. In failing to consider the application the magistrate abdicated her duty rendering any resultant order improper, incorrect and illegal.

16. It is important then at this stage to underscore without going into the merit of the trial, the basis on which the application was merited. First, the Applicant was unrepresented until towards the end of the trial. Secondly, and flowing from the first point, the case involves documentary evidence, which according to the Applicant's counsel, the Applicant was unable to properly cross examine the witness on. Some of the questions intended for cross examination as submitted by the counsel are so weighty that they go into the core of the case. This means that a proper cross examination of the witnesses may determine the guilt or otherwise of the Applicant. Thirdly, an accused has a right to a fair trial which includes the right to be represented by a counsel of his choice. The failure to allow a counsel to ably represent an accused definitely violates this right. Of noteworthy is that this right is non-derogable. A court would be abdicating its noble role if it failed to ensure that the right is observed. That is to say that courts are obligated to uphold the sanctity of the Constitution. That is what this court shall be doing in granting the orders sought. Finally, it has not been demonstrated by the Respondent what prejudice the prosecution case would suffer if the application is allowed. This would be pointed by, for instance, the unavailability of the witnesses or procuring them with difficulties. Clearly then, the trial will flow well even after a brief delay by the further cross examination of the witnesses. After all, the prosecution will have a right to further re-examine the witnesses. Additionally, no other accused person is on trial as one pleaded guilty and the others were acquitted.

17. With the above observations, more so having regard to the provisions of the law, I disagree with the Respondent's submission that the recalling of the witnesses is tantamount to the re-opening of the prosecution's case. Profoundly, the acquittal of the other accused persons would be a non-issue in the cross examination. I further respectfully differ with this line of reasoning as it is clear that the only thing that the Applicant wants is to further cross-examine some of the witnesses he deems were not ably cross-examined as he lacked an advocate during their initial appearance. He desires to only recall PW3 to PW9.

18. In view therefore, I find that a tribunal exercising its discretion judiciously and reasonably would find that to allow the further cross-examination was warranted in this matter particularly as it would enable the Applicant to fully exercise his right to legal representation as set out under **Article 50(2)(g) of the Constitution**.

19. In the result, I allow the application. I set aside the order of the learned trial magistrate issued on 6th April, 2018 dispensing with the hearing of the Applicant's application dated 6th April, 2018. I substitute it with an order that the Applicant is allowed to recall PW3, PW4, PW5, PW6, PW7, PW8 and PW9 for purposes of further cross examination. The same must be done within a period of 30 days. The matter shall be mentioned before learned trial magistrate, Hon. M.W.Njagi on 5th November, 2018 for mention for allocation of hearing dates. The 30 days start to run from 5th November, 2018. It is so ordered.

Dated and Delivered at Nairobi this 31st day of October, 2018

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Kibathi for the Applicant

2. Miss Sigei for the Respondent.