



No. 80/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL MISC. NO. 111 OF 2013

MUTUKU MUSYOKI NDOLO .....APPLICANT

VERSUS

REPUBLIC.....DEFENDANT

RULING

1. **Mutuku Musyoki Ndolo** hereinafter “*the applicant*” is charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences act No. 3 of 2006. In the alternative he is charged with an offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.
2. The applicant pleaded not guilty to the charges and the case was set down for hearing. The case proceeded for hearing. The prosecution closed its case on the 30<sup>th</sup> August, 2013.
3. On the 23<sup>rd</sup> July, 2013, the applicant filed an application seeking transfer of the case to another court in order for the case to be heard afresh.
4. In his oral submission the applicant stated that the application was based on the fact that he was not supplied with witness statements. When he applied for the statements the prosecutor made him peruse the same in court and he was ordered to continue with the case, yet he did not understand the language.
5. The learned State Counsel, **Mr. Mwangi** opposed the application. He stated that the applicant claimed he had been prejudiced because he was not allowed to recall PW1 and PW2 for further cross-examination. He submitted that the applicant had been given ample time to peruse and use witnesses statements and cross-examine witnesses. His demand all-over a sudden for the case to start *de novo* in his opinion was un-procedural. He viewed the application as a delaying tactic.
6. I have carefully considered the application by the applicant and the response thereto by the State Counsel. An accused person has a right to a fair trial. This includes being informed in advance of the evidence the prosecution intends to rely on, and to have a reasonable access to that evidence (*vide Article 50 (2) (j) of the Constitution*).
7. Being informed in advance of evidence to be adduced would include being supplied with statements recorded by witnesses. The trial magistrate in the lower court taking cognizant of that fact allowed the applicants application to be supplied with witness statements at the expense of the Republic on the 3<sup>rd</sup> April, 2013. Whether or not her order was complied with cannot be stated with certainty because it was not recorded, if indeed the applicant received the statements. Nonetheless the case proceeded, two (2) witnesses testified on the 29<sup>th</sup> April, 2013. When the matter came up on the mention date the accused applied for recall of the two (2) witnesses who had testified for further cross-examination. The reason he gave was that he was not satisfied with the kind of evidence they had adduced.

8. In dismissing his application the trial magistrate stated that the applicant had been allowed to peruse the police file for two (2) hours prior to the case proceeding. She alluded to the fact that he must have been supplied with witness statements and she also considered the fact that the complainant was a minor therefore recalling her would be traumatic.
9. The right to recall witnesses is provided for in section 146(4) of the Evidence Act which states:-

***“The court may in all cases permit a witness to be recalled either for further examination – in-chief or for further cross-examination and if it does so, the parties have a right of further cross-examination and re-examination respectively”***

10. The applicant herein is unrepresented. Looking at his application he has thumb printed on the affidavit in support of the same. There is no doubt that he is illiterate. The court had a duty of establishing if indeed he was able to comprehend the statements he was given to peruse prior to ordering him to cross-examine the witnesses. Failure to do so was thus denying him fair trial as envisaged by Article 50(2)(j) of the Constitution. In the circumstances the court should have granted his prayer to recall the witnesses for further cross-examination.
11. In the instant application the applicant seeks transfer of the case to another court. This brings in the issue when the case should be transferred to another court? A case may be transferred to another court if it is demonstrated that there will be no fair or impartial trial in the court handling the matter. ( vide section 81(1) (a) of the Criminal Procedure Code).
12. The applicant herein is disgruntled following a court order. In his affidavit he only states that he was subjected to trial without evidence to be relied on. In essence he does not directly cast doubt on the impartiality of the magistrate. He has absolutely no apprehension in his mind that if furnished with statements as required the trial will not be fair.
13. The test for making an order for transfer of a case is whether a reasonable apprehension exists in the mind of the accused that following an order made he will not get an impartial trial. In the case of ***Republic versus Hashimu [1968] KLR 656*** an application for transfer of a case was disallowed because the application was made as a result of an order of a magistrate allowing witnesses to testify.
14. From the foregoing, it is apparent that the applicant has failed to demonstrate why an order for transfer of the case to another court should be made. In the premises, I reject it.
15. However, pursuant to the law, I do quash the order closing the prosecution’s case and direct that the prosecution’s case be re-opened for purposes of recalling PW1 and PW2 for further cross-examination by the applicant. The applicant shall also be furnished with all prosecution witnesses statements and a note to that effect be made on record.
16. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 10<sup>TH</sup> day of SEPTEMBER, 2013.**

**L.N. MUTENDE**

**JUDGE**