



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL MISC APPLICATION NO. 81 OF 2017

ALI YUSUF JUNEJA

HUSSEIN YUSUF JUNEJA.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicants, ALI YUSUF JUNEJA and HUSSEIN YUSUF JUNEJA, through their counsel, MR. SHIMAKA N. LEONARD, have filed a Notice of Motion application dated 24th April, 2017 under certificate of urgency. The motion seeks the following orders

(a) Spent

(b) spent

(c) THAT this Honourable court calls for the lower court record of Shanzu Criminal Case No 234 of 2016 with a view to evaluate and satisfy itself as to the legality, propriety, judiciousness and correctness of the orders made by Honourable D. MOCHACHE on 7th April, 2017 in Criminal Case No 234 of 2016.

(d) THAT this Honourable court be pleased to set aside the ruling of Hon. MOCHACHE in Criminal Case No. 234 of 2016.

(e) THAT this Honourable court be pleased to order the recall of the complainant and one SAMEER SHERALI JAHI who swore and affidavit dated 8th March, 2017 for purposes of cross examination only.

2. The application is supported by nine (9) grounds on the face of it and the joint affidavit sworn by the Applicants on 24th April, 2017. The same are as follows;

(a) THAT the Applicants are the accused persons in criminal case No. 234 of 2016 which case is being presided over by Hon. D. Mochache.

(b) THAT the Applicant are represented by counsel

(c) THAT on the 28th March, 2017 the matter was coming up for hearing at Shanzu Law courts and the court proceeded with the prosecution's case without the advocate for the applicants being present, and the prosecution closed its case.

(d) THAT counsel for the applicants thereafter made an application to recall two witnesses for purposes of cross examination.

(e) THAT the said application was denied by the trial court.

(f) THAT the denial will cause a great injustice to the applicants if the orders of the trial court are not vacated to allow the applicants challenge the said evidence.

(h) THAT it is only just and fair that the proceedings of the trial court are stayed, to enable this application be heard and determined

(i) THAT it is in the interest of justice that this application is allowed to prevent a miscarriage of justice to the applicants

3. The supporting affidavit has seventeen (17) paragraphs and the relevant one are as follows:-

Paragraph 5: That our advocate was attending a different matter in the High court in Mombasa which information we gave to the trial court.

Paragraph 6: THAT before our advocate could get to court, the hearing was continued and two witnesses were called, and an affidavit produced in court as evidence.

Paragraph 7: THAT we were never afforded an opportunity to challenge the said evidence.

Paragraph 8,9,10 and 11: are to the effect the defence application to have the matter re-opened for purpose limited to cross examination of two (2) witnesses was rejected and the matter scheduled for submissions on case to answer.

Paragraph 14: THAT the trial court did not properly exercise its discretion as provided under section 146 (4) of the Evidence Act in denying the application to recall the witnesses for cross- examination.

Paragraph 15: THAT as a result, the trial court has violated our Constitutional right to a fair trial that allows us to challenge evidence produced against us and as well as that witness statements made in writing ought to be cross examined.

Paragraph 16: THAT no prejudice will be suffered by either party as witnesses to be recalled hail from Mombasa County.

Paragraph 17: THAT the interest of justice lean towards granting the orders sought.

4. The court called for the lower court file to evaluate for itself the proceedings of the day as weighed against the provisions of the law alleged to have been breached and or violated by the refusal of the trial court to allow witnesses to be recalled for the purpose of cross examination only.

5. The prove from revision is donated to the High court by the provisions of sections 362 and 364 (1) (b) of the Criminal Procedure Code.

Section 362 of the said code provides as follows.

“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”.

Section 364 (1) (b) of the same Act provides

“ In the case of any other order other than an order of acquittal, alter or reverse the order”.

6. The events of the day as per the record are recorded as follows;

16.3.2017

Before Hon. D Mochache (SPM)

State: Marinda

C/A – Etropia

Accused – Present

Mr Thiyaka for complainant

Pros – I am ready to proceed at 10.00am.

Pros : Mr Shimaka is not yet here.

Accused : He is coming

Court – Placed aside.

Later at 2.00pm

Mr Thiyaki : Watching brief for Samir Sherah

Accused: Mr Shimaka is coming.

Court: It is now 2.00pm. The matter was scheduled to proceed at 10.00 Mr Shimaka has not arrived. Hearing to proceed.

Pros : I would like to recall Pw1 to produce documents. Pw1, adult sworn states Shahzid Ahmed Yusuf . I recall testifying in this court., I bought motor vehicle from Samier Haji Sherali Z B 841 2 make Trailer Dolla- sale agreement MF1-1 produced as exhibit P1, Original log book Exhibit-2, transfer documents MF1-7 (a), Exhibit 7 attached to the transfer is a copy of ID MF1-7(b) and a copy of the records Mf1-7 (c) , PIN certificate MF1-7 (d) produced as 7 (a) – (d). An affidavit has been prepared and I wish to produce as exhibits. In the affidavit he depones that he sold the motor vehicle that's all.

