



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC. CRIMINAL APPL. NO. 14 OF 2013

CLEMENT KUNGU WAIBARAAPPLICANT

versus

REPUBLICRESPONDENT

RULING

1. By an undated Notice of Motion filed on 6th June 2013 under Article 23 of the Constitution and under sections 19, 20, 21, 25 and 26 of legal Notice No. 6 of 2006 the Applicant moved the court under certificate of urgency for the following orders:

1. The Honourable court be pleased to certify this application as extremely urgent and be heard ex-parte in the first instance.

2. The honourable court be pleased to issue conservatory order prohibiting the subordinate court from proceeding with the hearing of Criminal Case No. 407 of 2011, until this application is heard inter parties.

3. The honourable court be pleased to issue an order expunging the decision of the subordinate court to admit the evidence of P.W.7 Seif Mbauki SSP which was not sworn according to the Law.

4. The Honourable court be pleased to issue any such further order it may deem fit and convenient in the circumstances of this case.

2. The application was certified urgent and fixed for interpartes hearing on 14th June 2013.
3. Mr. Muhoho for the Applicant submitted that P.W.7 testified without taking oath and therefore his evidence should be expunged from the proceedings. He further submitted that the said witness was allowed by the court to produce statement of witnesses who had recanted their said statements and therefore that would be prejudicial to the accused person.
4. Mr. Njue for the state submitted that P.W.7 was properly affirmed since there was no Koran in the court on the said day under the substantive law relating to swearing which is the Oaths and Statutory Declaration Act and that oath and affirmation have the same effect.
5. He submitted that since the matter is still pending before the court one can only know whether

- the statements were considered and relied upon by the court in the judgment.
6. From the submissions by counsels and the pleadings herein there are only two issues for courts determination.

i) whether the evidence by P.W.7 was improperly admitted by the court without the said taking oath.

ii) whether the production of the statements by P.W.7 is prejudicial to the Applicant.

7. On the issue of the evidence by the P.W.7 it is noted that the court affirmed the same since being a Muslim there was no Koran in court and as submitted by Mr. Njue for the State both oath and affirmation have the same effect. Section 15 of Oaths and Statutory declarations Act provides as follows:

“Every person upon objecting to being sworn and stating, as the ground of such objection, either that he has no religious belief or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is required by law which affirmation shall be of the same effect as if he had taken oath (emphasis added.)

8. I therefore find no fault with the trial courts decision to affirm the P.W.7 the same having declined to be sworn using the bible and as was held by the court of appeal in MWANGI v R (2006)ekl evidence is only inadmissible before the court if the witness was neither sworn or affirmed hence qualifying both method in validity of evidence as required in section (151) of Criminal Procedure Code.
9. As regard the production of witness statements the record shows that the said witnesses were declared hostile by the prosecution thereby giving them a right to cross examine the same on their earlier statements and since P.W.7 is the one who recorded the said statement he is the only one who could produce them before the court and to testify as how they were recorded and the validity thereof.
10. At this stage of the proceedings I see no prejudice that will be suffered by the Applicant by the production of the said statement and agree with the ruling of the trial court on the same and decline to issue conservatory orders sought.
11. I therefore find no merit on the application herein and I dismiss the same and order that Criminal Case No. 407 of 2011 proceed for trial to conclusion.

Dated and delivered at Nyeri this 21st day of June 2013.

J. WAKIAGA

JUDGE

Mr. Muhoho for the applicant

No appearance for the state.

Court:

Ruling read in open court in the presence of Mr. Muhoho for the applicant.

Right of appeal within 15 days.

J. WAKIAGA

JUDGE