



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Case 50 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

DAVID SILALE EKENO.....1ST ACCUSED

FRANCIS OYIE LOMONING.....2ND ACCUSED

RULING

This Ruling relates to an oral application by Mr Olonyi learned counsel for the accused for the re-call and further cross-examination of five prosecution witnesses namely PW1 – PW5, inclusive.

Counsel relied upon the provisions of Section 146(4) of the Evidence Act, (*Cap. 80, Laws of Kenya*). Counsel submitted that the said provision empowers the court to re-call any witness before judgment and not necessarily during or after closure of the prosecution's case, and that the application was made in good faith, and that it should be allowed.

The application was however opposed by Ms. Idagwa learned State Counsel who submitted that Section 146(4) of the Evidence Act does not allow the Defence to recall any witness and urged the court to disallow the application.

I have examined the said Section 146(4) of the Evidence Act and since I am of the view that it cannot be read in isolation from the other provisions of the Section, I set it out in full below -

“S. 146(1) Witnesses shall first be examined in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined.

(2) Subject to the following provisions of this Act, the examination in-chief must relate to the relevant facts, but the cross-examination need not be confined to the facts to which the witness testified in his examination in-chief.

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination, and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

(4) The court may in all cases permit a witness to be re-called either for further examination in-chief or further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

I think, along with this Section, should also be considered is Section 200(3) and 201(2) of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*) -

“S. 200 (1)

(1)

(2)

(3) where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

And Section 201 provides -

“201. (1)

(2) The provisions of Section 200 of this Act shall apply mutatis mutandis to trials held in the High Court.”

My understanding of both Sections 146(4) of the Evidence Act, and SS 200(3) and 201(2) of the Criminal Procedure Code is that an accused is entitled to demand the recall of any witness for purposes of cross-examination in specific circumstances – foremost among them where there has been a change of the trial magistrate or judge. The purpose of the recall is to afford the new trial magistrate or Judge, the opportunity to observe the demeanour of the witness or witnesses, or to clarify the evidence or some parts thereof which the accused or his counsel was unsure about.

Mr. Olonyi learned counsel for the accused suggested and submitted that the right to recall any witness for purposes of cross-examination is exercisable at any time before judgment. In this regard I think counsel is equating the right to recall a witness to the right to amend pleadings at large with leave of court under Order VIII rule 5(1) of the Civil Procedure Rules, 2010. I think that this comparison is inappropriate and cannot be made. In civil proceedings the purpose of late amendments is to enable the court to determine the real question in controversy between the parties.

In the criminal law jurisprudence system, the right to recall a witness for purposes of cross-examination is to bring all the evidence in relation to the commission of the offence or innocence of the accused. That right is conferred upon the accused on two occasions by law, **firstly** whenever there is a change of the trial magistrate or judge and **secondly** at any time both before and after the close of the prosecution case.

The question here is at what stage after the closure of the prosecution's case should the accused ask for the recall of any witness? I think it should be immediately **before** the commencement of the defence case. This is so to enable the accused to better prepare his own defence. In this case the accused have already testified on oath, and in essence closed their case. If for arguments sake their application were so granted, and the witnesses were recalled, it would essentially mean re-opening the trial and discarding the accused's own evidence. It would mean a trial would go on for ever. Like in civil cases, there must be finality in the criminal trial, subject of course to an accused's right of appeal.

An accused person who stakes out several adjournments after giving his own sworn evidence is I think playing Russian roulette with the mind of the court, and should not I think, be allowed to do so. Though the language of Section 146(4) is permissive or directory “may in all cases”, the provision is usually mandatory where the prosecution has yet to close its case. Thereafter it is entirely discretionary, and the court is bound to inquire into the motive of recalling witnesses long after they have testified and had been cross-examined and re-examined by competent counsel.

In the instant case, the prosecution closed its case on 6.05.2010. The accused were put on their defence on 11.06.2010. The accused did not commence their defence until 8.06.2011 a year later when the both

accused testified as DW1 and DW2 and gave sworn evidence and the defence hearing was adjourned to 10.10.2011 to allow the accused to call one “*independent*” witness. No such independent witness was availed on 10.10.2011, when it was reported that the said witness was a Form II student at Athinai Secondary School and was not available as he was attending school.

A similar excuse was given on 11.11.2011 when the matter was fixed for hearing on 2.02.2012. Again the student witness was not availed, and the matter was adjourned to 18th & 19th July 2012, when again counsel for the accused informed the court that he was not ready because “*some key witnesses had not turned up*” and the matter was put down for hearing on 5.11.2012.

This court was not sitting on that date and defence hearing was fixed for 29.11.2012. Defence counsel did not attend court on that date and the matter was put for hearing on 13.02.2013 when new counsel Mr. Olonyi appeared on record in place of Mr. Maragia, and the matter was fixed for hearing on 11.04.2013, when Mr. Olonyi after going through the record of proceedings applied for the recall of prosecutions witnesses PW1-PW5. These were the witnesses whose evidence was taken and recorded by my sister Hon. Lady Justice Mugo who first heard this case.

When I took over this matter on 6.05.2010, Mr. Maragia, learned counsel for the accused addressed the court thus -

“This matter proceed from where Lady Justice Mugo left. The accused are agreed.”

The court ordered -

“The matter to proceed from where Lady Justice Mugo left.”

It is thus clear to me that that was the right time to recall those witnesses and not now, nearly over three years since I took over the matter, and after adjournments lasting over two years. I agree with the prosecution counsel that the application is made in bad faith, and is an abuse of the process of court. It is disallowed.

I direct that the accused too close their case if they are unable to call the so-called “*independent*” witness.

It is so ordered.

Dated, signed and delivered at Nakuru this 26th day of April, 2013

M. J. ANYARA EMUKULE

JUDGE