



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL APPEAL NO. 143 OF 2015

JAMES MWALO ISIKA & 8 OTHERS..... APPELLANTS

VERSUS

REPUBLIC..... RESPONDENT

RULING

The Appellants/Applicants had filed an application by way of Notice of motion dated 1st September, 2015, seeking to be released or admitted to bail pending the hearing of the Appeal.

However, on 15/9/15 their counsel Mr. Odhiambo and Mr. Waithera indicated to court that if the appeal is admitted, they would abandon the said application and proceed to have the main appeal fixed for hearing to save on time.

They also requested that they proceed with Criminal Appeal No. 143 of 2015 and withdraw Appeals No. 123 to 130, all of 2015, which were filed by other Appellants.

They then sought court's permission to take further evidence on behalf of the Appellants as per the provisions of the Criminal Procedure Code which gives the court power to take further evidence when the court is dealing with an appeal from the subordinate court. They said that there is a lady who has evidence that can assist the court arrive at a proper decision with regard to the innocence of the Appellants and was not called then because the Appellants were unrepresented in the subordinate court.

Mr. Wangila for the state has not opposed the application to withdraw Criminal Appeals No. 123 to 130 all of 2015.

He opposed the application by the Appellants' counsel to call further evidence. He stated that section 358 of Criminal Procedure Code provides that such a decision should be made by the court itself and not designed for an application by counsel. He went on to state that the court has not looked at the appeal to the effect that it would call for more evidence.

Mr. Wangila, however, prayed that if the application is not dismissed, the counsel be directed to file a formal application for them to respond.

He prayed that that particular application be dismissed and the court gives them a hearing date since the Applicants had decided to abandon their application for bail pending Appeal.

In response, Mr. Odhiambo and Mr. Waithera, stated that the court cannot make the decision to call further evidence suo-moto without being prompted by either the appellant or respondent. They also said that the section does not bar the appellant or respondent from making an application of this nature or

bringing it to the attention of court that there is such need as long they give reasons for this.

Further, Mr. Waithera said that a perusal of the lower court proceedings will show that there is a reason for further evidence since all the Appellants mentioned this lady while giving evidence in their defence.

Having listened to all the counsel in their submissions to court, I allow the applications by the Applicants' counsel in the following terms as they are unchallenged:

1. The Appeal is hereby admitted and the application dated 1st September, 2015 abandoned.
2. The Appeals filed by the nine Appellants being Criminal Appeals No. 123, 124, 125, 126, 127, 128, 129 and 130 all of 2015 are hereby withdrawn.

As for the application by the Appellants' counsel to be allowed to call further evidence as provided for under Section 358 of Criminal Procedure Code, I agree that I have not looked at the Appeal to enable me grant the same.

Section 358 of the Criminal Procedure Code provides that;-

“In dealing with an appeal from a subordinate court, the High Court if it thinks additional evidence is necessary, shall record its reason and may either take such evidence itself or direct it to be taken by a subordinate court.”

A reading into this section of the law clearly does not bar either party in making an application requiring the court to call for further evidence, as long as they give reason for this.

I however direct the Appellants' advocates to move the court by a formal application for consideration.

Ruling signed, dated and delivered on the 29th day of September, 2015.

D.O. CHEPKWONY

JUDGE

In the presence of;-

M/S Ogweno for the state

Mr. Nabwana holding brief for Mr. Odhiambo for 1st to 9th Appellant except 5th. Mr. Waithera for 5th appellant

Court Assistant Mr. Kiarie

Mr. Waithera – Pray for a hearing date for the Appeal.

D.O. CHEPKWONY

JUDGE

29/9/15

Court – Hearing of the Appeal is fixed for 16/11/15.

D.O. CHEPKWONY

JUDGE

29/9/15