



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO. 212 OF 2018

IBRAHIM MUSEBE & ANOTHER.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

(Revision arising from a ruling delivered on 7th June 2018 in Mumias Criminal Case No. 925 of 2017 Republic vs. Ibrahim Musebe Akunda and Dennis Otieno Odera by Hon. FM Nyakundi, RM)

RULING

1. The court file in respect of Mumias SPMCCRC No. 925 of 2017 was placed before me on 13th July 2018 for revision of orders made in the ruling delivered on 7th June 2018 in the matter by Hon. FM Nyakundi, Resident Magistrate. The impugned orders arose from an oral application that the prosecuting counsel made on 5th June 2018. He applied that the defence counsel appearing for the accused, Ms. Shibanda Wilunda should disqualify herself from further acting in the matter as such for she was a prosecution witness listed as Witness No. 6 in the charge sheet. She was said to have been acting for the accused persons in a civil suit where she had drawn a plaint where the accused persons are the plaintiffs who have sued Ima Hauliers, the complainant in the criminal case.
2. Ms. Wilunda, in her response, conceded that she did represent the accused persons in the civil suit, but stated that the suit was still fresh, and had not been heard and determined. She asserted that she could not possibly be a witness in the criminal matter due to the client-advocate relationship between her and the accused and the fact that the accused were entitled to legal representation of their own choice. She asserted further that she could not testify against her clients as that would amount to conflict of interest. She further stated that the police were yet to approach her for the purpose of recording a statement.
3. By way of rejoinder, the prosecuting counsel said that Ms. Wilunda was a witness in the criminal case as per the charge sheet, adding that she was also a potential co-accused in the matter. It was countered that even she was unwilling to testify she could still be compelled.
4. The trial court noted, in its impugned ruling, that an advocate is an officer of the court, who should at all times act to assist the court arrive at a fair judgement. He noted that the issues raised did not relate to advocate-client confidentiality but it was about the possibility of defence counsel being called to testify to the fact she filed the civil suit on behalf of the accused. The court noted that should that be done, the accused and their counsel would be put in an awkward position. It would mean counsel would be appearing in the matter both as counsel and as witness at the same time. On the accused persons' right to counsel of their own, the trial court took the view that it was not being suggested that the accused were being denied opportunity to get any advocate to represent them. It was noted that Ms Wilunda was being categorical that she would not take the witness stand against her clients, but the court emphasised it has power to compel witnesses should they be recalcitrant. The application by the prosecution was in the end allowed, and Ms. Wilunda was required to disqualify herself from acting in the matter, and the accused were ordered to engage another advocate to take her place.
5. The accused are charged with the offences of conspiracy to defraud contrary section 317 of the Penal Code, Cap 63, Laws of Kenya, and of making documents without authority contrary to section 357 of the Penal Code. They allegedly conspired to make false accident claims and making false documents to facilitate the false claims. One of the charges in the criminal matter reads as follows-

‘CHARGE

COUNT 1: CONSPIRACY TO DEFRAUD CONTRARY TO SECTION 317 OF THE PENAL CODE.

PARTICULARS

OF

OF OFFENCE - CPC

1. IBRAHIM MUSEBE AKUNDA 2. DENIS OTIENO ODERO: On an unknown date before 14th February 2017, at unknown place within the republic of Kenya, with intent to defraud, jointly with others not before court, conspired to defraud IMA HAULIERS LIMITED, by making false accident claims alleging that you were injured while on duty, a fact which you knew to be false.

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WITNESSES

1. ...

2. ...

3. ...

4. ...

5. ...

6. SHIBANDA WILUNDA ASSOCIATES

7. ... ‘

6. It is not in dispute that that the accused persons in the criminal matter have a civil suit against the complainant herein Ima Hauliers Limited, where the plaint was filed by the advocate who appears in these criminal proceedings as their counsel. A copy of the plaint lodged in the civil case is not on record, but Ms Wilunda has conceded to being counsel for the accused in the civil matter, which suggests that she drafted the pleadings in question and caused them to be filed in court. It is also plain that she is listed in the criminal pleadings as a prosecution witness.

