REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION NO. 90 OF 2016

REPUBLIC.....APPLICANT

VERSUS

SAMUEL MUNYAO…….....RESPONDENT

RULING ON REVISION

This revision originates from a letter dated 26th September 2016 by Hon. D. Orimba, the Principal Magistrate at Kangundo Law Courts, who forwarded the file for **R vs Samuel Munyao, Kangundo Criminal Case No. 12 of 2015** to this Court. Hon Orimba sought directions as to whether it is legal to re-open the case after an accused has been placed on his defence, testified, closed his case and a judgement date set.

The accused person in that case was arraigned in the trial Court on 6th January 2015 when he pleaded not guilty to a charge of assault causing actual bodily harm contrary to section 251 of the Penal Code. The hearing proceeded with the prosecution calling three witnesses before closing its case. The accused was found to have a case to answer and put on his defence, and he gave sworn testimony and called two additional witnesses before closing his defence case on 4th May 2016.

On that date, after the trial magistrate, Hon T.N Sinkiyian, set a judgment date of 18th August 2016, the prosecutor sought to call a doctor to produce the P3 as an exhibit. The accused did not oppose the application, and stated that he would also like to question the doctor on the extent of the injuries. On this basis, the trial magistrate allowed the application and re-opened the prosecution's case for that purpose, and gave the prosecutor leave to call a clinical officer other than the maker of the P3 from. The trial magistrate then allocated a further hearing date and vacated the judgment date.

This Court in this regard notes that the applicable procedure for hearings after an accused person has pleaded not guilty to a charge is set out in sections 211 to 215 of the Criminal Procedure Code. Section 211 of the Criminal Procedure Code provides that once the accused person is put on his/her defence the court shall proceed to hear the accused person and his witnesses if any. Section 212 provides 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 prosecution to adduce evidence in reply to rebut the matter, and section 215 provides that the court having heard the complaint and the accused person and their witnesses shall either convict the accused and pass a sentence upon or make an order against him according to law, or shall acquit him.

The applicable procedure and principle of law therefore is that the prosecution cannot re-open its case

once it has closed, except in limited circumstances where it is allowed to calling evidence in rebuttal. This exception is of limited scope, as the essence of the presentation of evidence in rebuttal is to call evidence to refute a particular piece of evidence which has been adduced by the defence. Such evidence is therefore limited to matters that arise directly and specifically out of defence evidence, and were not foreseen by the prosecution.

Where the evidence sought to be introduced in rebuttal is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it, then generally speaking such evidence is inadmissible. This is for the reason that the Prosecution cannot call additional evidence merely because its case has been met by certain evidence to contradict it. In addition, evidence available to the Prosecution *ab initio*, and which remedies a defect in the case of the Prosecution, is generally not admissible.

The issue of reopening of the prosecution case after the defence had closed it case was considered by Wakiaga J. in **Ruth Gathoni Gichuki v Republic & Another [2014] e KLR** wherein the learned Judge held as follows:

> 1. "**It is therefore clear that the only time when the prosecution is allowed to reopen their case is if the accused person in his defence introduces a new matter which the prosecutor could not have foreseen.**
>
> **2. The right to reopen the case should not be confused with the right to recall witnesses under section 150 of the criminal procedure code.**
>
> **3, A look at the application to reopen the case before the trial court and the nature of evidence the prosecution intend to submit will confirm that it is not evidence that has arisen from the applicant's defence so as to fall under the provisions of section 212 of CPC neither is it a right to recall witnesses under the provisions of section 150 or 200 of CPC.**
>
> **4. To allow the prosecution to reopen its case after the close of the defence case will amount to allowing the prosecution to fill in the gap in their case which will be prejudicial to the applicant and will amount to a breach of the right to fair trial."**

I therefore find that by allowing the prosecution to reopen its case the trial magistrate did not comply with the applicable procedure, and exceeded her jurisdiction as the said evidence sought to be introduced by the prosecutor was not being led in rebuttal, but to fill the gaps in the prosecution case, and also compromised the accused persons right to a free and fair trial.

I accordingly set aside the orders by Hon T.N Sinkiyian given on 4th May 2016 granting leave to the prosecution to re-open the prosecution case, and to call a clinical officer other than the maker of the P3 form. I also direct that the trial magistrate proceeds with the trial according to the procedure set out in sections 212 to 215 of the Criminal Procedure Code.

This ruling and orders to be furnished to Hon T.N Sinkiyian, Resident Magistrate at Kangundo Law Courts; the Accused person, namely Samuel Munyao; and the Directorate of Public Prosecution without delay.

DATED AT MACHAKOS THIS 31ST DAY OF OCTOBER 2016.

P. NYAMWEYA

JUDGE