



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

PETITION NO. 53 OF 2013

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOM UNDER ARTICLES 23 (1), 50(2), 165 (3) (b) & (d), 159 (2) (e) OF THE CONSTITUTION

1. ANNE MUNYUA
2. ANNE MUNEE MUTUKU
3. ESTHER NDUNGE JOHN
4. MONICAH WAMBUA
5. TERESIA MAITHYA
6. TABITHA MUTUA
7. MUTUKU NZIOKA
8. AMOS JAMES MULI
9. MUTISO NZOMO ROBERT
10. NZIOKA NTHYAKYO
11. WAEMA KILONZO
12. AMOS MBUU MUYUMBI
13. RICHARD KASONGO NGOSA
14. DANIEL MAINGI KAMUYA
15. MUSYOKA KYALO DOMINIC
16. KILONZO MUIA
17. MUTUA WAEMA
18. MUSEMBI MUTISYA
19. TIMOTHY KANINI TERESIA

20. WAMBUA MAITHYA
21. WAMBUA NGOOSA
22. MAINGI KIOKO
23. DOMINIC MUSEMBI
24. PATRICK KIIO KIMUYU
25. CHARLES MUSYOKA MUTUNGI
26. DOMINIC MUTUA MUNYAO
27. MULINGE JOHN
28. MULI MACKENZIE
29. NZIOKA JOHN
30. MAKAU MUINDI
31. MUTUKU MUTISO
32. MWEU JUMA
33. MAURICE MUTINDA
34. JOSEPH MAKAU
35. JOSPHAT KYALO
36. KIMUYU MUTUNGA
37. MUTUA JOHN
38. CHARLES MUTUKU
39. JAMES MUTISYA KISENGE
40. CHARLES WAEMA
41. MUSEMBI JOHN
42. MAKAU MAKENZIAPPLICANTS/PETITIONERS

VERSUS

1. THE CHIEF MAGISTRATE, MACHAKOS LAW COURTS.. 1ST RESPONDENT
2. THE HONOURABLE THE ATTORNEY GENERAL 2ND RESPONDENT

J U D G M E N T

1. By a petition dated 9/10/2013, the Petitioner seeks the following reliefs:-

- a. **“An order do issue that it is a violation of the Petitioners’ rights to allow evidence tendered against them without (statements) having (been) supplied to them in advance.**
- b. **A declaration that the Petitioners’ fundamental rights have been and/or are being violated.**
- c. **A declaration that Section 150 of the Criminal Procedure Code is unconstitutional in so far as it allows evidence by the prosecution against an accused person without having been given copy of the same and in advance.**
- d. **A mandatory injunction directed to the magistrate’s court not to allow evidence in contravention of Article 50 (2).**
- e. **An order that the trial be tried or continued by another magistrate other than Honourable L. Simiyu.”**

2. According to the affidavit in support of the petition, the Petitioners were arrested following a complaint made by the agents and/or servants of the Interested Party. The Petitioners were subsequently arraigned before the **CM’s Court, Machakos Criminal Case No. 1784/2012**. The Petitioners stated that when the trial commenced, the defence applied to be supplied with the statements recorded by the prosecution witnesses together with any documentary exhibits. During the trial process, the prosecution applied for adjournment to call a surveyor to testify. The Petitioners have deponed that the surveyor’s report was not among the list of exhibits supplied to the defence. That when the defence objected to the said application, the trial magistrate invoked **section 150** of the **Criminal Procedure Code** and proceeded to allow the application. The Petitioners’ complaint is that allowing the application amounted to trial by ambush as no surveyor’s report had been disclosed.

3. That the trial magistrate made the following order *“the defence be and is at liberty to obtain maps, documents and any endorsements from lands office as are crucial for use in this matter”*.

4. That the said order is ambiguous and prejudicial to the Petitioners as they cannot tell the case they face and that the said order is tantamount to asking the Petitioners to investigate their own case. According to the Petitioners, the trial magistrate ceased being an independent arbiter and has descended into the conflict arena by assisting the prosecution to prosecute the Petitioners.