7. The law on disqualification of counsel is the Advocates (Practice) Rules. Rule 9 thereof provides that an advocate may not appear as such advocate before any court or tribunal in any matter in which they have reason to believe that they may be required as a witness to give evidence. In interpreting that provision, Sitati J said in *Mwendwa vs. M’Mwendwa* (2004) 2 KLR 621, that it need not necessarily be the opposite party calling the advocate as a witness, even the party for whom the advocate appears could require the said advocate, his own lawyer in the matter, to give evidence. The court observed that where the reality of being required as a witness becomes apparent, then the advocate, who may be so required to testify, should not continue to appear as advocate for a party in the matter.

8. It was said in *Jayantilal Narberam Gandesha vs. Killingi Coffee Estate Ltd and Panyiottis Prekeiss* (1969) EA 299, that where an advocate is required to give evidence in a case where he is also acting the proper cause of action for him would be to act as a witness rather than as counsel. It was said that it would be improper for an advocate both to conduct the case and give evidence; he should act as a witness and not appear as an advocate in the case. The court, in that matter, did not consider it irregular or illegal or as acting outside of jurisdiction for a magistrate seized of a matter to find it improper for an advocate to appear as an advocate and as a witness, and to have considered it his duty to require the advocate to relinquish his retainer. It was noted that an advocate is an officer of the court, and if a court considered that an improper procedure was about to be undertaken it has a duty to stop it, and in doing so it would be properly acting under its inherent powers.

9. I am conscious of the decision in *Jaferali and another vs. Borrisow and another* (1971) EA 165; where the court appeared to say that Rule 9 was not mandatory. The court said that the rules of practice are rules of etiquette and while the court will endeavour to ensure that the rules are not violated, it would appear that the court does not have power to prevent the anticipated violation. I agree that Rule 9 is in permissive language, but that should not be taken to mean that the advocate has a choice in the matter. It is a matter of ethics, etiquette, proper conduct. An advocate who cares about the standing of his profession in the eyes of the public and the integrity of the processes of administration of justice must do the right thing. Rule 9 says that acting an advocate in a matter where one is a potential witness is not proper conduct, and one should not wait to be told so.

10. As to advocate-client privilege, the court in *Virji and others vs. Sood* (1973) EA 145, said that section 134 of the Evidence Act provides that an advocate is not permitted, without his clients express consent, to disclose any communication made to him in the course and for the purpose of his employment as such by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment. However, the court stated that not every communication made by a client to his advocate is privileged. It noted that the word ‘disclose’ shows that the privileged communication must be of a confidential or private nature. It was said that the privilege only extends to professional advice, and not anything else. In that case a general background of how an advocate was instructed and the steps he took in the matter was said not to be privileged so long as it did not relate to communication.

11. In *Kagunyi vs. Gathua and another* (2008) 2 KLR (EP) 521, the court said that the guiding principle should be the interest of justice, which mandates, as distilled by the practice of the law and ethics, that an advocate faced by any such situation, ought to refrain himself without having to wait to be impeached by the opposite side when the matter comes up on trial. The court further noted that a party is entitled to an advocate of his own choice save where the cause of justice appears likely to be compromised. .

12. I believe I have said enough. It is clear to my mind that Ms Wilunda finds herself in a situation where she is counsel in a matter where she is likely to be called as a witness. Her clients are alleged to have had conspired to defraud. To facilitate the fraud they are alleged to have had made documents without authority and to have had used the said to file a civil suit. Ms Wilunda is their counsel in the civil suit. The allegation to my understanding is that they uttered or presented the alleged false documents to Ms Wilunda, whereupon she prepared pleadings and then initiated the civil action. Quite plainly, Ms Wilunda is a potential witness. Whether the state has called her as such or has not recorded statements from her is neither here nor there. Whether she will willingly accede to being a prosecution witness or she would decline testifying against her clients is also irrelevant, for the court has power to compel here.

13. In view of what I have stated above, guided by the authorities that I have referred to, I do not find anything irregular or improper or illegal about the order made on 7th June 2018 in Mumias SPMCCRC No. 925 of 2017 by Hon. FM Nyakundi, RM. There is no error on the record for me to revise under section 364 of the Criminal Procedure Code, Cap 175, Laws of Kenya. Consequently, I hereby order that the court file in Mumias SPMCCRC No. 925 of 2017 be returned to that court for final disposal of the matter.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 19TH DAY OF JULY 2018.

W MUSYOKA

JUDGE