



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CRIMINAL APPLICATION NO. 50 OF 2016

MARTIN MUTUMAAPPLICANT

VS

REPUBLIC.....RESPONDENT

RULING

On 9th of February, 2015, **Martin Mutuma** (hereinafter “the Applicant”) was arraigned before the Chief Magistrate's Court, Meru and charged with the offence of stealing from a locked motor vehicle **Contrary to Section 279 (g) of the Penal Code**. It was alleged that on the **7th February, 2015** at about 10.15 am at Meru Museum gate within Imenti North District of Meru County, jointly with another not before Court, the applicant stole one Coat and 60 eggs all valued at Kshs 9,040/= the property of Santis Wanja Ileri. That in order to commit such theft, the Applicant and that other person opened the window of a motor vehicle with a piece of stick. The Applicant denied the charges.

The trial commenced on 24th May, 2016 when PW1 and PW2 testified and were cross – examined by the Applicant. The matter was then adjourned to 5th July, 2016 for further hearing. On that date, the prosecution was ready to proceed with two (2) witnesses but the Applicant refused to proceed with the trial on the ground that he had no faith with the court. The trial court declined to recuse itself and ordered the matter to proceed for hearing. However, due to the then ongoing strike by Advocates the matter was adjourned to 4th August, 2016.

On the said 4th August, 2016, the Applicant again informed the court that he had no faith with it and would not proceed with the trial. The court once again indicated that there were no good reasons for it to recuse itself but for time constraint, the matter was adjourned to 27th October, 2016. On that date, the accused told the court that he did not wish to participate in the proceedings even though the prosecution was ready to proceed. The trial court then ordered the matter to proceed for hearing whereby PW3 and PW4 testified but without being cross – examined by the Applicant who was present in court. The matter was then adjourned to 22nd November, 2016.

The record of the trial shows that on the 22nd November, 2016, the Applicant refused to come out of the cells as he did not want to appear before the trial court. The trial court therefore ordered that the trial do proceed in the absence of the Applicant. PW5, the Investigating Officer thereupon proceeded to testify and the prosecution closed its case. The court reserved the matter for ruling on no case to answer for 24th November, 2016 when the Applicant was put on his defence. It is recorded that when the court orderlies attempted to bring the Applicant out of the cells to court, he became violent whereby the trial court concluded that the Applicant was not willing to make any defence. The court therefore reserved its judgment for 13th January, 2018. On that date, the Applicant was not produced and the trial court issued a Production Order for the 18th January, 2017. That then is the background to the Applicants application before this court.

In the meantime, on 16th October, 2016, the Applicant had filed a Notice of Motion supported by Affidavit sworn by him on 13th October, 2016. In the application, the sought orders that this court intervenes and orders that his case be heard afresh by a different court. The grounds for the application were that, his case had stayed for a long time without being heard and determined; that his case had overwhelming chances of acquittal and that it is the trial court that had directed him to make the application. In the Supporting Affidavit, the Applicant averred that he had pleaded not guilty to the charges and that the trial court had directed him to make the present application.

When the matter came up for mention before me on 16th January, 2017, the Applicant informed the court that the trial court had sided with the complainant; that the court was supposed to deliver a judgment in December, 2016 but it did not and that therefore his case had no date of judgment. He complained that he did not testify before the trial court and that the matter had proceeded in his absence. On the said allegations, Mr Mulochi for the prosecution urged the court to call for the lower court file for the Applicant to be heard. This Court called for the record of the trial court and the application was heard on 23rd January, 2017.

At the hearing, the Applicant stated that he had conducted the case before the trial court without witness statements; that when he got the statements he found that he had conducted the case improperly whereby he applied for the recall of witnesses. That when the court declined his application, he applied for the court to disqualify itself. Mr Mulochi the learned prosecutor opposed the application. He submitted that the trial court had delivered a ruling on the Applicant's application whereby he turned violent leading to being excluded from the trial. He urged the court to dismiss the application. I have considered the record, the supporting affidavit and oral submissions of the parties.

