



REPUBLIC OF KENYA

High Court at Kisumu

Criminal Miscellaneous Application 18 of 2013

AART PETER VAN WIJK.....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

The applicant's application dated 18<sup>th</sup> March 2013 prays for the following reliefs:-

- 1. That this Honourable Court be pleased to call and examine the record and proceedings before the subordinate court in Kisumu CMCRC No. 2 of 2012 Republic v Aart Peter Van Wijk for purposes of satisfying itself as to the correctness, legality or propriety of the said proceedings and of any finding of the subordinate court aforesaid.**
- 2. The court be pleased to stay further proceedings in Kisumu CMCRC No. 2 of 2012 Republic v Aart Peter Van Wijk pending the completion of the revision process prayed for in order 1 above and or until further orders of this Honourable court.**

The said application is supported by the applicants affidavit sworn 18<sup>th</sup> March 2013. The grounds that the application is based are that the applicant in the criminal trial pending at the lower court was not accorded a Dutch interpreter a language which he is well versed and therefore he was prejudiced from the beginning.

**Mr. Nyamweya** counsel for the applicant further argued that although the applicant was represented by **Mr. Onsongo** Advocate, he did not understand or follow the proceedings.

He further argued that there was no substituted charge sheet which the prosecution had promised and the same if it had been brought would have been read in Dutch; the applicant's language.

The applicant further attached the evidence that culminated into him being put on his defence. He in particular argued that no evidence of arson was proved against him or of being in the country illegally, yet the trial court decided to put him on his defence.

The application was opposed by **Mr. Kiprof** the learned State Counsel vide the replying affidavit of **Magoma Kennedy**. He argued that the application is unmeritorious as the applicant was all along represented by counsel and he cannot afford to argue that he did not understand the language of the court. He prayed for the same to be dismissed.

I have carefully perused the said application as well as the attached hand written lower court's proceedings. What is not in dispute is that the applicant has all along been represented by Mr. Onsongo, Advocate.

From the date of taking plea the court record shows that the applicant did comprehend the language of the court. There is nowhere, where it is indicated that he did not understand English, the language which the courts proceedings of 3<sup>rd</sup> January 2012 is recorded.

On 19<sup>th</sup> January 2012 when this matter came up for hearing Mr. Onsongo counsel for the applicant told the court that he was ready. The prosecution said:-

**“I pray for an adjournment. I pray to substitute the charge sheet. The earlier charge sheet does not indicate the value of the property”.**

Mr. Onsongo did not oppose the application but went a head to make an application for his clients properties to be released to him. Ultimately on that day the court made favourable orders to both the prosecution and the defence.

Of particular significance the court said:

**“Application for substituted charge sheet is allowed. The substituted charge sheet to be read to the accused person during the hearing date when we shall have a Dutch interpreter”.**

**“The Executive Officer to ensure and avail a dutch interpreter on 1<sup>st</sup> March 2012 when this matter will proceed for hearing”.**

On 4<sup>th</sup> April 2013 when the matter came up for hearing the prosecutor said:- **“I have two (2) witnesses but we do not have a dutch interpreter”.**

Onsongo responded **“We can proceed without the interpreter”**

The matter then proceeded from that date onwards where at all times Mr. Onsongo was ready to proceed and he went ahead to cross examine the prosecution witnesses appropriately.

I have deliberately reproduced the above court proceedings because the applicant's application is grounded on the fact that he did not understand the proceedings in English.

I am respectfully unable to agree with the applicant. The purpose of hiring a legal representative is so as to take care of ones interest. The understanding between a counsel and his client is confidential and privilege. The counsel is, so to speak, the mouth piece of his client.

From the record, and indeed this is a court of record, there is no iota of proceedings showing that the applicant did not understand or appreciate the proceedings.

The question of the fresh charge sheet that was to be brought, which from the record the same seemed not to have been brought, cannot be an issue at this stage. The discretion of introducing afresh charge sheet or not is within the prosecution. The fact that they did not bring it is not for the applicant to demand. The provisions of Section 362 and 364 of the Criminal Procedure Code Chapter 75 laws of Kenya are very clear. This court may examine the subordinates courts Criminal Proceedings **“for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court”** (See Section 362).

Section 364 (2) States:-

**“No order under this Section shall be made to the prejudice of an accused person unless he has had**

**an opportunity of being heard either personally or by an advocate in his own defence:**

**Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned”.**

Subsection 5 states:-

**“When an appeal lies from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed”.**

My reading of the above portion of the law clearly goes contrary to the applicant's application. He was duly represented by a counsel, as required. The said counsel did not protest that his client did not appreciate the language of the court.

Further on perusal of the proceedings and in particular the time of cross examination I am persuaded that the counsel appreciated his brief and he was well instructed.

Equally if the applicant was dissatisfied with being put on his defence, he had an option of appealing to this court as provided by Subsection (5) above. To that extent therefore this court cannot exercise the discretion of revision

Mr. Nyamweya during his submission told the court that there was and indeed there is a Dutch interpreter available. My advice therefore is that, that interpreter should be used for the benefit of the applicant at the time when he shall be presenting his defence if need be.

I do not find any merit in this application to exercise the revisionary powers granted to this court. There is no prejudice suffered by the applicant so far from the proceeding at the trial court. In any case as alluded above this is not a case for appeal although the applicant had the right of appealing against the decision of the court to put him on his defence. The application is otherwise disallowed.

**Dated, signed and delivered at Kisumu this 15<sup>th</sup> day of May 2013**

**H. K. CHEMITEI  
JUDGE**

**In the presence of:**

.....Advocate for the Applicant

.....Advocate for the Respondent

*HKC/aao*