REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

MISC CRIMINAL APPL. NO. 52 OF 2020

YOUNG MULE.....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

1. Vide letter dated 3.6.2020 and filed on 4.6.2020, learned counsel B.M. Mungata & Co. Advocates sought revision of the Senior Principal Magistrates Court at Kangundo in Traffic Case 322 of 2018, on an application to have the matter start *de novo* and/ or reopen the prosecution case for purposes of cross examination of the prosecution witnesses.

2. In the said letter the reasons given for the instant application were that when the prosecution case proceeded for hearing, the accused was not represented by counsel; that the accused person was unable to properly cross examine the prosecution witness and as such the accused person was unable to raise a proper defense; that on 18.5.2020, counsel for the accused applied for the proceeding to start denovo and the court declined and that upon perusal of the proceedings, counsel was confident that had proper cross examination been conducted the accused person would most probably have been acquitted under Section 210 of the Criminal Procedure Code. It was stated that the prosecution would not be subjected to unnecessary hardship by recalling the witness for cross examination; further that it was in the interests of justice under Article 50(2)(h) of the Constitution of Kenya to have the accused person represented by counsel.

3. The state opposed the application on the grounds that the instant application was a delaying tactic that is ill-advised and an abuse of court process. He urged the court to dismiss the same and that the matter proceed for defence hearing.

4. The application was canvassed vide written submissions. Learned counsel for the applicant placed reliance on the provisions of Article 50(2) of the Constitution as well as section 146(4) of the Evidence Act and submitted that the recalling of a witness is part of the right to a fair hearing. It was submitted that most of the witnesses of the prosecution were close relatives of the deceased and as such the prosecution would not be subjected to any serious prejudice. Counsel cited the case of **Vincent Otieno Otieno v R (2019) eKLR** and urged the court to allow the application dated 4.6.2020.

5. In reply, learned counsel for the state cited the provisions of section 200(3) of the Criminal Procedure Code and submitted that it is only the accused person and not the defence counsel who has a right to recall prosecution witnesses. Counsel cited the case of **Ndegwa v R (1985) KLR 534** and submitted that the defence counsel's only available option is to scrutinize the trial court proceedings before the trial court and design a credible defence for his client. Counsel urged the court to dismiss the application in its entirety.

6. The singular issue for determination is whether the court may allow the application to reopen the case and allow the prosecution witnesses to testify afresh.

7. The applicant has invoked the revisionary power of the court that is provided for in **Article 165(6) and (7) of the Constitution** and **Section 362 as read together with Section 364 of the Criminal Procedure Code**. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the case. Reproduced as follows:

> **"362.** ***The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."***
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> ***364.(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the high court may***

…….

b. in the case of any other order than an order of acquittal, alter or reverse the order.

(***2***). ***No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;***

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

……;

5). When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

8. The operative law that provides for recall of witnesses is consisted in section **150** of the Criminal Procedure Code which provides as follows :

"***A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:***

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

9. The scope of the powers conferred upon the trial court were considered in the case **Murimi v. Republic (1967) E.A. 542** where the court observed that a "just decision" of the case arose when (a) there had been no case to answer, (b) when the defence had left the prosecution unproved beyond reasonable doubt, and (c) when the prosecution could have called the missing witness

10. This case speaks of the fact that the said provision of the law confers a discretion upon a trial court to summon or call any person as a witness or examine any person in attendance though not summoned as witness or recall and re-examine any person already examined. The basis on which a trial Judge should invoke his powers under this section depends on the facts of each particular case; and that section by no means permits a trial judge to turn into an investigatory court, his primary role in our legal system being to adjudicate disputes between two contending parties. Finally, the operation of the section is also subject to the proviso attached to it. It is therefore incorrect for the state to rely on Section 200(3) of the Criminal Procedure Code and also submit that the only option available to the defence counsel is to scrutinize the trial court proceedings before the trial court and design a credible defence for his client.

11. In **Kulukana Otim v R [1963] EA 257**, the Court of Appeal, in considering section 148 of the Ugandan Criminal Procedure Code which is, in *pari materia* with our section 150, stated that:

"It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself…."

