



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**APPELLATE SIDE**

**CRIMINAL APPEAL NO. 67 OF 2013**

*(From the original conviction and sentence in criminal case no. 1088 of 2010 of the Principal Magistrate's Court at Kilifi before Hon. A. Obura – PM)*

**MOHAMED SANGA TSUMA ..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. While preparing my ruling I have noted that the parties' submissions address both the appeal and the Notice of Motion and have decided to deal with them as such to avoid further unnecessary delay.
2. The appeal filed by the appellant against the ruling of the trial court as delivered on 29<sup>th</sup> July, 2013 essentially brings to the fore the scope and application of Section 150 of the Criminal Procedure Code in Criminal trials. A second issue, raised by the State, is whether the appeal can be entertained under Section 347 of the Criminal Procedure Code.

Both parties have affirmed the court's exercise of judicial authority under Article 159 of the Constitution.

3. The gist of the appellant's complaint was that the trial court, invoked Section 150 of the Criminal Procedure Code after the close of the prosecution case, to summon several witnesses, rather than make a finding under Section 210 or 211 of the Civil Procedure Code. This, the appellant argues amounts to an illegality, a miscarriage of justice and a violation of the appellant's rights under Article 159 (2)(b). For their part, the State supports the trial court's action and asserts that the invocation of Section 150 of the Criminal Procedure code is in line with Article 159 in particular sub Article (2) that justice be done to all. They further state that the witnesses summoned were cross-examined by the defence.
4. Although the appellant has pegged his appeal on the provisions of Article 159 (2) (b), the substantive provisions on fair trial are enshrined in Article 50. Article 159(2) (b) cited by the appellant is in the following terms:

**“in exercising judicial authority, the courts and tribunals shall be guided by the following principles:**

- a. ....
- b. **Justice shall not be delayed”**

These principles are intended to guide the court exercise of its judicial authority. Article 50(2) (C) prescribes the right of an accused to “*have the trial begin and conclude without unreasonable delay*”. The trial court is also obligated to uphold the rights enshrined in Article 50 of the Constitution.

- 5. In the case of *Anarita Karimi Njeru v Republic [1979]1 KLR 154* the court stated that a party alleging a violation of his or her constitutional right should demonstrate such violation as precisely as possible. In the instant case, the plea was taken on 15<sup>th</sup> December, 2010. Following preliminaries, hearing began in earnest on 14<sup>th</sup> July, 2011. After two witnesses were heard, the case was delayed as the complainant and the accused was considering a “settlement” with the aim of the former withdrawing his complaint. It did not materialize and the prosecution, was forced to close its case in 10<sup>th</sup> June, 2013 and further subsequently denied the request to “re-open” its case. It is not clear what provisions of the Criminal Procedure Code the request was based on. On both occasions the trial court correctly affirmed the appellant’s right to a fair trial “within reasonable time.”
- 6. In its ruling on 29<sup>th</sup> July, 2013 the court gave reasons for the decision to summon certain witnesses, citing article 159 and Section 150 of the Criminal Procedure Code. All the summoned witnesses attended court and testified on 16<sup>th</sup> September, 2013. The appellant was given an opportunity to cross-examine the witnesses and the court had yet to give its ruling when he appealed to this court. From the foregoing, it is difficult to accept that the appellant’s case was unreasonably delayed by the trial court’s action as he now complains. The appellant has not alleged any other violation of his right to a fair trial beyond the alleged delay. While it is true that Section 150 gives wide power to the court to summon witnesses *suo motu*, that power must be exercised in accordance with Article 50 and the principles in Article 159 of the Constitution.
- 7. In appropriate cases, the court is entitled, even after the close of the prosecution’s case to invoke Section 159 of the Criminal Procedure Code rather than give its ruling under Section 210 of or 211 of the Criminal Procedure Code. From her ruling the trial magistrate was clearly alive to the provisions of Article 50 and 150 of the Constitution. She expressed the commitment to have the summoned witnesses cross-examined and that was subsequently done. Secondly, she justified her action: She noted the seriousness of the charges and stated that her action was necessary in order to do justice to all under Article 159 (2).
- 8. I agree with the State objection that this appeal may be premature because there is yet no ruling or judgment on the entire evidence taken. But more importantly, there is no demonstration by the appellant of the violation of his right to a fair trial “within reasonable time”. In my view it would not be proper at this court in the circumstances of this case to anticipate the final decision of the court by quashing the court’s impugned ruling as prayed by the appellant. The appeal is therefore dismissed. The court directs that the trial court expedites the matter.

Delivered and signed at Malindi this **24th** day of **June, 2014** in the presence of: Mr. Nyongesa for the State.

**C. W. Meoli**

**JUDGE**