

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 403 of 2008

CORNEL MUSANDO OTIENOAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGEMENT

The appellant and others were charged with various counts of stealing under section 275 of the Penal Code. The trial thereafter proceeded before several Magistrates but the decision subject to this appeal was made by Mrs. Muketi Senior Principal Magistrate. On 15th July 2008 PW10 gave evidence and purported to produce various exhibits on behalf of the prosecution. The advocates for the various parties including the appellant's advocate objected to the production of the said documents. Of paramount importance to this appeal is MFI 34 which the defence team objected to its production. In a ruling delivered on 15th July 2008 the trial court upheld the objection by the defence team and refused the production of the said documents. The basis was that it was a computer generated document and that it was not accompanied with a certificate as required under section 65 of the Evidence Act. After the ruling the prosecutor made an application under section 150 of the CPC to recall two witnesses who had testified namely PW1 and PW2. The application was made because the prosecution was aggrieved by the ruling that rejected the production of MFI 34, 47, 71 to 102. The application was opposed by the advocates of the accused persons. However, after hearing the rival submissions, the learned trial Magistrate granted the prosecution leave to recall the said witnesses.

The matter was adjourned to the afternoon of the same date since the said witnesses were not present in court. At about 3 p.m. PW2 John Allan Banda was recalled and sworn to give evidence and produce certain documents. In his evidence before court he confirmed that MFI 34 refers to bank statement and that it was computer generated. He also confirmed that he had certified the said document and in his possession was a certificate to that effect. When he tried to produce MFI 34 as an exhibit, the advocates for the accused persons made an objection. After hearing the objection the court again sustained the objection contending that litigation has to come to an end and that it was too late for the prosecution to produce the said documents.

Strangely and without being prompted by any party the trial court made a short ruling dated 28th August 2008 revisiting earlier decision and allowing the production of MFI 34 and the certificate that was earlier brought before court by PW2. I do not understand who moved the court for me to appreciate the basis of the ruling dated 28th August 2008. However in that ruling the court gave an overview as to why it had earlier refused the production of MFI 34 and the basis was that there was no certificate confirming that the computer was in place and since section 65 had been complied with subsequently, the document had to be produced. That is what the appellant is calling contradictory decision taken by the trial court.

The appeal was opposed by the State and in their submission contended that the trial court was right in making the ruling that reversed the earlier rulings. In my understanding decisions of any court has to be consistent, orderly and smooth in the way it is made and it must be made on factual evidence supported by the law. No doubt contradiction and inconsistency is bound to create or erode the administration of

justice in a manner that may result in confusion to the consumers of justice. The point is that it is incumbent upon judicial officers to make consistent and credible decisions to avoid possibility of confusion and contradiction. The parties to any litigation are entitled to a smooth and clear trial in the determination of issues litigated before any court. In this case the trial court made three decisions on the same subject matter and it is the case of the appellant that without any person addressing court a decision was made detrimental to his interest. As stated I do not understand how the third ruling was made and the issues that prompted the trial court to reach that decision. However, it is clear that the decision of the trial court was based on proper appreciation of the law and safe for the procedural defects that third ruling was made in circumstance which is not clear, then there is no basis to warrant me to interfere with the said decision. In my humble view the decision made by the trial court on 28th of August 2008 was based on proper appreciation and analysis of the Evidence Act. In any case there is no evidence to show that the appellant would suffer in any way or that he would be prejudiced in the production of the said document. The said document was not tendered before me for me to appreciate the contents and the nature of the said document. In my view there is nothing to show that the appellant was in any way prejudiced or that his rights to fair trial was affected by the ruling made by the trial court on 28th August 2008. It is also my position that there is no error or misdirection committed by the trial court in making the decisions subject to this appeal. As stated, the first two rulings were based on production of several documents by PW10, however, the ruling made on 28th August 2008 arises from the evidence of PW2 who had knowledge on the facts pertaining to MFI 34. I am therefore satisfied that there is no basis for me to interfere with the judicious discretion exercised by the trial court. There is no error and there is no misdirection committed by the trial court in reaching the three different rulings. It was within her jurisdiction to make the three rulings in a manner she did and it was based on circumstances and facts that were alive before her. My finding is that the appeal has no merit and it is hereby dismissed. I direct that the trial court to proceed with the hearing of the criminal case No. 2863 of 2003 on priority basis so that it can be determined conclusively once and for all. I direct all parties to appear before the trial court for mention on 3rd August 2009 for purposes of fixing a hearing date.

Dated, signed and delivered at Nairobi this 29th day of July 2009.

M. WARSAME

JUDGE