



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL APPEAL NO. 48 OF 2017

AMOS MUIGAI KIMONDO.....PPELLANT/ACCUSED

VERSUS

REPUBLIC.....RESPONDENT

(From the ruling in Wajir Resident Magistrate's Court Criminal

Case No. 302 of 2016 – Hon. Mugendi Nyaga (RM)

JUDGEMENT

1. This appeal arises from a ruling in a criminal trial at Wajir court dated 17th August, 2017 where the defence counsel in the middle of the accused's defence testimony sought to stand down the accused person (now appellant) and sought an order from the court for the motor vehicle registration KBH 686U Toyota Corolla saloon wagon to be subjected to an inspection by NTSA (National Transport & Safety Authority) since the person who inspected the motor vehicle PW5 was not gazetted to carry out the exercise. That witness was Corporal Abdi Adan who had testified as PW5.

2. As a consequences in a ruling dated 17th August, 2017 the learned magistrate decided as follows:

“The defence were given ample time to cross examine PW5. In the opinion of this court it is during cross examination that defence ought to have pinned down PW5 on his qualifications. Similarly, it was during cross examination that they could have challenged methodology used to carry out the examination of the motor vehicle. At this stage it is too late to do so. Defence is seeking challenge production of PW5's report through the back door. The report was properly produced. Allowing the present application will not serve any justice. For that reason I disallow the application by the defence. Defence hearing to proceed.”

3. From the above ruling, the appellant has come to this court on appeal through counsel, Stephen Gakonyo Wanyoike raising seven grounds of appeal. Counsel also filed written submissions which he relied upon.

4. According to counsel for the appellant, PW5 was called wrongly by the prosecution as an expert witness as he was not endorsed by NTSA to conduct motor vehicle inspection. Counsel referred to the Evidence Act (Cap 80) on the description of an expert witness as well the case of **Sherrad vs Jacob [1965] NI 151**. Counsel also relied on a case of **Turner [1975] QB 834 at 841 CA** an English case in which according to counsel, it was stated that **“expert evidence or opinion was admissible to furnish**

the court with scientific information outside the knowledge of the judge or jury.”

5. Counsel also relied on the case of **Amosam Builders Developers Ltd vs Gachie and 3 Others [2010] EA 1** which according to counsel, listed the conditions to be satisfied for one to qualify as an expert witness.

6. Counsel stated that for motor vehicle inspection herein, it was only the NTSA that could authorize persons to carry out inspections and that the particular witness PW5 was not so authorized, as PW5 was only authorized by the DPP (Director of Public Prosecutions) to take photographs and not to inspect motor vehicles. Counsel relied on the Gazette Notice to demonstrate the Gazettement of PW5 to take photographs, and also the Gazettement from NTSA for authorized motor vehicle inspectors for the Garissa area valid for that time of 2013.

7. Counsel lastly, submitted that in any case, section 309 and 310 of the Criminal Procedure Code (Cap 75) allowed the prosecution to tender additional evidence when the defence introduced new and unexpected evidence, and as such the request of the defence should have been allowed by the court in the interests of fair trial under Article 50 (k) of the Constitution.

8. Mr. Okemwa, the Principal Prosecuting Counsel in response submitted that they had been served with the written submissions of Mr. Wanyoike. Counsel stated that he had suggested to Mr. Wanyoike that the defence could prepare their own technical report on the motor vehicle. In his view, the trial court should have granted leave to the defence to inspect the vehicle as requested.

9. I have considered the appeal and the submissions on both sides. I have also perused the ruling of the trial court.

10. In my view, the whole confusion arose because of the way the defence brought this issue before the trial court. They should have raised the issue of the qualifications of PW5 when he testified. They could have also chosen another line of defence. Since they did not question the qualifications of PW5, who did not in any case say that he was appointed by NTSA, they should have either on their own initiative or through an early application to the court asked for permission to inspect the subject motor vehicle and come with their independent report.

11. They chose instead to obtain documents or Gazettements of both PW5 and motor vehicle inspectors for Garissa authorized by NTSA and then, as the accused was tendering his defence, suddenly demanded that the vehicle should be inspected afresh. This was a needlessly confusing and delaying tactic, which might have prompted the magistrate to conclude that it was a delaying tactic.

12. Having said so, in my view, the learned magistrate should have given the defence a time frame in which to inspect the vehicle and present such evidence as part of their defence. The Prosecuting Counsel does not object to the request of the defence, and in my view rightly. In my view denying the request of the defence would amount to violation of the right to a fair trial enshrined under Article 50 of the Constitution.

13. I thus allow the appeal and set aside the order of the trial court disallowing the defence request to inspect the motor vehicle. I however leave it to the trial court to give the defence a specific time frame within which to do the inspection for the case to be heard and determined expeditiously. I will hereafter fix a mention date before the trial court.

These are the orders of this court.

Dated, Signed and Delivered at Garissa this 3rd May, 2018.

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GEORGE DULU

JUDGE