REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL REVISION NO. 4 OF 2018

CLEMENT MASKATI MVUKO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

[An Application for Revision arising from the order dated 18th December, 2017 issued by D.M. Ndungi, SRM in Mariakani SPM's Court Criminal Case No. 517 of 2015]

RULING

1. The Applicant, Clement Maskati Mvuko, is the accused person in Mariakani SPM's Court Criminal Case No. 517 of 2015. On 18th December, 2017 after submissions by the parties at the close of the defence case, the trial magistrate, D.M. Ndungi, Senior Resident Magistrate, issued orders as follows:

> **"After hearing the submissions by the defence counsel Mr. Mwadzogo Advocates and perusing the court record of 29/10/2015, I find that the former trial magistrate Hon. Lutta Senior Principal Magistrate made a mistake by failing [to] conduct a voire dire examination of PW1 (Complainant). PW1 was a child of tender years (12 years) in standard 5 and ought to have been done voire dire examination to ascertain whether he was competent to testify on oath.**
>
> **The mistake is that of the court and should not be vested upon the complainant. This mistake should not be allowed to hinder justice. The mistake can be cured by invoking section 150 of the Criminal Procedure Code and Section 146(4) of the Evidence Act to recall the complainant (PW1).**
>
> **Under the circumstances and to avoid failure of justice, I invoke the provisions of Section 150 of the Criminal Procedure Code and Section 146 (4) of the Evidence Act and order that PW1 (Complainant) be recalled to testify afresh. Such orders can be made at any stage in the proceedings under section 150 of the Criminal Procedure Code. The defence (accused) will not be prejudiced as he will have an opportunity to cross-examine PW1 after PW1 is recalled.**
>
> **Both the prosecution and the defence will be entitled to make additional or supplementary submissions after PW1 is recalled."**

2. Aggrieved by the said ruling, the Applicant moved this court under certificate of urgency to review the record of the trial court in order to determine the correctness, legality or propriety of the ruling. He has also prayed for the transfer of his case to another magistrate of competent jurisdiction.

3. It is the Applicant's case that he had raised the issue of the court's failure to subject the complainant to a *voir dire* examination both at the close of the prosecution case and at the close of the defence case but the prosecution had not made any attempt to rectify the omission. According to the Applicant, the decision of the court to *suo moto* recall the witness was tantamount to the court taking sides.

4. The Applicant contends that the misinterpretation of Section 150 of the Criminal Procedure Code (CPC) and Section 146(4) of the Evidence Act vitiates the proceedings making them unprocedural. According to the Applicant, although Section 150 of the CPC allows the court's *suo moto* recall of a witness, the purpose of such a recall is for the court to examine the witness and not for the witness to testify afresh. Further, that Section 146(4) of the Evidence Act governs situations where a party is making an application to recall a witness and not where the court is recalling a witness.

5. It is the Applicant's view that the mandate to declare that the lower court was in error for failing to conduct a *voir dire* examination of PW1 was in the arena of the superior court and this power had been usurped by the trial magistrate. It is the Applicant's position that the duty of the lower court was simply to evaluate the evidence that was already on record.

6. The Applicant asserts that the orders made were prejudicial to him as he had relied on the issue of lack of *voir dire* examination in submitting that the prosecution had not proved its case against him. In his view, a recall would grant the prosecution an opportunity to fill the gaps in its case and the right to cross-examine the witness would not cure the prejudice caused to him by the recall of the witness.

7. In his written submissions, the Applicant relied on the decision in **Callen Gesore Onsare & another v Director of Public Prosecutions & another [2017) eKLR** in support of the preposition that the power to recall a witness is not available after the close of the defence case.

8. The Applicant also submitted that the Constitution has, under Article 162, set a hierarchical court system hence the finding by the learned magistrate that his predecessor had erred has led to mistrial.

9. The State does not oppose the application for review.

10. The impugned ruling in a nutshell found that the trial magistrate's predecessor had erred by failing to conduct a *voir dire* examination of PW1, a child of tender years, which would have ascertained whether or not he was competent to testify on oath. In order to cure the mistake the court invoked Section 150 of the CPC and Section 146(4) of the Evidence Act and issued an order recalling PW1 stating that the Applicant would not be prejudiced as he would be accorded an opportunity to cross-examine the said witness. Therefore, the question to be answered is whether the said ruling was correct, legal and proper.

11. Section 150 of the CPC provides that:

> **"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."**

12. Section 146(4) of the Evidence Act 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 the right of further cross-examination and re-examination respectively."**

13. A reading of Section 150 of the CPC shows that it empowers the court to, at any stage of the trial, summon a new witness or recall a witness already examined for re-examination. Where the court determines that the evidence of the new witness or the witness to be recalled is essential to the just decision of the case, the court is under a duty to summon the witness. In exercising the power, the court should ensure the protections afforded to the parties in the proviso are adhered to.

