



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO. 206 OF 2016

PAUL MASAKU MAKAU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application herein although filed as a miscellaneous application is in fact a revision application. It is brought under Article 50(2) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code. The Applicant who is the accused in Makadara **Cr. Case No. 2153 of 2013** has moved this court for review of an order by the trial magistrate directing him to proceed with the case without witness statements. The court is also urged to revise an order by the then trial magistrate in Makadara **Cr. Case No. 1779 of 2009** ordering the withdrawal of the case under **Section 87(a) of the Criminal Procedure Code**. Consequently this court should revise the order directing fresh hearing in the aforesated **Cr. Case No. 2153 of 2013**.

It is important that this court sets the background to this application. The Applicant was initially charged in **Makadara Cr. Case no 1779 of 2009** with the offence of robbery with violence with an alternative charge of handling stolen goods. The case progressed on well and the prosecution closed its case. The applicant was put on defence. It was at this stage that he escaped from lawful custody. He could not be immediately traced and on 28th September, 2011, the case had to be withdrawn under **Section 87(a) of Criminal Procedure Code**. Thereafter, the applicant was arrested and had to be charged afresh in **Cr. Case No. 2153 of 2013**. His contestation is that he was compelled to proceed with the former trial, **Cr. Case No. 1779 of 2009** without witness statements which was prejudicial to the process of a fair trial. When he was charged afresh, although he was furnished with witness statements, trial magistrate made an order that the evidence adduced in **Cr. Case No. 1779 of 2009** be admitted in **Cr. Case No. 2153 of 2013**. He submits that this is prejudicial to him more particularly because the evidence was tendered when he was not accorded sufficient facilities to conduct his defence for want of prosecution witness statements.

The Respondent on the other hand is of the view that **Cr. Case No. 1779 of 2009** was properly withdrawn under **Section 87(a) of the Criminal Procedure Code**. The withdrawal was precipitated by the Applicant's own conduct after he absconded from the trial. It followed that upon his arrest, he had to be charged afresh. Further, although he indicated that he wished the trial be heard *de novo* pursuant to **Section 200 of Criminal Procedure Code**, that provision did not accord him absolute right that his wish had to carry the day. The trial court declined fresh hearing on noting that most of the witnesses who had testified in the previous trial could not be traced to testify afresh. As such, the prosecution invoked

Section **34 of the Evidence Act** which provides for admissibility of evidence given in previous proceedings. Furthermore, the applicant had been furnished with all witness statements in the previous trial and his contention to the contrary was baseless.

From the background I have set above, it is now the onerous duty of the court to determine whether there exists an illegality or incorrectness or irregularity in the orders made both in criminal **Case no. 1779 of 2009 and 2153 of 2013**. With regard to the former, the question is whether the case was properly withdrawn under **Section 87(a) of the Criminal Procedure Code**. The same reads as follows:

“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal-

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;”

The record of proceedings shows that at the time the case was withdrawn on 28th September, 2011 by then Hon. M. Muya (now a judge), the prosecution had already closed their case and the applicant had been put on defence. The provision is in categorical terms that it only applies before the close of the prosecution case. In effect, the applicable provision was **Section 87(b) of the Criminal Procedure Code** where the prosecution upon application for withdrawal of the case after the accused has been called upon to make his defence the court shall be acquit him.

Another illegality manifested in that order was that the court moved itself *suo moto* by ordering the file closed and withdrawing of the case under **Section 87(a)**. As demonstrated by the law, the obligation of moving the court for the withdrawal of a case is conferred on the prosecution. The court’s mandate is to either consent or refuse the request. The court cannot purport to confer on itself powers not accorded to it by the law. In this case, the prosecutor was in court. The magistrate ought to have awaited the prosecutor to make an application for withdrawal of the case before making the appropriate orders. Instead, the magistrate usurped the mandate of the prosecutor which set the motion for illegal proceedings. Respectively, **Cr. Case No. 1779 of 2009** was terminated unprocedurally which act amounted to an illegality. The defect can therefore be cured by way of revision.

I will now relook at the applicant’s contention that notwithstanding that he should stand the fresh trial in **Cr. Case No. 2153 of 2013**, the importation of the evidence adduced in **Cr. Case No. 1779 of 2009** is prejudicial to him as he will not be accorded a fair trial in the latter. His case is that the trial should start afresh with all the witnesses testifying afresh as he was not furnished with prosecution witness statements which he required to enable him combat the prosecution case and mount a strong defence. I will then have to make a summary of what transpired in **Cr. Case no. 1779 of 2009**.

