REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC. CRIMINAL APPLN. NO. 18 OF 2017

JOSEPH ODHIAMBO OMONDI ..... APPLICANT

-versus-

REPUBLIC ..... RESPONDENT

RULING

1. **JOSEPH ODHIAMBO OMONDI,** the Applicant herein, was charged with the offence of attempted defilement and the trial is at the defence hearing before the **Rongo Senior Resident Magistrate's Court** in **Criminal Case No. 372 of 2013**.

2. When the Applicant was placed on his defence he jumped bail and was arrested three months later. The surety applied for and was discharged and the Applicant has remained in custody since then. When the Applicant was called to present his defence which he had indicated to be by way of a sworn testimony and intended to call 3 witnesses he prayed for an adjournment that he was not ready to conduct the defence and requested for copies of the proceedings. That was on 08/05/2017. The case was fixed for a mention on 22/05/2017.

3. Before the mention date, the Applicant filed this application contending that the trial was unfair as crucial documents including witness statements, exhibit memo form and the investigation diary were not availed to him. When the application came up for hearing before this Court the Applicant appeared in person and argued that he wanted the case to start *de novo* before another trial court as he had lost faith in the trial court. He further stated that he had been provided with copies of the proceedings and the P3 Form but did not request for and was not provided with copies of the witness statements and that he examined the witnesses from what they stated before court.

4. The State vehemently opposed the application. It contended that the prayer is a ploy to delay the finalization of the case as the Applicant seems not keen to deal with the matter further and that the matter has been pending before 2013. It was pointed out that the Applicant had absconded and occasioned delay that led to some witnesses relocating before testifying. It was further submitted that even the complainant relocated after testifying and the whereabouts are not known such that if the case is to start *de novo* then that will visit immense injustice to the complainant.

5. I have carefully considered this application. It is a fact that the **Constitution** accords the Applicant a right to a fair trial under **Article 50** which entails the right to access all evidence against him in a criminal trial to aid him conduct his defence well. When this application was heard, I called for the trial court file which I have perused. The Applicant was charged on 02/09/2013 and pleaded not guilty. The case was set for hearing but since the complainant was deaf the hearing delayed until a suitable sign language interpretor was found. The hearing began before **Hon. Rugut, Senior Resident Magistrate** who was transferred to another station before the case was finalized.

6. The case was taken over by **Hon. Kamau, Resident Magistrate** who complied with **Section 200(3)** of the **Criminal Procedure Code** and the Applicant indicated that the case was to proceed further and did not recall any witness. The hearing proceeded until the prosecution closed its case where it indicated that some other witnesses had relocated and were not traceable. All along the Applicant cross-examined the witnesses at length.

7. The Applicant raised the issue of the proceedings on 08/05/2017 and he was readily availed together with a copy of the P3 Form. Even on the said day the Applicant admits that he never raised the issue of witness statements.

8. Whereas an accused person is entitled, as of right, to the evidence the prosecution intends to rely on in a criminal case, and without lessening that duty on the prosecution, when an accused person fully participates in a criminal trial until one is placed on his/her defence and does not even raise the issue of the evidence before the trial court but rushes to the High Court instead, the High Court must deal with the matter by carefully considering what each side offers to say and the net effect of what is sought for to both the Applicant and the complainant.

9. In this case the charge is a sexual offence and is such a serious one. The complainant is deaf. Even though the complainant relocated alongside other witnesses and they are not easily traceable, it took quite an effort to get the sign language interpretor to court. If the matter must begin *de novo* then there is no guarantee that the victim will testify and that will lead to miscarriage of justice. I also note that even the

application for the trial court to disqualify itself was never raised before that court.

10. By looking at the conduct of the Applicant in the criminal case and before this Court, it is clear that the Applicant is not taking the case seriously. Applications in the nature of recusal of a court must not be taken lightly. Such an application must be made before the presiding court in the first instance. Even before a party rushes to complain before the High Court that a trial court ought to recuse itself or that no documents were offered, there must at least be an effort to raise such matters first with the trial court. That court is bound by and is always called upon to uphold the Constitution and must deal with the issue once raised.

11. It was until when the Applicant was placed on his defence when he raised the issue of the proceedings and the trial court promptly made an order that the same be availed to the Applicant. The proceedings were provided together with the exhibits. There is no reason as to why the court would not have made a like order had the Applicant raised the issue of the statements much earlier. I however wish to state that trial courts must take deliberate efforts to ensure that the rights and fundamental freedoms guaranteed in the Constitution are fully realized. That is the only way Kenyans will enjoy the fruits of the Constitution. It is therefore and always a calling upon a trial court to ensure that no trial begins before confirming that the prosecution has availed all the evidence against an accused person to that person or the Counsel as the case may be. Conversely, an accused person or a Counsel should not participate in a trial in which this cardinal constitutional requirement is not met. Needless to say, that is the settled practice before the High Court.

12. Coming back to the application at hand, I find that the Applicant had ample and reasonable access to the witness statements and the charge sheet throughout the trial. He chose not to remind the court for the same. He fully participated in the trial and examined the witnesses appropriately. He understood the charge and even how to defend himself and opted to give sworn testimony and call three witnesses. It can now be seen that the Applicant is geared towards the case starting de novo as he understands that the witnesses may not be available to testify once again. If such a request is allowed, that will be tantamount to defeating justice. In the unique circumstances of this matter, I do not see how the Applicant's rights under the **Constitution** were infringed.

13. Since the Applicant was already provided with the proceedings and exhibits, I hereby order that he shall as well be provided with the witness statements and the charge sheet. Given that the case was initiated in January 2013 and ought to have been concluded within a period of 12 months, the trial court shall take measures to ensure a speedy determination.

14. A copy of this ruling together with the case file shall be placed before the trial court on **02/08/2017** for appropriate directions.

15. Those are the orders of this Court.

DATED, SIGNED and DELIVERED at MIGORI this 31st day of July 2017.

A. C. MRIMA

JUDGE