This is an application for this court to disqualify the trial court (Hon. Karanja) from conducting the trial of the Applicant. The grounds are that the trial court is biased against the Applicant; that the trial had taken long and that the trial court had advised the Applicant to make the present application. Article 50 of the Constitution of Kenya provides that an accused person is entitled to a fair trial which includes a speedy trial. The relevant provision of Article 50 provides.

“ (1)

(2) ***Every accused person has the right to a fair trial, which includes the right;-***

(a)

(b)

to have adequate time and facilities to prepare a defence;

(d)

(e) ***to have the trial before a court established under this constitution.***

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g)

(h)

(i) ***.....to remain silent, and not to testify during the proceedings;***

As regards, the complain that there was delay of the trial, the record shows that although the Applicant was arraigned in court in 2015, there were initial adjournments that were occasioned by the non availability of statements. However, the Applicant was finally supplied with the said statements on 13th

August, 2015. On 10th September, 2015, the following is the record of the proceedings:-

“ Prosecutor. I have 3 witnesses. PW1 swears states in Kiswahili which the accused understands”.

Accused. I don't have statements. I cant go on.

Prosecutor. I will provide it.

Court. Matter adjourned I give the accused time to peruse the statement. Hearing 29th September, 2015.

Signed.

Accused. This court is not fair the prosecution is frustrating me.

Court. I direct that the accused be given chance to see the case he is against. Matter placed aside so that he is given statements.

Signed.

Later

Coram as before

Court. I have observed the demeanor of the accused who appears to be very rude and anti-system. He has engaged into open arguments in court.....

Court. I have noted that the accused has been issued with statements now, but because he has voiced concerns that this court will be unfair, I hereby disqualify myself and ask the accused which court he will like to be tried in.

Accused. I want to go to court 1.....”

The matter was thereafter allocated court No. 4. On 7th January, 2016 the prosecution was ready to proceed with 3 witnesses but the matter was adjourned as the Applicant was unwell. The matter finally commenced on 24th May, 2016. From the foregoing, this court is not satisfied that the Applicant's trial has been delayed.

The next issue is the complaint of bias. From the record, it is quite clear that it is not true that the Applicant did not have witness statements when he conducted his trial. He was supplied with the statements in September, 2015 and the trial began on 24th May, 2016 when PW1 and PW2 testified. In any event, there is nowhere on record to show that he applied for the recall of any witness and for what reason and was denied the chance. What the record shows is that after PW1 and PW2 testified, the court adjourned the matter to 5th July, 2016. When the prosecutor stated that he was ready with two (2) witnesses, the Applicant is recorded to have stated;-

“ Accused. I am not ready to proceed. The complainant had come to court and wanted to forgive me as he said I was not involved but the court refused and I have no faith in the court.”

That marked the beginning of the Applicant's refusal to co-operate in his trial.

As regards the Applicant's failure to testify, the record is clear. The Applicant exercised his right under Art, 50 (2) “ to remain silent and not be testified. Further, the trial court was entitled to proceed with the trial in his absence on 22nd and 24th November, 2016, respectively when the Applicant became violent and refused to leave the cells. The court acted within the provisions of Article 50 (2) (f) of the

Constitution.

It must be made clear that parties who come to court are not to choose which court is to adjudicate over their disputes. All courts are deemed to be impartial unless there is evidence to the contrary. This court is satisfied that the trial court did not exhibit any bias against the Applicant and was entitled to decline to recuse itself. It is the Applicant who exhibited open and uncalled for hostility against that court.

In the premises, I find the application to be without merit and is dismissed. The court file for the trial court be returned for that court to expeditiously proceed with its proceedings.

It is so ordered.

DATED AND DELIVERED AT MERU THIS 16TH DAY OF FEBRUARY, 2017.

A. MABEYA

JUDGE