Cross examined by the 1st accused: We want Samir to be called as witness.

Cross examination by 2nd accused: I want barrier to come to court

Pros: The defence can call Samir as a witness. We are not calling him. We rely on the documents. I close my case. That is all.

Court: Submissions on 28.3/2017.

8. On 28.3.2017, the matter came up for submissions, and Mr Shimaka, counsel for the accused persons attended court and simply apologized to the court stating that:

“I am sorry I could not make it to court last time. The matter is coming up for submissions, I have an application to make. He made his application to re-open the case and recall makers of the documents. The same was opposed by the prosecution and ruling set for 7.4.2017”.

9. The Honourable trial court rendered itself on the history of the case and stated that the whereabouts of the advocate were not revealed to court. True, when the advocate attended he did not make an effort to inform court where he was held up. However, that is not the single ground on which he asked court to re-open the case and recall the witnesses for cross examination. The reason he gave was that the witness who testified on 16.3.2017 in his absence produced documents among them and affidavit upon which he desired to cross examine the maker.

10. I have looked through the ruling and nothing has touched on this point. At this stage, the contents of the affidavit and the copies of documents produced from KRA are unknown. This is a red flag to the admissibility of the evidence of affidavit and photocopies.

11. The other point I wish to point out is that the fact that pw1 had testified and been cross examined earlier but did not produce the evidence he now produced and the fact that another party, referred to as seller was not called as a witness to produce the sale agreement, was not addressed. The applicants (accused persons), though layman, sensed the danger and applied for the said seller by the name Samir to be called as a witness. This was not granted and here the trial court is faulted for failing to exercise its discretion judiciously, despite identifying the correct law and principles to apply in the case where a party calls upon court's discretion to recall witnesses.

12. Article 50 (2) (k) of the constitution on completeness of trial states as follows;

“Every accused person has a right to a fair trial which includes -

2 (k) adduce and challenge evidence

Bearing in mind that Pw1 was recalled to produce documents,

the evidence contained in the said documents did not form part of her testimony to court in the first instance, and hence ought to have been interrogated or tested by cross examination as to their authority and credibility.

13. I have read through the submissions by the prosecution in opposition to the application, and what comes to the fore is the failure by the applications counsel to attend court . It is worth observing that the reason for applying for the reopening of the case and recalling of Pw1 was because this is a witness who had testified and was recalled to produce new evidence which the defence wished to cross examine him over the content as the same was produced in the absence of their counsel.

14. The powers of the trial court after it has summoned one to give and produce further evidence is determined by the provisions of section 150 Of the Criminal Procedure Code; which states as follows;

“Provided that the prosecution or the Advocate for the prosecution or the defendant or his advocate shall have the right to cross examine any such person and the case for such a 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 witness”.

15. The admissibility of Pw1's evidence after he was recalled was of great importance and the court in embracing the principle of fair trial,

ought to have, on its own motion adjourned the case to allow for the defence to prepare their defence and cross examine this witness who was only buttressing his evidence.

16. The applicants have complained that the refusal by the court to allow the re-opening of the case and recalling of Pw1, they were denied their right under section 153 of the Evidence Act which requires that;

“a party be called to prove the contents of a document authorized by them so as to have its contents admitted as evidence”.

17. Further section 146 (4) of the Evidence Act states that:

“ 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 a right of further cross- examination and re-examination respectively”

18. The totality of the observation made herein is that while counsel may have failed to adequately or satisfactorily explain his absence in court, this inadvertence should not have been visited upon his clients, the applicants, who are entitled to the right to fair trial. From the provisions of the law as observed herein, justice leans in favour of reopening the case and recalling Pw1 so that he can be cross examined on the documents he produced to test their authenticity and veracity before they can be admitted as evidence against the applicants.

19. For these reason, the application for revision is allowed and the following orders issue;

(a) Ruling delivered on 7th April, 2017 be and is hereby set aside.

(b) The proceeding to be re-opened and Pw1 to be recalled for cross examination, limited to his further evidence.

(c) The matter to be mentioned before the trial court for directions on 22.10.2018.

Ruling read and delivered this 16th day of October, 2018.

LADY JUSTICE D.O CHEPKWONY

In the presence of

M/s Ocholla for the state/Respondent.

M/s Odhiang, counsel holding brief for Mr Shimaka, counsel for the Applicants.

C/clerk- Beja Nduke