



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Misc Crim Appli 33 of 2007

ATANUS OCHOLA MUTENDE APPLICANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

The applicant was convicted by the Senior Resident Magistrate at Mumias, on 13th February, 2006.

Being dissatisfied with the decision of that court, he has lodged on appeal to the High Court, being Criminal appeal No.18/2006.

As the applicant awaits the hearing and determination of his appeal, he has brought an application seeking an order for the production of the Occurrence Book (O.B) of Manyala Police Post, dated 9th September 2007. His request is that the said O.B be produced before this court at the stage when his appeal will be heard.

The applicant contends that he intends to base his submissions on the contents of the said O.B as he believes that the same will help to advance the success of his appeal.

In answer to the application the learned State Counsel has said it was not merited because the applicant had not applied for the production of the O.B during his trial.

It is the respondent's submission that had an application been made before the learned trial magistrate, the State would have been afforded an opportunity to provide the maker of the statement recorded in the O.B, to explain the contents, and to be cross-examined, if necessary.

The respondent also submitted that the applicant had failed to explain the relevance of the O.B. to his pending appeal. Therefore, the respondent considers the application to be misconceived, and asked that it be dismissed.

During the hearing of the application, the applicant readily conceded having not applied for the production of the O.B, during his trial. He then asked this court to order that he be provided with a copy of the proceedings before the trial court. Finally, he asked the court to fix a date for the hearing of his appeal.

As regards the fixing of a date for the hearing of the appeal, the court informed the applicant that a hearing date could only be set in the relevant appeal file.

In my considered opinion, the applicant having conceded that he did not apply for the production of the O.B. during the trial, he was now effectively asking for the production of additional evidence, at the stage of hearing his appeal.

In principle, by virtue of the provisions of section 358 of the Criminal Procedure Code, the High Court has power to take further evidence, if it thinks such additional evidence is necessary.

The applicant herein has told the court that he believes that the O.B, if produced, will help him to advance his chances of success in the appeal. However, he did not indicate how the O.B. was supposed to advance the prospects of success, of his appeal.

In response, the learned State counsel submitted that had the applicant applied for the O.B. during his trial, the State may have been able to make available the person who made the relevant entry onto the O.B., so that he could testify about the contents thereof.

In my understanding, the learned State Counsel must have presumed that the applicant wishes to now take advantage of either the omission or the inclusion of some information which is embodied in the O.B.

Of course, in the light of the failure by the applicant to state specifically how the contents of the O.B. would be useful to his appeal, the learned State Counsel was right to try and anticipate the use to which the applicant wanted to put the contents of the said O.B.

On my part, I would only be right to order that additional evidence be taken during the hearing of the appeal, if I were to be satisfied that the same was necessary.

The applicant has, so far, not persuaded me that it is necessary, in the interests of justice, to allow for the production of the additional evidence. I believe that part of the reason for the applicant's inability to demonstrate how or why the additional evidence would be necessary, stems from the fact that the applicant has not yet received a copy of the record of the proceedings before the trial court.

In the light of that fact, this court first directs the learned Deputy Registrar of this court to provide the applicant with a copy of the record of the proceedings before the trial court. The applicant shall not be required to pay for the said copy of the proceedings. In other words, the same shall be provided free of charge.

Meanwhile, the application before me is dismissed. However, in the circumstances of this case, the dismissal of this application shall not, by itself, be a bar to the applicant making another application of a similar nature, should he be minded to do so, after he will have perused the record of the proceedings before the trial court.

It is so ordered.

Delivered, dated and signed at Kakamega this 5th day of May, 2008

FRED A. OCHIENG

J U D G E