

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Criminal Revision 317 of 2006

Ableey Nasser Ahmed.....APPLICANT

Versus

Republic.....RESPONDENT

RULING

The complainant in Mombasa C M's Criminal Case No 681 of 2005, Munira Ali, wrote a letter to the Attorney General, The Hon The Chief Justice, The OCPD Mombasa, Police Division, The Resident Judge, Mombasa High Court and to the Chief Magistrate Mombasa, complaining of the way her case was being handled. In that letter dated 7th July 2006, she has accused the trial magistrate of failing to issue witnesses summonses upon the prosecution witnesses who failed to attend court instead of closing the prosecution's case. There is also a terse assertion that the trial Resident Magistrate is tilted in favour of the defence in that they are always granted adjournments as opposed to the prosecution's side. On the basis of the these allegations the complainant is of the view that proceedings should be set aside with a directive that the case do begin afresh before another magistrate.

Upon receiving this letter, I have agonized to determine the best way to sort out the dispute. In exercise of this court's supervisory powers under section 65(2) of the constitution of Kenya and pursuant to Section 362 of the Criminal Procedure Code I called for the records relating to the aforesaid proceedings for purposes of satisfying myself as to the correctness, legality or propriety of the finding or order recorded or passed therein.

The result of my perusal shows that on 22nd day of February 2005, one Ableey Nasser Ahmed appeared before the Chief Magistrate upon which he denied a charge of assault causing actual bodily harm contrary to section 251 of the penal code. The particulars of that offence are to the effect that on the 3rd day of February 2005, at Kibokoni in Mombasa District of Coast Province unlawfully assaulted Leila Mohamed Abdalla thereby occasioning her actual bodily harm. This charge was withdrawn with leave of court on 23rd August 2005 and substituted with a charge containing two counts. On the first count the particulars of the same remained unchanged save that the complainant's name was substituted with that of Munisa Ali.

The second count is in respect of a charge of malicious damage to property contrary to section 339(1) of the Penal Code. The particulars in respect of this count are that on the 3rd day of February 2005 at Kibokoni in Mombasa District within Coast Province, wilfully and unlawfully damaged one dress valued at Kshs 1,500/-, the property of Zakia Hussein.

The complaint raised is that the prosecution was denied a chance to call two crucial witnesses when its application for adjournment was refused by the trial court. It is the view of the complainant that the trial court has not been fair. It has been alleged that the learned Resident Magistrate is biased in favour of the defence in that the defence has always been given an adjournment whenever they asked for.

My perception of the complaint is that this court has been urged to interfere with the discretion of the trial court on whether or not to grant an application for adjournment. I have perused the entire proceedings and it is clear that since the time of plea this case has been adjourned ten times for various reasons.

Eight out of the ten adjournments were prompted by the prosecution The remaining two slots were at the instance of the defence.

On the 20th day of June 2006, the learned Resident Magistrate considered an application for adjournment by the prosecution and as opposed by the defence. In the end the learned Resident Magistrate rejected the application for good reasons she specified in her ruling.

After a careful consideration of the complaint vis-à-vis the proceedings on revision I am convinced that the learned trial Resident Magistrate properly exercised her discretion. There is nothing incorrect or illegal in the manner she dealt with the application for adjournment. Consequently, since the complaint has no merit, I refuse to interfere with the learned Resident Magistrate's decision on revision.

August 10, 2006

Sergon,J