



ORIGINAL

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. NO. 13 OF 2009

SHEM MAGANDA NGOLO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1). The applicant herein is charged with two offences in the lower court namely; **“Defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 Laws of Kenya and Indecent Act with a child contrary to section 11 (1) of the sexual offences Act No. 3 of 2006 Laws of Kenya”**.

2). The matter substantially proceeded before the lower court and when the applicant was put on his defence he chose to give unsworn evidence. His counsel prayed that he be allowed to lead his client when giving his unsworn testimony. The trial court refused and referred this court for directions after the applicant filed a constitutional reference.

From the application the issues which were framed for determination are two namely;

- a. **Whether it will not be prejudicial to the prosecution to have the applicant led throughout his unsworn statement when he will not be subjected to cross examination.**
- b. **Having had choice to give sworn evidence or unsworn statement would it be unconstitutional if he is not led by counsel?**

3). **Mr. Kopot** counsel for the applicant argued that the question of legal representation is a constitutional right. This right permits the applicant to be led and or assisted throughout the trial even in situation like what is at hand. He further contended that since he was well seized of the issues and having the benefits of the notes taken during the trial proceedings he should be allowed to lead his client.

He further argued that the prosecution shall suffer no prejudice and in any case if new evidence are

introduced by the applicant the respondent shall have the liberty of asking to cross examine or call fresh evidence to rebut.

He argued that since the unsworn testimony does not hold much probative value the applicant should in fact be led during his testimony.

4). **Mr. Mongare** counsel for the respondent vehemently opposed the same. He argued that since the prosecution will not have an opportunity to cross examine the applicant he should not have the benefit of counsel. He said that if the applicant will raise new issues then the prosecution may not have an opportunity to cross examine him.

He buttressed his argument by the provision of section 211 of the Criminal Procedure Code which is silent on whether or not an accused person who has elected to give unsworn testimony ought to be led.

5). Having heard the rival parties, it is clear from our statutes and practice that there are three ways in which an accused is permitted to defend himself namely;

1. **By sworn testimony where he will be cross examined.**
2. **By unsworn testimony where he shall not be cross examined.**
3. **By keeping quiet and letting the court make a decision.**

6). In the second choice which the applicant has chosen he is still capable of calling his witnesses. It is always presumed in my opinion that a party who is well represented by a counsel shall always have the benefit of guidance and direction from his counsel. It is equally expected that even the choice to give unsworn testimony is derived from such an advice and that he must have been advised on the merits and demerits of such line of defence. It is therefore easily concluded that the applicant was fully aware of the consequences of his decision and also confident that he could communicate with the court. The counsel for the applicant relied heavily on Article 50 (7) of the constitution which states:-

“In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court”.

7). This sub article is very clear, for the basic reason that the intermediary is supposed to assist an accused or a complainant to communicate with the court. An intermediary is meant to assist where the accused is unable to communicate and respectfully it is not tantamount to examination in chief.

8). I do not find any reason to suggest that the applicant cannot effectively communicate with the court. From the reasons advanced by the applicant it would appear that the counsel's intention for wanting to lead the applicant is so that he (the accused) may not miss the points he (counsel) noted during the prosecution's case but not to assist him in communication. That would clearly amounts to examination in chief.

9). In the South African case of **The State -VS- Bathusi [1978] BLR 20 (HC)** the court faced with similar situation had this to say:-

“It is contrary to generally accepted practice in South Africa and England for counsel to lead accused person in their unsworn statements and I cannot accept the argument put forward in the above case that it would be contrary to section 12 (d) of the constitution to deprive the accused of the help of his counsel in making his unsworn statement. He is centrally not so deprive. He has no doubt taken the advice of his counsel in choosing to make an unsworn statement and has no doubt

told his counsel what he intended to say. They have presumably described the content of his statement.

The accused was certainly not in anyway unconvinced in making his statement unaided, and had no difficulty in repeating almost word for word his previous statement”.

10). In the case of **Cheruiyot -VS- Republic [1976 -1985] EA 27** our Court of Appeal while dealing with the right of accused to make an unsworn statement had this say:-

“An accused person has an unbreachable right to elect to make an unrestrained unsworn statement without rebuke and without reminders in his defence in court. His statement must be recorded in full by the court and not cut short, however long, tedious, repetitive or unintelligible it may appear, even if certain matters mentioned therein are already in the knowledge of the court as a result of perusal of depositions at the preliminary inquiry or other documents. The accused must be freely allowed to make his defence in his own way”.

11). Based on the above authorities and the circumstances obtaining herein I do not think the applicant shall in any way be prejudiced if he gives his testimony unaided by counsel. As earlier stated he must have been advised on the consequences attendant to the nature of this kind of testimony and its probative value.

12). The notes or any other record and evidence used by the prosecution is easily available in the court's records and can be obtained. The counsel could only in the circumstances be useful in the event that there is any obstruction or interference from any side when his client is giving his testimony.

In the premises, I do not see any constitutional or statutory rights of the applicant which shall be infringed if he goes ahead with his unsworn testimony without being led by the counsel.

The application is disallowed and I do order that this matter be referred to the lower court for hearing and final disposal.

Dated, signed and delivered at Kisumu this 24th day of June, 2013.

**H.K.
JUDGE**

CHEMITEI

In the presence of:

.....for the applicant

.....for the respondent

HKC/va