



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CRIMINAL APPL. NO. 46 OF 2013

EUTICHUS MUCHEMI GATUNDU.....APPLICANT

Versus

REPUBLICRESPONDENT

RULING

BACKGROUND

1. The applicant is charged with the offence of Robbery with Violence contrary to section 296(2) of the Penal Code and in Criminal case No. 56 of 2012 Othaya He pleaded not guilty for the said charges on 8th February 2012.
2. The trial commenced before the Principal Magistrate Othaya in which six witnesses testified on behalf of the prosecution and that the accused persons were put on their defences and the applicant EUTICHUS MUCHEMI GATUNDU stated that he will give sworn statement of defence and call two (2) witnesses.
3. On 14th March 2013 the applicant indicated to court that he will not be giving any evidence.

APPLICATION

4. On 24th October 2013 an application filed under certificate of urgency on 8th March 2013 brought under Article 50(1) (2) c, h, and j of Constitution of Kenya 2010 and section 150 of CPC was placed before this court which application was certified urgent and fixed for hearing.
5. The second application was filed by PETER MWANGI GAKUYA the 2nd accused in which he sought an order that the trial before the Principal Magistrate's court Othaya proceed to conclusion.
6. On 24th October 2013 the two applications were consolidated for hearing.

SUBMISSIONS

7. The 1st applicant submitted that he wished to recall P.W.1 for cross examination since he did not have time to cross examine him during the trial and in his affidavit he deponed that the trial magistrate declined his application to have him recalled.
8. Mr. Njue for the state opposed the application and submitted that the applicant had all the opportunities to cross examine the said witnesses.
9. From the proceedings herein it is clear that the applicant cross examined P.W.1 on 11th July 2012 and at no time made any application before the trial court as alleged in his affidavit in support of the application herein.

ISSUE

10. From the submissions herein the only issue for the court's determination is when can the right to recall a witness be exercised.
11. This issue has been decided in the case of MURIMI v R (1967) EA where the court held that section 150 of CPC gives the court power to summon any person or recall or re-examine any person who has already testified if evidence appears essential for the just decision of the case but unless the evidence to be tendered by the recalled witness is of a purely formal nature a case for the prosecution should not be reopened to call a witness in order to establish a case against an accused person.
12. Though this right seems to be limited to the court, it is also clear that both the prosecution and the defence can apply for the recall of any witness and that this application must be made before the trial court.
13. The mandate to recall a witness is for the trial court which heard the evidence and it is not for this court to decide so noting that no such application was made before the trial court and that the application comes late in the day after the applicant's co-accused has given his defence.
14. I therefore find no merit in the application herein which I hereby dismiss and direct that the file be sent back to Othaya Principal Magistrate's Court for final determination noting that this court had not granted any stay of proceedings.
15. From the above ruling the application by PETER MWANGI GAKUYA is allowed.

Dated, signed and delivered at Nyeri this 4th day of April 2014.

J. WAKIAGA

JUDGE

Applicant in person.

Mr. Gitonga for the state

Court: Ruling read in open court in the presence of the applicant and Mr. Gitonga for the state.

J. WAKIAGA

JUDGE