The Applicant was initially represented by learned counsel, Mr. Bosire. An application was made for witness statements and an order made by the court on 27th April, 2009 that the statements be supplied. The matter next came up on 15th June, 2009 and counsel for the Applicant submitted that they were ready to proceed and requested the next available date. He did not make an application for the witness statements which logically indicated that the court’s order was complied with and the statements served. On 3rd November, 2009 when PW1, PW2 and PW3 testified there was no advocate on record for the Applicant but he did not lodge a complaint on the lack of representation and he subsequently cross examined the witnesses.

The next hearing date was 20th November, 2009. Prosecution had one witness present. The Applicant asked for the recalling of the three witnesses who had testified. The court ordered that the witnesses be recalled and witness statements supplied. When the matter came up next on 15th December, 2009 the Applicant’s advocate was ready to proceed but an adjournment due to the absence of witnesses was granted. This again logically points to the statements having been furnished. On 15th March, 2010 PW4

testified after which the Applicant's advocate applied that PW3 be recalled. The court however deferred the ruling on this request until after the investigating officer confirmed the availability of the witness.

On the next hearing date advocate for the applicant once again applied for the recall of PW3. The court ruled that PW3 and the remaining witness should be availed at the next hearing. At the next hearing PW5 was called and after he had adduced his evidence the prosecution closed its case. It should be noted that the Applicant did not deny the fact that the prosecution did not recall the witness. A ruling was made that a *prima facie* case had been established and the Appellant put on his defence. He chose to give an unsworn statement and waived the right to call witnesses. The Applicant thereafter escaped from lawful custody which forced the case to be withdrawn under **Section 87(a) of the Criminal Procedure Code**.

From this summary, it is clear that the Appellant's submission that he was never supplied with witness statements is not only baseless but unjustified. If anything it is purposed to stragulate an expeditious disposal of the case which negates a fair administration of justice. To the contrary, the record attests that the applicant was accorded a fair trial and at no time was he compelled to proceed without witness statements. In fact, the court allowed him to have his day as it conceded to recalling three witnesses who had testified.

Further, when the fresh trial was filed, the application for admissibility of the evidence adduced in **Cr. Case No. 1779 of 2009** was informed by the fact that the witnesses who had testified could not be traced to testify afresh. Indeed, the said provision is couched in candid terms thereby providing for conditions when evidence given in previous proceedings can be deemed admissible in current proceedings. For avoidance of doubt, the entire Section 34 of the Evidence Act reads as follows:

“Evidence given by a witness in a judicial proceeding is admissible in subsequent judicial proceeding or at a late stage in the same proceeding, for the purpose of providing the facts which it states, in the following circumstances-

a) Where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;

and where, in the case of a subsequent proceeding-

b) The proceeding is between the same parties or their representatives in interest; and

c) The adverse party in the first proceeding had the right and opportunity to cross-examine; and

d) The questions in issue were substantially the same in the first as in the second proceedings.

(2) For the purposes of this section-

a) The expression “judicial proceeding” shall be deemed to include any proceeding in which evidence is taken by a person authorized by the law to take that evidence on oath; and

b) A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.

Flowing from the above provision, I find that there was no illegality or irregularity *per se* with the court ordering that the proceedings recorded in **Cr. Case No. 1779 of 2009** be admitted in the current trial. That is to say that the prosecution had sufficiently demonstrated that the witnesses who had testified in the previous trial could not be available to testify afresh.

Having observed that an illegality was meted by the withdrawal and closure of **Cr. Case No. 1779 of 2009** under **Section 87(a) of the Criminal Procedure Code**, this court has no alternative but to recall the order. In the result, I hereby set aside the order of then Hon. N. Muya, Chief Magistrate given on 28th

September, 2011 ordering the closure and withdrawal of the case. Consequently, I find and hold that the institution of **Cr. Case No. 2153 of 2013** was illegal and I hereby expunge all the proceedings recorded in the said case including the process of taking plea. I order that the file thereby be closed. I substitute these orders with an order that the Applicant shall continue with his trial in **Cr. Case No. 1779 of 2009** from where it had reached before he escaped from lawful custody. The trial magistrate will so take over the trial upon compliance with **Section 200(3) of the Criminal Procedure Code**. Any exhibits produced in **Cr. Case No. 2153 of 2013** and formed part of the proceedings in **Cr. Case no. 1779 of 2009** shall revert to the latter file. The matter will be mentioned before the trial court on 25th November, 2016 for purposes of fixing a hearing date and compliance with the orders of this court. It is so ordered.

Dated and Delivered at Nairobi this 16th September, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Applicant present in person

2. M/s Akuja for the Respondent.