5. The application is opposed. The 1st and 2nd Respondents and the Interested Party filed grounds of objection. A summary of the said grounds of objection is that the Petitioners will have their right to cross-examine the surveyor. That **section 150** of the **Criminal Procedure Code** is not unconstitutional. That no rights of the Petitioners have been breached. That the Petitioners’ application for the recusal of the trial magistrate ought to have been made before the trial magistrate. That the trial court has a constitutional mandate to try matters without undue regard to technicalities of procedure. The Respondents accused the Petitioners of trying to shop for a court.

6. The Petition was canvassed by way of written submissions which I have duly considered.

7. One of the issues raised herein is whether the Petitioners’ constitutional rights were violated. **Article 50 (2) (j)** of the Constitution provides as follows:-

50. (2) “Every accused person has the right to a fair trial, which includes the right-

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”

8. It is trite that to satisfy requirements of a fair trial, the prosecution is duty bound to provide an accused person with relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial etc (See for example **George Ngodhe Juma & Others –vs- The AG Misc. Cr. Application 345/2001** and **Thomas Patrick Gilbert Cholomondeley –vs- R 2009 e KLR**).

9. The Court of Appeal stated in the **Cholomondeley Case** (supra) as follows:-

“the prosecution’s duty to disclose continues during the pre-trial itself, so that if any new information is obtained during the trial, it must be disclosed”.

10. The duty to disclose is therefore a continuing one. The duty of the court is to ensure a fair trial for the accused. This right is protected once the accused is informed of the evidence before it is produced and the accused given reasonable access to it to adequately prepare for his or her defence.

11. **Section 150** of the **Criminal Procedure Code** which the court has been asked to declare unconstitutional provides as follows:-

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall 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 to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

The proviso to **section 150** of the **Criminal Procedure Code** provides for adjournment to enable parties to adequately prepare for cross-examination. **Section 150** of the **Criminal Procedure Code** is therefore not unconstitutional. There is no ambush as long as the prosecution or the defence has been given time to prepare for the cross-examination. In my view, it matters not whether **section 150** of the **Criminal Procedure Rules** is invoked *suo moto* by the court, or the prosecution or the defence applies.

12. The filing of this petition was triggered by the orders made by the trial court on 7/6/2013. The orders were, inter alia as follows:-

- **‘That the defence be and is at liberty to obtain maps, documents and any endorsements from lands office as are crucial for the use in this matter.**
- **That the defence be and is at liberty to engage the services of a licensed surveyor of the choice to be available during the scene visit and during time of measurement by the District Land Surveyor.’’**

It is not clear whether the wording of the trial court is an error or whether it is a slip of the pen in reflecting the word “defence” in the orders in question. Be as it may, as stated in the **Cholemondeley case** (supra) the defence has no reciprocal duty to disclose their case to the prosecution. The burden of proof also lies with the prosecution. The defence can therefore not be asked to provide any documents or to avail a surveyor.

13. On the question of recusal, the application ought to have been made before the trial magistrate. (See for example **R –vs- C.S for Transport and Infrastructure & 5 Others Ex parte – Kenya Bus Service Association and 8 others (2014) e KLR Jasbir Singh Rai & 4 Others (2013) e KLR**. The only issue raised concerning the trial magistrate in making the impugned decision is to allow the calling of further evidence. However, as stated in the Bangalore principles of Judicial conduct, Judicial rulings or comments on evidence made during the course of the proceedings do not fall within the prohibited conduct, unless the judge appears to have a closed mind (See **R vs C.S. for Transport & Infrastructure** (supra). I see no reason to disqualify the trial magistrate from hearing this case.

14. As stated by the Court of Appeal in the **Cholomondeley case** (supra) while sounding a caution on the undoubted right of appeal *“first, the fact that a trial judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all.”*

15. With the foregoing, I find no merits in the petition and dismiss the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 24th day of February 2015.

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JUDGE