



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO. 51 OF 2013**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**FRANCIS KISIENYA MUMBI..... ACCUSED**

**RULING**

1. The accused **Francis Kisiinya Mumbi** is facing trial for the murder of **Paul Muchiri Kamoni**. The particulars of the offence on the information dated 22<sup>nd</sup> April 2013 are that on the 15<sup>th</sup> day of March 2013 at Umoja One Estate in Nairobi County murdered Paul Muchiri Kamoni. The information under reference is the subject of this ruling.
2. The accused took plea on 2<sup>nd</sup> May 2013 and he pleaded not guilty to the charge. At the commencement of the trial on 18<sup>th</sup> March 2014 the court invited both the prosecution and the defence to address the court by way of opening statements. **Mr. Konga** for the prosecution gave a brief summary of the case stating that the accused went to the house of the deceased on the morning of 15<sup>th</sup> March 2012 and stabbed him on account of a love affair gone sour. He indicated that the prosecution would be calling 9 witnesses to prove the murder. **Mr. Olewe** for the defence indicated to the court that he did not wish to address the court at that point.
3. The trial commenced on 18<sup>th</sup> March 2014 and on 16<sup>th</sup> September 2014 the prosecution closed its case having presented 9 witnesses. After hearing the submissions of the parties and considering the testimony of the witnesses, the court found sufficient evidence to place the accused on his defence. The defence hearing opened on 25<sup>th</sup> February 2015. The accused elected to give sworn evidence and to call 2 witnesses. The defence case closed on 11<sup>th</sup> June 2015.
4. At the close of the defence case, **Mr. Konga** made an application to amend the charge sheet to read 2012 and not 2013 having noticed what he termed a typing error as the offence was committed in 2012 and not 2013. **Mr. Olewe** for the defence objected stating that both parties had closed their case and an amendment would lead to the trial being reopened. The court directed both parties to make substantive submissions on the application and objection.
5. The information bears the date 15<sup>th</sup> March 2013 while in actual fact the incident occurred on 15<sup>th</sup> March 2012. The prosecution's argument is that the date on the charge sheet should be treated as a typographical error as the evidence on record shows that the offence was committed on 15<sup>th</sup> March 2012. **Mr. Konga** for the prosecution submitted that both the prosecution witnesses and the accused in his defence testified to the fact that the alleged offence took place on 15<sup>th</sup> March 2012. That **Section 275(2) of the Criminal Procedure Code** makes provision for amendment on a defect on the information at any

stage of the trial process provided that no injustice will be occasioned. He further submitted that the defence ought to have raised the objection at the beginning of the trial as provided by **Section 275 of the Criminal Procedure Code**. Finally, counsel submitted that if need be, the court could order the amendment and the accused be allowed to cross-examine witnesses.

6. In opposition, **Mr. Olewe** for the defence submitted that the application cannot be entertained by the court because the prosecution had closed its case and would be tantamount to re-opening the case. That such an amendment would lead to a retrial which the court had no power to order. Secondly, he submitted that the accused had mounted his defence based on the particulars of the charge and that the amendment would cause an injustice in violation of **Article 52(2) (e) of the Constitution**. Finally counsel submitted that the error in the information goes to the root of the evidence. He cited the case of **Republic Vs. Kirui 2014 eKLR** to buttress this submission.

7. The application raises 3 key issues. The first is whether the court has power to order the amendment. The second is whether the amendment if ordered would cause an injustice. The third is whether the discrepancy on the information was material as to vitiate the trial.

8. Whether or not the court has power to order the amendment is a matter of law. **Section 275(2) of the Criminal Procedure Code** which was cited to me by both parties states:

*“where before a trial upon information or at any stage of the trial it appears to the court that the information is defective, the court shall make an order for the amendment of the information as the court thinks necessary.”*

It is clear from this provision that the court has power to order an amendment. It can do so upon application of either party or of its own motion depending on the nature of the defect. And it can do so at any stage of the proceedings.

9. The test to be applied on whether or not to order an amendment is whether or not such an amendment would occasion an injustice. In **Kassam Ukiru –Vs- Republic 2014 eKLR**, the court of appeal sitting in Kisumu found and held that a discrepancy on the date in the charge sheet and the date given in evidence did not cause any prejudice to the appellant as to occasion a miscarriage of justice or a violation of his fundamental right to a fair trial.

10. In the present case, would an amendment to the charge sheet to read 15/3/2012 instead of 15/3/2013 occasion an injustice to the accused? The answer would depend on whether the accused could identify with the case he was facing and whether he mounted a defence to counter the case he was facing. The record shows that the information dated 22<sup>nd</sup> April 2013 indicates the particulars as *“Francis Kisenya Mumbi: On the 15<sup>th</sup> day of March 2013 at Umoja One Estate in Nairobi County murdered Paul Muchiri Kamani”*. The accused took plea on the said information on 2<sup>nd</sup> May 2013 in which he denied the charge. When the trial commenced, prosecution witness Kevin Pius Mwambuingi (PW1) testified that the deceased was stabbed on 15<sup>th</sup> March 2012. PW2 testified that she was in the company of the deceased on the morning of 15<sup>th</sup> March 2012 when the accused found them in bed in the deceased’s house. Indeed all the prosecution witnesses spoke of events of 15<sup>th</sup> March 2012. The defence cross-examined all the witnesses and there is no evidence that the issue of the date was raised in cross-examination.

11. During the defence, the accused gave sworn testimony. He told the court that he recalled the events of 15<sup>th</sup> March, 2012. That he went to the deceased’s house that morning to deliver to him the matatu to operate that day as per the agreement he had reached with the deceased the previous day. That he found the deceased in bed with one Frida Kaloki. This shows that the accused understood the case facing him as emanating from the events of 15<sup>th</sup> March 2012 and was not prejudiced in any way. Contrary to the submission of the defence that the accused mounted his defence on the basis of the date on the information, the defence evidence on record shows that the accused mounted his defence on the basis of the events of 15<sup>th</sup> March 2012 and has not in any way been embarrassed by the error on the charge sheet which reads 2013 instead of 2012. My firm conviction is that an amendment to the charge sheet to correct

the year shall not in any way occasion an injustice. I further find that the correction of what is now apparent to be a typographical error cannot entitle the parties to re-open the trial which is at its tail end.

12. In the premises I order that the charge sheet be and is hereby deemed amended to read 15<sup>th</sup> March 2012 in place of 15<sup>th</sup> March, 2013.

Orders accordingly.

**Ruling delivered and signed at Nairobi this 31<sup>st</sup> day of March, 2016.**

**R. LAGAT-KORIR**

**JUDGE**

In presence of:

..... Accused

..... Court clerk

..... For State

..... For Accused