



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Criminal Appeal 20 of 2006

REPUBLIC APPELLANT

VERSUS

TONY MUTAI RESPONDENT

JUDGEMENT

This is an appeal by the State from the Ruling of the Resident Magistrate, Eldoret, Mrs. A. B. Mong'are given on 31st August 2005 in Eldoret Criminal Case No. 9438 of 2003. The Respondent was charged on 2nd December, 2003 with offence of doing grievous harm to another contrary to section 234 of the Penal Code.

The hearing commenced in earnest on 20th May, 2004 when it was heard from time to time until 19th August, 2005 when the prosecution closed its case. The prosecution had called 5 witnesses including the complainant. On the 24th August, 2005, Counsel for the Accused submitted on a No Case to Answer under the provisions of Section 210 of the Criminal Procedure Code. One of the points of law raised was that the evidence on record was at variance with the Charge Sheet.

In the Charge Sheet it was stated that on the 28th November, 2003 at Kongasis Farm, Uasin Gishu District within the Rift Valley Province, Tony Mutai, the Accused, unlawfully did grievous harm to Simon Keitany. In his evidence, the complainant testified that he was assaulted on 27th November, 2003. In his statement to the Police he had stated that he was assaulted by the Accused on 27th November, 2003. On this ground, the Learned trial Magistrate held that the Charge Sheet was at variance with the evidence before the Court and on this technicality the suit must fail. The Accused person was then acquitted under Section 210 of the Criminal Procedure Code. The trial Court did not consider the merits or otherwise of any other issue.

The Prosecution, being aggrieved with the said decision lodged this appeal raising two grounds:-

1. That the Learned trial Magistrate erred in law and in fact in acquitting the Respondent under Section 210 of the Criminal Procedure Code despite the prosecution having established, a prima facie case.
2. That the learned trial Magistrate erred in law and fact by acquitting the Respondent on the assumption that variance of dates between the Charge Sheet and the evidence, rendered the Appellant's case fatal.

Ms. Oundo for the Appellant, referred to Section 214 (1) and (2) of the Criminal Procedure Code which

provides as follows:-

“Section 214 (1) where, at any stage of a trial before the close of the case for the prosecution, it appears to the Court that the charge is defective, either in substance or in form, the Court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the Court thinks necessary to meet the circumstances of the case:-”

There is a proviso as to the consequences that flow from any alteration of the charge.

Section 214 (2) provides:

“(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that in fact the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.”

It was submitted for the Appellant that the trial Magistrate ought to have invoked the Court’s power under section 214 (1) of the Criminal Procedure Code and amended the Charge Sheet to insert the correct date of the alleged assault. That in effect, it was wrong for the Court to assume that the power was exercisable by the Prosecution. Counsel further argued that in any event that the variance dates between the Charge Sheet and the evidence was immaterial and not fatal considering the provisions of section 214 (2).

Mr. Kuloba, Counsel for the Respondent supported the acquittal of his client and the decision of the trial Magistrate. He submitted that the Court’s power under Section 214 (1) of the Criminal Procedure Code could only be exercised before the close of the Prosecution case. That the Prosecution did not apply for amendment of the Charge Sheet before the close of the prosecution’s case and it was the duty of the prosecution to raise the issue.

With regard to Section 214 (2), Counsel for the Respondent argued that the said provision was limited to the “time” of the alleged commission of the offence and not the date. He referred to section 137 (1) of the Criminal Procedure Code – stating the description of the date was essential to be given with reasonable clearness as envisaged by the said provision. He said date could be in terms of months or other longer period.

Counsel for the Respondent also referred to and relied upon two decisions, one of the Court of Appeal , Kenya and other from the then East African Court of Appeal. These are:-

1. Jason Akumu Yongo –v- Republic (1982-88) 1 KAR, 167

and

2. Yozefu & another –v- Uganda (1969) EA, 236.

The Court was also invited by the Respondent to consider and look at the whole case in this appeal. He argued that even if the Charge Sheet was amended, the evidence was not sufficient to establish a prima facie case. The Respondent in effect relied on the provisions of Section 354 of the Criminal Procedure Code.

