



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL REVISION NO. 08 OF 2019

(From original conviction and sentence in Cr. Case No. 2441/2018

by Hon. O. S.N. Mwangi - SRM)

REPUBLIC.....PROSECUTOR

-VERSUS-

RICHARD KONDO SIMON.....ACCUSED

RULING

1. The State moves court via *Article 165, Constitution of Kenya and Section 362 Criminal Procedure Code* as per the letter dated 18/07/2019.
2. I write to inform you of the conduct and decision by Hon. S.N. Mwangi, as Senior Resident Magistrate at Nyahururu Law Courts on 04/07/2019 when she declined the prosecution's application to have a second count admitted in an ongoing case.
3. The case is;
4. Cr. No. 2441/2018
5. Cr. No. 247/152/2018
6. Accused – Richard Kondo Simon
7. Offence – Assault causing bodily harm contrary to Section 251 of the Penal Code.
8. The matter came up for a mention on 04/07/2019 to fix a hearing date where the prosecution made an application to amend the charge sheet by adding another count, count two, being assault causing bodily harm contrary to **Section 251 of the Penal Code**. The amendment was necessitated by the fact that during plea taking the P3 relating to the second count was not availed thus the accused person was charged on one count.
9. This matter was part heard where the doctor testified on 08/03/2018 and produced the P3 for the first count. The court denied the application on grounds that the prosecution went fishing for evidence to support the second count.
10. This fact was not true at it was already indicated that the P3 was filed on 15/10/2018 and the complainants recorded their statements on 27/10/2019 two days before the accused person took plea. The court in its ruling stated that the fact that one witness had already testified and it would have been prejudicial to the accused person.
11. Only the doctor testified and the P3 in question would have to be produced by the doctor who filled it. The accused person would have been given a chance to cross examine the doctor and therefore the accused person would not have been prejudiced in any way.
12. The charge in question relates to an assault on the daughter of the complainant and not the existing charge of assault on the complainant.
13. In declining the application by the prosecution to have the charge sheet amended and introduce another count, the court did not give any legal basis. It is trite law that the prosecution can amend the charge sheet when need arises and the evidence supports the charges.

14. The prosecution feels aggrieved by the decision of the learned Magistrate and more so the ruling that the prosecution went fishing for evidence while it is very clear that the P3 form was filled before the accused person took plea. The complainant with regard to the second charge had recorded her statement before the matter took off for hearing.

15. The prosecution urges this Court itself on the following;

16. Whether the learned Magistrate was within the law to decline an application by the prosecution to amend the charge sheet before the close of the prosecution case?

17. Whether the reasons given by the learned Magistrate that the prosecution went on a fishing expedition for evidence was sufficient to deny the said application?

18. This application to act as a stay to further criminal proceedings in the Criminal Case No. 2441 of 2018 pending the ruling of the Court.

19. In considering the merit and demerit of this revision application we urge your Lordship to invoke the supervisory powers under **Article 165 of the Constitution and revisionary powers under Section 362 and 364 of the Criminal Procedure Code** and vacate and set aside the orders of the learned Magistrate.

20. Analysis and determination

21. I have perused the trial court file crc case no 2441 of 2018 and noted that the judgement was rendered on 30/10/2020. The impugned order sought to amend charges. 1. That the Magistrate made a forfeiture order in regard to Exhibit 1B which was the elephant tusk and ordered that the elephant tusk which was released to Kenya Wildlife Service Nyahururu through the investigating officer be handed over to the National Museums of Kenya.

22. That the said order was improper as it offends the provisions of Section 105 of the Wildlife Conservation and Management Act No. 47 of 2013 as the same is clear that wildlife trophies ought to be forfeited to Kenya Wildlife Service.

23. That the said forfeiture order should be revised or altered and be substituted with an order that Exhibit 1B which is an elephant tusk be forfeited to Kenya Wildlife Service for safe custody.

24. The charges having been dismissed and accused acquitted, there is nothing to amend and the intended amendment has been overtaken by event and application spent. Thus the court the following orders;

(i) The application is thus struck out accordingly

Dated, Signed and Delivered at NYAHURURU this 4th day of March, 2021.

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CHARLES KARIUKI

JUDGE

PRESENT:

Rugut – State Counsel

No appearance for Accused

Court Assistant - Henry