

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 464 of 2009

ELIJAH OMONDI OWINOAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

The applicant was charged with criminal case No.124 of 2009 at Limuru court and faced two counts. In the 1st count he was charged with robbery with violence contrary to section 296(2) of the Penal Code and in 2nd count he was charged with rape contrary to section 3(1) of the Sexual Offences Act No. 3 of 2006. The matter proceeded partly when the applicant was un-represented by an advocate and two witnesses gave evidence. On the 3rd August 2009 the Applicant appointed Mrs. Abuga to act on his behalf. Mrs. Abuga made an application before the trial court seeking that the two witnesses who had earlier given evidence be recalled for further cross examination. The prosecution opposed the application for recalling the two witnesses on the grounds that the accused proceeded and that he never indicated he wanted the services of an advocate.

On 14th September 2009 the trial court refused to grant the prayers that were sought by the applicant. It was the contention of the trial court that the accused proceeded with the case and cross-examined the witnesses and that there was no merits in the application for recalling the witnesses.

The applicant has appealed against the said ruling rejecting the recall of the witnesses. It is now the case of the applicant that this court grants the stay of proceedings in the Limuru SPMC Criminal case 124 of 2009 Republic v Elijah Omondi Owino pending the hearing and determination of criminal appeal no. 464 of 2009 on the grounds that the appeal would be rendered nugatory.

I have considered the application, the supporting affidavit and the arguments by Mrs. Abuga learned counsel for the applicant and the submissions by Mrs. Maina learned State counsel. I agree that recalling a witness is a discretionary order and the court can only give an order recalling a witness if the evidence on record appears to be essential. In this case the magistrate acted within her discretion in refusing the orders for recalling the two witnesses that had given evidence. The power to recall or summon witnesses is given under section 150 of the Criminal Procedure Code and it says that;

“The court may at any stage of the trial or other proceedings under this code summon or call any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine a person already examined.”

The criteria for recalling a particular witness is that if the evidence appears to be essential to the just determination of the case and for the best interest of justice. In this case the trial court considered the application and found the same to be wanting. It was incumbent upon the advocate for the applicant to state the reasons why it was necessary to recall the two witnesses who had given evidence and who

were cross examined by the applicant. The court is guided by reasons and without stating the reasons for recalling the two witnesses it is not open to the applicant to expect the court to merely recall the two witnesses simply because there was a request or an application made for their recalling. I think the magistrate was right in refusing to recall the witnesses without being given sufficient explanation for the said cause. It is clear that the applicant was given an opportunity to cross examine the two witnesses and in the absence of any basis to say that the applicant may have been prejudiced or is likely to suffer by reason of further cross examination by his advocate, then the court had no option but to refuse the application for recalling the two witnesses. Having considered the material that was presented before me, I am satisfied that the trial court exercised its discretion properly and that there was no ground to enable the said court to allow the application for recalling the two witnesses. The application has no foundation and the trial court was absolutely right in holding the same had no merits. I too agree. The application dated 9th November 2009 is rejected.

Dated, signed and delivered at Nairobi this 4th day of February 2010.

M. WARSAME

JUDGE