



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Appeal 106 of 2004

IGNAS KIRINGOAPPELLANT

VERSUS

REPUBLICRESPONDENT

RULING

By an application by Notice of motion dated 4th December, 2007, and made under section 350(2) (v) of the Criminal Procedure Code, the appellant/applicant sought from the court the following orders.

1. THAT the Application be certified urgent and service thereof be dispensed with in the first instance.
2. THAT this Honourable court be pleased to grant leave to the appellant to amend by filing and serving upon the state supplementary grounds of appeal.
3. THAT the draft supplementary ground of appeal annexed to the supporting affidavit of JM be deemed as duly filed and served upon the state.
4. THAT the grounds of appeal filed herein by the appellant in person together with the annexed supplementary grounds of appeal be deemed together to be the appellants amended grounds of appeal.

The application is supported by the annexed affidavit of JACQUELINE MUTHEE and is based on the ground that upon being appointed counsel for the appellant took the view that a pertinent ground of appeal was left out by the appellant. She therefore sought to make it a supplementary ground of appeal, and it reads –

“THAT the learned trial magistrate erred in law and in fact by failing to make a finding from the record that no conviction could stand or be sustained against the appellant as the appellant’s constitutional rights were violated and/or offended in particular the appellant’s rights as under section 72(3) of the Constitution as read together with section 36 of the Criminal procedure Code, effectively therefore violating the appellant’s right to a fair trial under section 77 of the Constitution.”

When the appeal came for hearing on 11th February 2008, Mr. Omido appeared with Ms. Jacqueline Muthee for the appellant, and Mr. Monda appeared for the State/Respondent. Mr. Omido told the court that the court had directed the application be heard together with the appeal.

Mr. Monda then said that he had no objection to the application for leave to amend the grounds of appeal, and that the ground sought to be introduced touched on a breach of fundamental rights. However, he applied for an adjournment on the ground that there was a matter pending in the Court of Appeal in which directions would be given that week as to whether a breach of fundamental rights should lead to an acquittal or to compensation. The adjournment was granted and the appeal fixed for hearing on 19th February, 2008.

Mr. Omido then applied for the application for amendment of the grounds of appeal to be allowed as prayed and Mr. Monda replied –*“that is in order.”* The court then made the following order –

“Grounds 2, 3 and 4 of the application by notice of motion dated 4th December, 2007 are hereby granted as prayed.”

On 19th February, 2008, the Coram and appearances were as before, save that Mr. Ondari appeared for the Respondent in place of Mr. Monda. When Mr. Omido indicated that counsel for the appellant were both ready to proceed, Mr. Ondari, said that he was also ready but

understood that counsel for the appellants wished to raise a constitutional issue under section 84 of the constitution. He then submitted that such an application should be made formally by way of a petition. Mr. Omido contended that they would prefer to argue the point in the context of their grounds of appeal. Mr. Ondari then indicated that he would be raising a preliminary objection if the appellant's counsel attempted to argue the constitutional point with the rest of the appeal, as they can't come to court otherwise than by a petition.

I have considered the submissions by both counsels. By reason of the order made by this court on 19th February, 2008, the draft supplementary ground of appeal, which raises the constitutional point, together with the grounds of appeal filed by the appellant in person, became together the appellant's grounds of appeal. This was done with the full knowledge of Mr. Monda, the learned State Counsel who appeared for the Respondent on that day, and who said that it was in order for Mr. Ondari to come later and say that he would raise a preliminary objection to that course of action is reminiscent of the biblical proverb about a Kingdom going to war against itself. He is putting the clock back, which is hardly conducive to the expeditious disposal of the matter now before the court. Whatever preliminary objection he wishes to raise can, in my view, be argued in tandem with the other issues.

Secondly, let us all remember that we are at an appellate stage. It would not make sense if the appellant's grounds of appeal were to be mutated so that one ground alone is isolated for bringing by way of a petition, when others came differently.

If the constitutional point is heard first and dismissed, do we then proceed to hear the other grounds? The reverse is also true. If the other ground are heard first and dismissed, shall we still proceed to hear the constitutional point? How many appeals shall we have heard?

This is one appeal. All the grounds ought therefore to be argued together. It is so ordered. A fresh hearing date be given at the Registry on priority bases.

Dated and delivered at Mombasa this 18 Day of March 2008.

L. NJAGI

JUDGE