14. In **Kulukana Otim v R [1963] EA 257**, cited by J. Ngugi, J in **Stephen Mburu Kinyua v Republic [2016] eKLR**, the Court of Appeal of Uganda, in considering Section 146 of the Ugandan Criminal Procedure Code, which is similar to our Section 150 of the CPC, stated that:

> **"It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself…."**

15. J. Ngugi, J went ahead and held, and I concur with him, that it was necessary for the court to form an opinion that it would be essential to the just decision of the case to call or recall a witness. This is what the learned judge said:

> **"This is important because it would appear that the second part is triggered when the Court itself forms the opinion that the evidence to be called is essential to the just decision of the case. Section 150 implies that once a Trial Court comes to that conclusion, the duty to call that witness is triggered. This is not the situation we have here. The Trial Court did not make any assessment or finding that the evidence of the three witnesses it permitted to be called were essential to the just determination of the case. Instead, the Trial Court acquiesced to the Prosecution request to call the three witnesses. We must therefore conclude that the Trial Court acted pursuant to the first discretionary part of section 150 of the CPC."**

16. In the case at hand, the trial magistrate stated that he was making a recall so as to avoid failure of justice. It is noted that the decision by the trial court to recall the witness was reached after submissions by counsel for the Applicant that the evidence adduced could not sustain a conviction. This is indicative of the fact that the trial court had appreciated the whole case and the evidence before it and may have taken cognizance of the effect of the failure to conduct a *voir dire* examination before the testimony of the complainant was recorded. It must be appreciated that the Applicant had submitted at the close of the defence case that in the absence of a *voir dire* examination the testimony of PW1 was rendered unusable.

17. In my view, the decision reached by the court was going to be prejudicial to the Applicant and the opportunity to cross-examine the witness would not have cured the prejudice for the reason that the court reached its conclusion after the Applicant had pointed out the weaknesses of the prosecution's case. Whereas the trial magistrate was driven by the need to do substantive justice in the matter, he failed to appreciate the fact that his action was not aimed at further clarification of the evidence but the curing of a defect occasioned by the mistake of the court. It is necessary to stress that had all the parties been vigilant, the error could not have occurred. It was indeed the duty of the

initial trial magistrate to conduct a *voir dire* examination of PW1 once the age of the child was disclosed. Equally, the prosecution had a duty to request the court to conduct a *voir dire* examination of the child.

18. Apart from the prejudice that would have been occasioned by the recall of PW1, I am also of the opinion that the power of the court to recall a prosecution witness after the close of the prosecution case should be exercised in line with the *ex improviso* rule which allows the calling of evidence by the prosecution after the close of the defence case only for the purpose of rebutting the evidence of the defence that raised a new matter that the prosecutor could not by the exercise of reasonable diligence have foreseen. The rule is found in Section 212 of the CPC which states that:

> **"If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter."**

19. In **R. v Harris (6) (1927), 20 Cr. App. R. 86, 89,** also cited in **Stephen Mburu Kinyua** (supra), Avory, J explained the rule as follows:

> **"There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fail by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso,* which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which arose ex improviso, may not be answered by contrary evidence on the part of the Crown. That rule applies only to a witness called by the Crown, but we think that the rule should also apply to a case where a witness is called in a criminal trial by the judge after the case for the defence is closed, and that the practice should be limited to a case where a matter arises ex improviso, which no human ingenuity can foresee, on the part of a prisoner, otherwise injustice would ensure."**

20. The impression one gets is that the trial magistrate was, by ordering that PW1 testifies afresh, assisting the prosecution to rebut the evidence that had been given by the Applicant in his defence. It was on record all along that no *voir dire* examination had been conducted before the testimony of PW1 was recorded. The Applicant had submitted on this issue at the close of prosecution case. It was therefore not something that was being raised by the Applicant in his submissions after he had closed his case. In my view therefore, the order to recall PW1 breached the tenets governing the invocation of the *ex improviso* rule.

21. The court also made a finding that the previous magistrate had made a mistake. This, coupled with the fact that the issue of the lack of *voir dire* examination had been raised by the Applicant at the close of the prosecution case before the previous magistrate, gives the impression that the latter magistrate was reviewing the decision of the former magistrate.

22. In deciding not to recall PW1 even after the issue had been raised by the Applicant, the former magistrate had impliedly made a decision not to recall PW1. He proceeded to put the Applicant on his defence and even recorded his evidence before the latter magistrate took over the matter. The Applicant therefore has a point when he submits that the trial magistrate acted against the principle underlining the need for a hierarchical system of courts as provided by the Constitution. He sat as an appellate court over the decision of his predecessor. That was erroneous.

23. It is my considered view that whereas a trial court has the discretion to summon a fresh witness or recall a witness who has testified, this discretion should be exercised with caution so as to ensure that the prosecution does not use the opportunity to clean up its act. Much greater caution is called for when the court decides to act *suo moto*. It is always better to let the parties present their cases in the manner they think best. The prosecution should be left to identify the witnesses it wants to call. Likewise, the defence should be left to decide on the witnesses to call. In my view, by deciding to recall PW1 instead of taking the file into his custody for the purpose of writing judgement, the trial magistrate violated the Applicant's right to a fair hearing protected under Article 50 of the Constitution. The decision of 18th December, 2018 is thus vitiated.

24. I thus find that it was incorrect and irregular for the trial magistrate to direct the recall of PW1. The Applicant's application for review on this issue is therefore merited. The order issued by the trial court on 18th December, 2017 recalling PW1 to testify afresh is set aside.

25. There is the question as to whether the matter should be transferred to another magistrate. The trial has reached its conclusion and what remains is the writing and delivery of a judgment. I do not find anything on record to show that the trial magistrate was driven by ill motive when he issued the recall order. No bias is established and the Applicant did not actually pursue this issue in his submissions. This was one of those errors made by judicial officers in the normal discharge of their duties. There is therefore no reason for transferring the matter to another magistrate.

26. The Deputy Registrar is directed to remit the subordinate court file, together with this Court's ruling, to D.M. Ndungi, SRM who shall proceed to write and deliver judgement in the matter.

Dated, signed and delivered at Malindi this 25th day of October, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT