REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL PETITION NO. 1 OF 2017

CALLEN GESARE ONSARE

JOSEPHAT OUKO ONSARE……PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS

THE ATTORNEY GENERAL …….....RESPONDENT

R U L I N G

1.This is a ruling of the application dated 13th February, 2017.

The applicant seeks the following orders:

1. **Spent**

2. **Spent**

3. That the Honourable court be pleased to make a finding that the decision by the trial magistrate of re-opening a trial in **Keroka Criminal Case No.297 of 2014** on her own motion is unlawful and unconstitutional and it infringes on the applicants'/Petitioners rights to a fair trial and order for the reading of the judgment.

4. That court do find that **Section 150 of the Criminal Procedure** is not applicable in a concluded trial.

This application is supported by the annexed affidavit of **Callen Gesare Onsare** and the following grounds:

(a) That the trial magistrate having concluded the trial had no duty opening the same on her own motion.

(b) That the applicants/petitioners are apprehensive that the re-opening of the trial is actuated by intervention from same quarters and is likely to infringe on the applicants'/petitioners fair trial.

(c) The trial magistrate conducted the trial and was very aware of the evidence adduced and how many witnesses testified and had issued a last adjournment on 19th December 2015.

(d) The trial magistrate ought to have delivered the judgment as scheduled.

SUBMISSIONS

(e) The applicant, counsel, Ogari, relies on:

1. Chamber summons dated 13th January, 2017 by Callen Gesare Ensare – the deponent.

2. Affidavit sworn on 13th January 2017 by Callen Gesare Ensare – the deponent.

3. He submits that the trial court should read the judgment, intend of re-opening the case.

4. He submits that **Section 150 of C.P.C** is not applicable to the concluded trial.

5. The re-opening of a concluded case goes against constitutional provisions under **article 50 (2) (e) of constitutional 2010.**

6. He relies on **Criminal Appeal No.5 of 2006, Murimi –vs- Republic, a Tanzanian** case where the court held: (i) the magistrate should have acquitted the appellant as the prosecution had failed to make out a case sufficient to make out a case sufficient to require the accused to enter in a defence.

7. He urges this court to allow the application

Court further held:-

Section 151[equivalent to Section 150 of our C.P.C.] should be used to empower the trial court.

8. He cited **Criminal Case No.10 of 2011**, **Republic –vs- A balikair Ahmed Mohamed**, the court held a case that had closed couldn't be re-opened.

9. He cited **article 159 (2) (b) (d)** of the constitution 2010 where it declares that justice shall not be delayed, and justice shall be administered without undue regard to procedural technicalities.

(b) The Respondent, the learned State Counsel, Ochieng, opposed this application.

1. The re-opening of the trial is provided for under **Section 150 of C.P.C,** and was therefore lawful.

2. The trial magistrate properly executed her judicial authority under **article 159 (2) (d)** of the constitution 2010.

3. In the absence of the proceedings of the lower court, the applicant is but pre-empting the intention of the trial magistrate. This court is unable to determine the peculiar circumstances under which he/she reached this decision.

4. Provisions of **Section 150 of C.P.C.** however allows the defence to cross-examine the witnesses, so suffers no prejudice.

5. Therefore he urges this court to dismiss this application.

Section 150 C.P.C. reads:

"At any stage a trial or other proceeding under this code, summons or call any person as witness, or examine any person in attendance though not summoned as a witness, recall or 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 adequately prepared if, in its opinion either party may be prejudiced by the calling of that person as a witness."

