



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 95 of 2011

VERONICA WAIRIMU NJAU.....APPLICANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

VERONICA WAIRIMU NJAU is on trial before the Senior Resident Magistrates' Court, Gatundu. She is charged with the offence of Stealing by servant contrary to **Section 281 of the Penal Code**.

Five (5) witnesses testified for the prosecution. Thereafter, the learned trial magistrate put the accused to her defence.

However, the accused felt prejudiced by that action because she was not granted an opportunity to make submissions after the prosecution had closed its case.

The accused lodged an application for Judicial Review, seeking orders to quash the decision made on 26th January 2011, placing her on her defence.

The accused also seeks an order of mandamus, to compel the learned trial magistrate to hear her submissions before the court can determine whether or not she had a case to answer.

It is the contention of the accused that the trial court had denied her the right to challenge the evidence adduced by the prosecution.

In answer to the application, Ms Maina, learned state counsel conceded.

The respondent pointed out that although the advocate for the accused, Mr. Kimathi, had been given an opportunity to attend court, he had been unable to do so on the appointed date.

I have perused the record of the proceedings before the trial court. I note that the case has had a chequered history, dating back to 27th August 2008.

On 27th April 2009, 4 witnesses testified, leaving only one more witness.

Regrettably, on 18th May 2009 a fire gutted the court-house, destroying many files and exhibits, including the original file and exhibits in this case.

The prosecution succeeded in putting together another file and another set of the exhibits; and on

18th November 2009, four (4) prosecution witnesses were present in court, ready to proceed.

Due to shortage of time, the court was only able to take the evidence of one witness.

When the trial was scheduled to resume on 12th May 2010, both the prosecution and the defence were ready to proceed. However, the learned trial magistrate was unable to accord them a hearing because he was attending to other official duties.

On 28th August 2010, **PW 2**, **PW 3** and **PW 4** testified. Thereafter, the prosecution sought and was granted an adjournment because the Investigating Officer was not available. The case was adjourned to 13th October, 2010.

On 13th October 2010, the Investigating Officer (**PW 5**) testified. However, the cross-examination was not concluded, as Mr. Kimathi, the learned advocate for the accused, needed to peruse some of the documents before proceeding further.

As a result, **PW 5** was stood down until 5th November 2010.

Unfortunately, the learned trial magistrate was not sitting on 5th November 2010, resulting in an adjournment.

Again on 3rd December 2010, the learned trial magistrate was unable to sit. On that date, the case was adjourned to 26th January, 2011.

The accused was in court on 26th January 2011, but her advocate was absent. The accused informed the court that her advocate was unable to come to court on that day, as he was far away. Although the accused did not tell the court about the exact place where her lawyer was, it is now clear that the lawyer was before the Principal Magistrate's Court, Kajiado.

He had gone to Kajiado to handle an application for stay of execution in Civil Suit No. 327 of 2009.

The learned trial magistrate rejected the application by the accused, for an adjournment. The reasons for that decision are clear from the following words;

“The accused person now tells the court that her Advocate is far and unable to attend. She does not specify where he is and reason for his inability to attend. The witness is before court and has travelled from far i.e. Tharaka. He is a police officer with other duties to perform at his place of work. The court cannot just grant an adjournment where no concrete reason for applying for the same has been advanced as in the present case. To do so would amount to discouraging witnesses from attending court.”

Those reasons, coupled with the age of the case convinced the court that an adjournment was unjustified.

I do appreciate the position of the learned trial magistrate. Any party seeking an adjournment must offer persuasive reasons to the court.

But I also appreciate the fact that the accused had a lawyer on record. The lawyer had been diligently attending court prior to the 26th of January 2011. He cannot be accused of intentionally trying to delay the case.

The lawyer was representing the accused. It is he who would have continued to cross-examine the Investigating Officer. The accused was not able to continue with that task, in the absence of her lawyer.

Even the explanation she tendered to the court, about why her lawyer was absent, was not persuasive. The explanation is a demonstration of the accused's lack of capacity to safeguard her legal interests. She definitely needed her lawyer! But her lawyer was also needed elsewhere, as another of his clients was in serious trouble. A decree was just about to be executed against that other client.

The lawyer was in a difficult spot. Whatever choice he made would end up leaving one client in a quandary. And that is what happened in this instance.

As a consequence, the accused feels that an injustice has been done to her. She was left on her own by her lawyer, when she needed his legal services. She needed him to finalize the cross-examination of the Investigating Officer.

The said exercise was not completed. But the court directed the prosecution to go ahead with re-examination.

As the prosecution found no reason to re-examine the Investigating Officer; and because that was the last witness, the case for the prosecution was closed.

Immediately thereafter, the trial court delivered a ruling, holding that the prosecution had established a prima facie case against the accused.

It is that action which prompted this application. The accused is simply asking that she be given an opportunity to make submissions before the court can determine whether or not the prosecution had made out a prima facie case against her.

As the learned state counsel, Ms Maina, said that process would not prejudice anybody. On the contrary, it may help the court arrive at a better informed decision. I say "better informed" because the court would then have received the benefit of the submissions by the accused, and hopefully, from the prosecution too.

The exercise would not cause any delays because no witness needs to be recalled.

And whilst I am still on the issue of the witness who travelled from far, I find that he would be prejudiced if he had to incur further expenses to come back to court once again. However, that, of itself, may not be sufficient reason to determine whether or not the trial court should order that he be recalled, if the application had been made.

In such a scenario, it is always necessary for the court to take the initiative to come up with solutions that will deliver real justice.

How could that have been achieved in this case, if the issue had arisen before me?

I would have first determined if the circumstances warranted the re-call of the witness. And if the answer was affirmative, I would have ordered the lawyer to meet the expenses of the witness who was to be recalled. I would have so ordered because it was the lawyer's absence which gave rise to difficult situation in which the accused was unable to proceed with the matter when it was scheduled for further cross-examination.

But such an order is not necessary currently, because the accused did not seek the recall of PW 5.

Reverting to the issue at hand, I now set aside the order by which the learned trial magistrate held that the accused has a case to answer.

I further direct the trial court to give to the accused person, opportunity to make submissions before the court can make its decision on whether or not the accused had a case to answer to.

I make no order as to costs.

Finally, I direct that the criminal case be mentioned before the trial court on 15th November 2012, for purposes of fixing a date for the submissions.

Dated, Signed and Delivered at Nairobi, this 8th day of November, 2012.

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FRED A. OCHIENG
JUDGE