12. The proviso to section 150 allows witnesses recalled to be cross-examined by the prosecution or the defence counsel and the case of Joseph **Ndungu Kagiri v R (2016) eKLR**, Justice Mativo observed as follows:

"***The question that arises is whether the further cross-examination was a good reason or whether it was necessary for the ends of justice. Counsel had just come on record, he had just been supplied with the proceedings and prosecution witnesses' statements and the accused persons had hitherto been unrepresented and did not have the benefit of the witnesses' statements at the time the trial proceeded nor did they have the benefit of legal representation. Counsel, in his wisdom deemed it fit to apply to cross-examine the said witnesses and the court overruled this application."***

13. In the case of **Joseph Ndungu Kagiri v Republic [2016] eKLR ibid**, Justice Mativo observed as follows:

"***Lord Denning in the celebrated case of Pett vs Greyhound Racing Association decried the state of unrepresented parties in court when he stated that:***

> ***"It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?"***

14. The above case seemed to suggest that there may be situations which would persuade a trial Judge to allow recall of witnesses and such a situation would be valid only if it is based on sound reasons.

15. In the instant case, the record bears witness that the accused person was unrepresented when the prosecution was giving their evidence and his gravamen is that had he had counsel, the case would not have turned out as it did. In my view his concerns were was justified because for purposes of section 150 of the Criminal Procedure Code, the trial is not concluded, and the discretion may be exercised any time before the trial is concluded. In the case of **De Sauza v Uganda [1967] EA 784** it was observed that trial in the Magistrates court ends with the close of the defence case.

16. In addition, the applicant had stated that had the applicant had counsel, then the matter would have resulted in an acquittal. I am of the view that allowing the application would be a measure against miscarriage of justice. According to **Archbolds Criminal Pleading, Evidence and Practice 38th Edition** paragraph 925 it was stated that "*A miscarriage of justice occurs where by reason of a mistake or omission or irregularity in the trial, the Appellant loses a chance of acquittal which is fairly open to that Appellant*". In order to avail the applicant a chance to be heard, there is no reason not to allow his application.

17. In the case of **Republic v Salim Mohamed [2016] eKLR** it was observed that

> "*Article 50 of the Constitution provides for fair hearing. Under Article 50 (2) an accused person has a right to fair hearing which includes: -*
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> *(a) to be presumed innocent until the contrary is proved;*
>
> *(c) to have adequate time and facilities to prepare a defence;*
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> *(g) right to choose and be represented by an advocate;*
>
> *(k) to adduce and challenge evidence;*
>
> *The accused is facing a serious charge and if found guilty might be sentenced to suffer death. He should be accorded all the available facilitation to enable him defend himself. It is clear that Mr. Shujaa was not the one representing the accused when the witnesses to be recalled testified. I do understand the position of the state in opposing the application as it is expensive and takes time to have a witness attend court and testify. Once a witness has testified it takes a lot of effort to convince such a witness to come back to court and testify again. However, Section 146 (4) allows the recalling of a witness who has already testified. Recalling a witness is part of the right to a fair hearing. It should not be felt that the court shielded the witness from further cross-examination unless it can be shown that the request to have the witness called is based on ulterior motive*."

18. The court in view of the above case is reminded of its powers under the Evidence Act in Section 146(4) that is expressed in the following terms:

> "***(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively."***

19. In this regard I find that the court is satisfied that that in order to accord justice to the applicant and having examined the trial court record, the trial court went into error in disallowing the application to recall the prosecution witnesses for cross examination. I have seen the need to recall the prosecution witnesses for cross examination. Recalling the prosecution witnesses for further cross examination does not amount to starting the case denovo. As the case is yet to be concluded a request for recall of witnesses by either the prosecution or defence should always be allowed to serve the interest of justice. There will be no prejudice caused to the prosecution if the witnesses are recalled for further cross examination as the prosecution counsel will have an opportunity to reexamine those witnesses if need be.

20. In the result I find merit in the request for revision by counsel for the defence. The same is allowed. The order by the trial court dated 18.5.2020 is hereby set aside. The prosecution's witnesses be recalled for further cross examination by the defence.

It is so ordered.

Dated and delivered at **Machakos** this **22nd** day of **July, 2020.**

D. K. Kemei

Judge