



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL REVISION NO.4 OF 2019

(Originating from Nyahururu CMCR.1282 of 2016 before Hon. S. Mwangi (SRM))

DIRECTORATE OF

PUBLIC PROSECUTION (D.P.P.).....APPLICANT

V E R S U S

CHIEF MAGISTRATE'S

COURT – NYAHURURU.....RESPONDENT

R U L I N G

The Director of Public Prosecution is aggrieved by the decision of the trial magistrate in *Nyahururu Criminal Case No.1282/2016 Republic v Antony Mariach Kunuita* who refused to allow the prosecution to amend Count II of the Charge Sheet.

The accused is charged with two offences. Count I is a charge of robbery with violence contrary to section 296(2) of the Penal Code while in Count II, he faces a charge of assault contrary to Section 251 of the Penal Code.

On 9/5/2019, the only remaining witness, PW5, a Clinical Officer produced the P3 form which he had filled on the same day. He classified the injuries sustained by the complainant as grievous harm because the complainant had lost sight in the left eye following the attack. As a consequence, the prosecutor applied to amend Count II from the offence of assault causing actual bodily harm to grievous harm. The accused opposed the application. The court reserved its ruling. In its ruling of 14/5/2019, the court declined to grant the application to amend the charge for reasons that the P3 form had been filled on 9/5/2019.

The prosecutor argues that there is no justification in the refusal because the delay in filling the P3 form was because that the complainant had been undergoing treatment and that the amendment will not in any way prejudice the accused because he can recall any witness he wishes to or cross examine them further. It is the prosecution's view that the court erred in declining the prosecution an opportunity to amend the charge just because the P3 form was filled on 9/5/2019.

Section 214 of the Criminal Procedure Code provides for amendment of charges. It reads 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:

Provided that-

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(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 the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.”

The above Section gives the court a wide discretion to amend the charge sheet upon an application. Of course, the said discretion must be exercised judiciously.

In the instant case, when the prosecution made an application for amendment of the charge under the above Section, and the accused person objected to the said application, the court reserved its ruling till 14/5/2019 when it ruled as follows:

“The application to amend the charge in Count II is declined because of the way it was made based on a P3 form that was filled on 9/5/2019.”

From a reading of the said ruling, the court did not consider the provisions of Section 214 of the Criminal Procedure Code because it never alluded to it.

The issue at hand was not the production of the P3 form. The P3 form which had been filled on 9/5/2019 was already produced in evidence and the court had not questioned its admissibility in evidence. At the time of the application to amend the charge, the prosecution had not closed its case and under Section 214 Criminal Procedure Code, the prosecution had a right to apply for an amendment of the charge. The question that the court should have addressed its mind to is whether the said amendment would be prejudicial to the accused.

The accused was charged in June, 2016. The Doctor, (PW5) who produced the P3 form that prompted the application to amend saw the complainant in 2016. The doctor said the complainant continued with the treatment of the eye in another hospital. It was not revealed when the treatment was completed. The accused had been charged with the offence of assault but after the complainant had undergone treatment it had turned out that he sustained a more serious injury to the eye prompting the application for amend the charge. It is not uncommon practice for the prosecution to prefer lesser charges pending medical evidence when more serious charges may be preferred.

PW5 was the last witness and if an amendment is allowed, the accused is not without protection. He has a right to recall all or some of the witnesses who have already testified or have them cross examined. The prosecution had called only 5 witnesses. Bearing in mind the serious injuries that the complainant sustained vis-à-vis the rights of the accused, I find that the accused will not suffer prejudice if an amendment is allowed. The prosecution should be ready to avail the witnesses within the earliest time possible bearing in mind the age of the case.

In the end, I do hereby revise the court’s order of 14/5/2019 declining to allow the prosecution to amend the 2nd count that the accused faces. The result is that the prosecution be allowed to amend count II and accused be allowed to recall any of the witnesses to testify afresh or for purposes of cross examination. The witnesses should be availed within the next two months that the trial court will be sitting.

Delivered, Signed and Dated at NYAHURURU this 13th day of June, 2019.

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R.P.V. Wendoh

JUDGE