Without more to be said, it is clear that **Section 150 C.P.C** gives a wide discretion to a trial magistrate when it comes to calling witnesses to assist in a just trial of a case. But it appears that emphasis of applying this legal provision is more to do with the way the prosecutor places its case before the court. One may venture to add that probably even after the defences opens its case but before it is closed, the court may still call witnesses or re-examine those who have already testified if such a step ensure a fair trial. But once the defence case is closed, then calling or recalling any witness appears a course not to be taken at all. This should be generally so because it is considered that the trial magistrate has the whole case before him/her and what remains is to find guilty or innocent. So unless a new matter or a whole new case or defence is made by the accused person in his case to warrant calling other witnesses to testify on the new case or matter, then it is prejudicial to the accused to call the other witnesses to testify on the new case or matter, then it is prejudicial to the accused to call the other witnesses. Otherwise where a reasonable doubt appears at the time of composing a judgment, the same need be resolved in favour of the accused person. No steps should be taken by the court to appear as if it is seeking further aids to resolve the doubt at all.

In this regard let me look at some of the cases in which Section 150 [or its equivalent] was in issue and what line of legal position was taken.

The substance or facts of each case need not be repeated here.

1. Fitalis Ogure s/o Oliench –vs- Republic [1950] 24 KLR C K Lestang J said:

Although at first sought this section appear only to give a wide discretion to a magistrate is calling any witness but also to make it mandatory on him to call or recall any person who evidence appears to be essential to the first decision on the case, the Supreme Court has repeatedly held that a judge should not call a witness in a criminal trial after the case from defence is closed.

The present case goes, however much further ……The witness was called after the case had been adjourned for judgment. At the close of the case for prosecution the learned magistrate was in doubt and instead of resolving this doubt there and then in favour of the accused, he decided in this course of calling fresh witness…….In my view in doing so the learned magistrate unwillingly committed an irregularity which is fatal to the conviction because if the evidence of that witness is rejected then it is clear that the appellant should be given the benefit of the doubt and be acquitted PP.80.

The conviction was granted, the sentence set-aside and the appellant set at liberty.

In the **HCC of Kenya at Nairobi, Misc. Criminal Revision 54 of 1994. Joginder Singh Mehta –vs- Republic**, this case was for judgment. However on considering evidence on record it is apparent to me that it will be unjust to decide this case without calling for more expert witnesses to give evidence on issues are essential to the this case. For that reason I invoke **Section 150 of the C.P.C** to call one pathologist and one government gynecologist to be summoned through the Executive Officer of the Court to come and give evidence.

The trial magistrate thus re-opened a concluded case.

1. The court held, J.W. Mwera, that the learned magistrate's order of 21/07/94, re-opening the case, was reversed and quashed.

2. The learned trial magistrate ordered to proceed and deliver the awaited judgment on the relevant material placed before as at the end of the defence.

Findings

In the instance case, **No.296 of 2014, at Keroka Court**, the prosecution case had duly closed, on 10th March 2016 the defence were put on their defence.

On 23rd August 2016, the defendant/applicants testified in their defence and called one witness, in their favour, and closed their case.

The court resolved to read of its judgment on 7th day of October 2016, after the parties filed their respective written submissions.

That however, on the appointed day for judgment, instead of reading the judgment as scheduled, the trial magistrate invoked **Section 150 of the Criminal procedure Code** and on its own motion opened the prosecution case.

Lack of the proceedings precludes me from knowing which witnesses he decided to call and for what reasons.

In the light of the authorities cited above, especially the ***Joginder Singh Mehta case***, whose facts are similar to the case under consideration, thus trial is rendered as unfair trial under **Article 50 (2)** of the **constitution 2010.**

In Conclusion

For those reasons, there is merit in this application.

1. Therefore the court order to re-open the prosecution case is unlawful, unconstitutional and infringes on the rights of the applicants to a fair trial as enshrined in our constitution.

2. The trial magistrate be and is hereby ordered to read the judgment on the basis of the testimonies as laid out after the closure of the case.

Orders accordingly.

C. B. NAGILLAH

JUDGE

Judgement delivered, dated this 28th day of April 2017.

In the presence of:

Madam Sagwa hold brief for Ogari for the Petitioner

Ochieng for the Respondent

Mercy - Court Clerk