



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO. 39 OF 2017**

**BETWEEN**

**JUSTUS WEKESA WANYONYI.....1ST APPELLANT**

**WILLIAM SIMIYU MASINDE.....2ND APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

***(An appeal from Ruling and Order in Criminal Case Number 2385 of 2010 in the***

***Chief Magistrate's Court at Bungoma by Hon. E.N.Mwenda (SRM) on 11.1.17)***

**JUDGMENT**

**Background**

1. By a Notice of Motion dated 16th October, 2015, the respondent sought leave to amend the charge sheet. The application was opposed by way of a replying affidavit sworn and filed by the appellants on 21st October, 2015.
2. By a ruling dated 11th January, 2017, the respondent was granted leave to amend the charge sheet.

**The Appeal**

3. Aggrieved by the Ruling, the appellants lodged the instant appeal on 3rd April, 2017 setting out 6 grounds of appeal which I have summarized into 4 grounds to wit:-

1. ***That the application to amend is being made 6 years after the charges were instituted***
2. ***Prosecution is fishing for evidence***
3. ***Five witnesses have already testified***
4. ***That it is a constitutional right of the appellants that the trial should not be delayed***

4. When the appeal came up for hearing on 6.11.18, Mr. Olunyi for the appellants submitted that the amendment will breach the appellants rights under Article 50(2)(a) of the Constitution and that power to amend under section 214 of the Criminal Procedure Code should be exercised judiciously. He urged the court to be guided by Article 159(2) (b) of the Constitution to ensure that justice is not delayed. Appellants placed reliance on **Republic v Michael Ezra Mulyoowa [2015] eKLR.**

5. Mr. Oimbo learned Counsel for the state opposed the appeal on the grounds that the appellants are to blame for the delay in the conclusion of the trial and further that they had not demonstrated what prejudice they will suffer if the amendment is allowed. Counsel gave various instances when the trial was adjourned at the behest of the appellants. On the other hand, the prosecution contends that the appellants would not be prejudiced because they would have the opportunity, if they so wished, to recall the prosecution witnesses who have already testified.

**Analysis and Determination**

6. Section 214(1) of the Criminal Procedure Code provides as follows:

*“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 sheet as the court thinks necessary to meet the circumstances of the case:...”*

7. That the prosecution has the right to amend or substitute the charge before the close of its case is not in doubt. That the appellants will be given an opportunity to demand for the witnesses who had testified to be recalled for further cross-examination if they so wish, is also not in doubt.

8. The appellants’ trial before the subordinate court has been pending for a period of eight (8) years and has on severally been adjourned at the behest of both the prosecution and the appellants. The record also shows that there were instances when the trial did not proceed because the trial magistrate was not sitting.

9. Five witnesses have so far testified. The right of the accused persons to be accorded expeditious trial, in my humble view goes hand in hand with the complainants’ expectation that they will have an opportunity to present their case, as it is, before the trial court.

10. The respondent seeks to amend the dates and sums of monies involved in this case and I am not convinced that the amendment will be prejudicial to the appellants.

### **Decision**

25. *Having considered the totality of the appeal, I dismiss the appeal and uphold the ruling dated 11th January, 2017.*

**DELIVERED AND SIGNED AT BUNGOMA THIS 9th DAY OF November 2018**

**T. W. CHERERE**

**JUDGE**

In the presence of-

**Court Assistants - Ribba & Diannah**

**1st Appellant -**

**2nd Appellant -**

**For the Appellants -**

**For the State - Mr Oimbo**