



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.70 OF 2015

REPUBLIC .....APPLICANT

VERSUS

MICHAEL EZRA MULYOOWA.....RESPONDENT

RULING

The Director of Public Prosecutions was aggrieved by the decision of the trial magistrate in **Makadara CMC Criminal Case No.1027 of 2010 Republic –vs- Michael Ezra Mulyoowa** who refused to grant him leave to substitute the charge sheet. According to the Director of Public Prosecutions, there was no justification why the trial court refused to grant him the chance to exercise his powers as provided under **Section 214** of the **Criminal Procedure Code**. It is the prosecution’s case that it would be prejudiced if it is compelled to continue with the case before substituting the charge sheet. On the other hand, the prosecution contends that the respondent would not be prejudiced because he would have the opportunity, if he so wished, to recall the prosecution witnesses who have already testified. The prosecution contends that there was no justification why the trial court declined its request to substitute the charge and include an alternative charge. The Director of Public Prosecutions therefore urged the court to revise the order issued by the trial court declining to grant its request to be allowed to substitute the charge by adding an alternative count. The prosecution’s application was supported by an affidavit sworn on behalf of the complainant by his counsel Odhiambo Adala.

The application was opposed. The respondent filed a replying affidavit in opposition to the application. He stated that he has been in court for a period of five (5) years since he was charged with the offence. He was of the view that the application made to amend the charge sheet was in bad faith and meant to frustrate the case from being concluded. He was of the view that unjustified judicial process was being used to frustrate the case from being concluded. He deponed that, so far, 17 witnesses had testified in the case. Only one witness was remaining to give his testimony. He stated that he had incurred a lot of expenses in attending the case noting that he was a foreign national who had been charged in Kenya. He pleaded with the court to disallow the application.

During the hearing of the application, this court heard oral rival submission made by Ms. Aluda for the State and by Mr. Wandati for the Respondent. They essentially reiterated the contents of the application and the supporting affidavits filed by the respective parties. The issue for determination by this court is whether this court can revise the order issued by the trial magistrate declining to allow the prosecution to amend the charge sheet by including an alternative charge at the stage that the proceedings has reached. **Section 214(1)** of the **Criminal Procedure Code** provides as follows:

*“Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either is in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge sheet as the court thinks necessary to meet the circumstances of the case:...”*

There is however a caveat that where the charge is substituted or amended and certain witnesses have testified, the accused will be given an opportunity to demand for the witnesses who had testified to be recalled for further cross-examination. That the prosecution has the right to amend or substitute the charge before the close of its case is not in doubt. However in the circumstance of this case, this court is of the opinion that the rights of the accused to be subjected to a fair trial process will be infringed if the prosecution is allowed to amend or substitute the charge sheet after 17 witnesses have testified. It is common ground that the only witness remaining to testify is the investigating officer. This is a formal witness whose evidence essentially is meant to wrap up the evidence adduced by all the prosecution witnesses. This court holds that the trial magistrate was within his right to refuse the prosecution to amend or substitute the charge at that later stage of the proceedings. Although **Section 214** of the **Criminal Procedure Code** grants an accused person the right to recall any witness who had testified for the purpose of cross-examination, this court has taken into consideration the fact that the accused's trial before the subordinate court has been pending for a period of five (5) years. If the prosecution was to be allowed to amend or substitute the charge, then it would mean that the trial of the respondent would take a longer period if he chose to exercise his right to re-call the 17 witnesses who had testified for cross-examination. The rights of the accused person to be accorded expeditious trial will obviously be infringed if the application for revision is allowed.

In the premises therefore, the application for revision lodged by the Director of Public Prosecutions on 22<sup>nd</sup> May 2015 lacks merit and is hereby dismissed. The interim orders issued by this court staying proceedings before the trial magistrate's court is hereby set aside. The trial before the subordinate court shall proceed to its conclusion. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JULY 2015**

**L. KIMARU**

**JUDGE**