



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

Misc Crim Appli 32 of 2007

MARTIN NAKHUNYWA APPLICANT

V E R S U S

REPUBLIC RESPONDENT

R U L I N G

The applicant, MARTIN NAKHUNYWA was convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. He was then sentenced to suffer death, as by law prescribed.

Being dissatisfied with his conviction and the sentence, the applicant lodged an appeal to the High Court.

Whilst the appeal was still pending, and in the anticipation of its being heard, the applicant brought this application, through which he seeks an order for the production of the Occurrence Book (O.B.), for Kakamega Police Station, for the 23rd of June, 2003.

It is the applicant's case that he intends to rely on the contents of the said O.B, when prosecuting his appeal. Apparently, the applicant was arrested on 23rd June, 2003, even though the trial court is said to have cited a different date in its judgment.

In answer to the application the learned State counsel, Mr. Karuri submitted that the applicant had had the time and opportunity to ask for the O.B, when he was before the learned trial magistrate.

As the applicant had not told this court that the trial court had rejected his application for the O.B, the learned State Counsel expressed the view that the present application was simply an after thought.

If the application were to be granted, submitted the learned State Counsel, it would be impossible for the State to call the maker thereof, so as to explain the contents of the requisite entry in the O.B. It was therefore submitted that that would cause the State to be disadvantaged.

In a brief reply to the submissions made by the State, the applicant told the court he had actually made an application before the trial court, for the production of the O.B. Notwithstanding the alleged application, the applicant says that the O.B was not provided to him during the trial.

In the light of the applicant's contention that he had applied for the production of the O.B during his trial, I did call for the record of the proceedings before the trial court. Upon a perusal of the record, I noted that the applicant herein was the 1st accused in CM CR. Case No.1508/2003.

Nowhere in the record of the proceedings before the trial court did the applicant herein expressly apply for the production of the O.B. What he did apply for was the written statement of his wife. The said statement was made available to him.

As the applicant did attempt to persuade this court to determine his application favourably, whilst he was relying on an untruth, the applicant is hereby reprimanded for attempting to mislead the court.

If the application was determinable on the basis solely of this court's judicial discretion, as informed by the impression founded on the perceived honesty of the applicant, I would have had no doubt in holding that the applicant has proved himself unworthy.

However, I have noted that PW3 testified that the owner of the stolen goods had "defined the robber." PW4 then said that the applicant was being sought by PW3, as the applicant had been identified.

In these circumstances, I find that it would be in the interests of justice to have the O.B produced, so that this court can thereafter make an informed decision on the issue of the identification of the applicant.

Accordingly, it is hereby ordered that the Officer-In-Charge (OCS) Kakamega Police Station should produce the O.B dated 23rd June, 2003. The said O.B is to be produced in court when Kakamega HC.CR.A. No.20/05 comes up for hearing.

In the event that the State should form the opinion that any other police officer was better-suited to produce the O.B, with a view to being able to offer such explanations as to the contents thereof, as may become necessary, leave is hereby granted to the State to produce the O.B through the said officer.

In determining the appropriate person to produce the O.B, the State is granted leave, if it may be deemed necessary, to recall PW3. However, the evidence of the officer who will produce the O.B will be limited to only explaining whether or not the applicant was named or described by the person who made the first report.

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

FRED A. OCHIENG

J U D G E