I have carefully considered the grounds of appeal, the law, authorities cited and submissions of Counsel. With regard to Section 214 (1), it is my opinion that the trial Court could only invoke its powers therein; to alter the charge by amendment or by substitution or addition of a new charge before the close of the prosecution case. It can do this on the application by the prosecution or at its own instance and/or volition. During the trial herein, the prosecution did not apply for any alteration of the charge and the Court did not invoke its power at its own instance. The prosecution closed its case without any alteration

under section 214 (1). To this Court that was the end of the matter and it is now water under the bridge. It is clear that there was an omission both by the prosecution and the trial Court. Perhaps both ought to have been more vigilant, however, this Court appreciates the heavy work-load of the Subordinate Courts in our country and the pressure and very difficult conditions they operate under. Such situations are vagaries that an over-worked , overloaded and under-staffed Judicial system must face from time to time and in the circumstances impossible to rule out. If there was any fault to be apportioned, I would place more on the prosecution. In any case, it was their case and ought to have ensured that the Charge Sheet contained the correct date.

With regard to Section 214 (2), Criminal Procedure Code, it is essential for this Court to interpret the meaning of “time” in the said provision. Does time refer to the minutes or hours when the event in question took place on or during the particular “day” or “date” referred to in the Charge Sheet? Or does time refer to the date on which the alleged event took place? In “**Collins – Concise Thesaurus**”, published by Harper Collins Publishers, 2002 reprint, **time** is inter alia, defined as:-

“(1) age, chronology, date, duration, epoch, era, generation, hour, interval, period

.....

(3) allotted span, day, duration, life, life span, life-time, season.

(4) heyday, hour, peak.”

In the light of the said meanings given to “time”, I do hereby hold

that “time” in section 214 (2) includes “date”. It is too restrictive to say that “time” refers to minutes or hours on a particular day when an event is supposed to have taken place. The definition give to time is wide and encompasses days, month/s and year/s. Date is said to be “*a particular day of month, sometimes in a particular year, given in numbers and words*”. It is part of the wider meaning of time.

I do hereby hold that the word “time” in the said section is not restricted to the time of day or night when the alleged incident took place.

Accordingly, I do hereby find that under the provisions of Section 214 (2) the date at which the alleged offence herein was committed is not material and the charge need not have been amended. The variance between the charge and evidence adduced with regard to the date which is part of time, did not make the charge fatally defective. In any case, the time difference herein between the two dates was only one day. No prejudice could have been suffered by the Respondent. If the time difference was say, five years, the Court is obliged to make adequate inquiries to ensure that the rights of the Respondent were not violated. The degree of variance matters if the same are extreme, unreasonable or suspect. In the premises, I hold that the trial Magistrate erred in law and in fact in acquitting the Respondent under Section 210 of the Criminal Procedure Code.

In this case, the trial Magistrate acquitted the Accused on the basis of this point of law. She did not go into any merits of any other issue, i.e. facts and evidence as to whether a prima facie case had been established. The decision was made on 31st August, 2005. The Honourable trial Magistrate is still based at Eldoret. She is the one who took the evidence of the prosecution witnesses not so long ago in the circumstances. I think the said Honourable Magistrate is still able to consider whether there is a case to answer or not and whether the accused should be placed on his defence or not. There would be no prejudice to the prosecution or the Accused.

It would be unfair to the Accused and waste of precious judicial time to order a retrial. There is no basis for such an order as the trial Court is independent and will act in accordance with the law in the circumstances.

In conclusion, I hereby do allow the Appeal and reverse the order of acquittal under section 210 of the Criminal Procedure Code. I also do hereby order that the trial Court presided over by the Honourable

Mrs. A. B. Mong'are proceed with the trial at the point where the submissions on No case to answer were made. The said Honourable Magistrate is at liberty to invite further submissions or make her decision under Section 210 of the Criminal Procedure Code on the basis of the submissions already made and on record. Orders accordingly.

Dated and delivered at Eldoret on this 30th day of January, 2007.

M. K. IBRAHIM

JUDGE