



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
CRIMINAL APPEAL NO. 64 OF 2016

CHARLES MORABA PIUS.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

J U D G M E N T.

INTRODUCTION.

This is the Judgment of **Criminal Appeal No. 64 of 2016**, from the ruling of **The Principal Magistrate Hon. E. K. Nyutu** dated **30/10/2016** in the Magistrate's Court in **Criminal Case No. 38 of 2016, State Vs Charles Moraba Pius.**

The accused Charles Lumumba Moraba Pius was charged of soliciting for a benefit contrary to **Section 39(3) (a)** as read with **Section 48(1)** of the **Anti-corruption and Economic Crimes Act No. 3 of 2003.**

Particulars thereof were that on the **28th day of December, 2015**, at **Kisii Lands Office, Kisii County**, being a person employed by a public body to wit, **Ministry of lands as Deputy Land registrar**, corruptly solicited a benefit of **Ksh. 6,000/=** from **Jane Kwamboka Ondieki**, as an inducement to render services in a boundary land dispute between **parcel No. Wanjare/Bogitaa /1949 Vs Wanjare/Bogitaa/1950**, a matter relating to the affairs of the said public body that was count 1. There were three other counts on various and different dates.

The accused is represented by one **Sagwe**, an Advocate of the High Court of Kenya. The accused pleaded **NOT GUILTY** to all counts.

The hearing commenced on **17th October, 2016**. On **8th November, 2016**, two witnesses, expert witnesses, **PW8** and **PW9** were ready to testify but the advocate was not present. The accused was asked about the whereabouts of his Counsel. The accused said he was unable to reach him even on phone, his phone was switched off.

The accused was asked if the matter could proceed without his Counsel, he said he had no objection.

The two witnesses took the stand and testified, the accused cross-examined them.

When counsel arrived in court at 5.30 o'clock, the two witnesses had already testified. On **30th October, 2016**, Counsel applied for the recall of the two witnesses for cross-examinations.

The prosecution opposed the application. The court ruled against the counsel's application.

This ruling is unexpurgatedly produced here-below:

{Court: court has considered the application by counsel for the accused as well as the objection raised by the prosecution. The court has heard the accused and noted that when this matter took off on 04/05/2016 there were 3 witnesses in court. The counsel for accused sought an adjournment and the same was granted.

The matter was fixed for hearing on 27/6/2016 with the consent of the said counsel of accused.

On 27/06/2016, it turned that some documents had not been supplied to the defence and an adjournment was granted to the prosecution. The matter was set for hearing on 17/10/2016 with the consent of counsel for accused.

On 17/10/2016, there were 4 witnesses in court but the counsel for accused was not present. The accused was given an opportunity to call the counsel but he reported that the counsel could not be reached through the phone.

The matter proceeded for hearing as the court heard that there was insufficient reason to warrant an adjournment. 3 witnesses testified on that day namely PW1, PW2 and PW3. The matter was thereafter fixed for hearing on 19/10/2016.

Counsel for accused came to court and made an application to recall PW1, PW2 and PW3 for further cross-examination. The application was allowed for the sake of justice and fixed another date for hearing on 07/11/2016.

The said PW1, PW2 and PW3 were recalled to court and the matter was set down for further hearing on 08/11/2016 with the consent of the counsel for accused.

On 08/11/2016, the counsel for accused did not turn out in court. The accused submitted that his Advocate had not been seen and his phone was off. The matter proceeded for hearing when the accused indicated to the court that he did not have any objection to the matter proceeding.

Today the 30/11/2016, the counsel for accused is making an application to recall PW8 and PW9. The trend by the counsel of the accused is obvious.

He is justified by absence in court on 08/11/2016 by tendering a police cash bail receipt purporting that he had been arrested. I have perused the same and noted that it was issued to Evans Makori. The counsel before the court is Samson Mauti Sagwe.

The cash bail receipt was issued on 08/11/2016 at 15:25 hours. The matter was set down for hearing at 2.00 p.m. I am not satisfied with the said cash bail receipt herein because it bears the name of a person different from counsel for accused. It was issued much later that the time which the hearing was set to have started and lastly the counsel for accused had not communicated to his client or anyone whatsoever about his alleged "Predicament."

For this reason the ground given by the counsel for the accused to recall PW8 and PW9 is an afterthought and calculated to ridicule the court processes.

This is a court of justice and its dignity must not be pauged at all times. It cannot be held at random on the wishes of a counsel for accused who is clearly on errand of mischief.

For this reason the application to recall PW8 and PW9 is denied.}

E. K. NYUTU

PRINCIPAL MAGISTRATE

30/11/2006

THE APPEAL

The Appellant being aggrieved with the ruling by **Hon. Magistrate** has now appealed to this court.

Has itemized FOUR Grounds of this Appeal, that is:

- i. **The Learned Trial Magistrate** erred in law by misdirecting herself when denying the recalling of two witnesses for further cross examination who testified in absence of counsel for the accused/Appellant thus occasioning miscarriage of justice.
- ii. **The Learned Trial Magistrate** erred in law by failing to recognize that the accused person has a constitutional right to be represented at all times by an advocate of his own choice as envisaged in the constitution of Kenya **2010**.
- iii. **The Learned Trial Magistrate** erred in law by denying the defence to a fair hearing as envisaged in **Article 50** of the constitution of Kenya **2010** and **Section 150** of the Criminal Procedure Code.
- iv. In the circumstances **The Trial Magistrate ruling** was bad in law and oppressive to the Appellant/Accused if further cross-examination of the two witnesses is denied.

Ask for the following ORDERS that:

- a) The appeal be allowed.
- b) The ruling of the lower court dated **30th day of November, 2016** rejecting the recalling of the two witnesses for further cross-examination be reviewed and set aside.
- c) The defence be allowed to recall the two witnesses who testified on the **8th day of November, 2016** for further cross-examination.
- d) Such further or other relief as may to this Honourable court to be just.

The Appellant's Affidavit.

The supporting affidavit sworn on **3rd February, 2017** in support of the petition of the deponent, **Charles Lumumba Moraba Pius** appeal, states, inter alia, as follows:

5. **That** on **08/11/2016**, my advocate did not arrive in court when the case was called at about 2p.m. the starting time.
6. **That** on **08/11/2016** I was asked to proceed with my case in absence of my advocate and in absence of the statement.
7. **That** I had not prepared for the case to present myself as I know I had already engaged an advocate.
8. **That** the two witnesses were called and testified in absence of my advocate and I never asked them proper questions as I had never read their statements.
9. **That** the two witnesses complete their testimony on **08/11/2016** and at around 5.20p.m. My

advocate arrived.

11. **The** delay by my advocate was because he and his driver were arrested by the police traffic officer on the way to Nyamira Law Court.

12. **The** cash bail receipt of **Ksh. 5,000** marked **exhibit 1**.

14. **That** the absence of my advocate was not intentional.

15. **That** on **30th November, 2016** my advocate made an application orally in court to recall the two witnesses who testified in his absence for further cross examination.

16. **That** the Magistrate made a ruling and denied the advocate's application which led to this appeal before this court.

20. **That** the unchallenged evidence given by the two witnesses on **08/11/2016** will render miscarriage of justice will take effect on my life.

21. **That** the prosecution will not suffer any prejudice of the two witnesses are recalled for cross-examination as the prosecution will have a chance to re-examine further.

The Respondents Affidavit and Grounds of Opposition.

The respondent, in his affidavit sworn on **13th February, 2017** set out the chronology of the hearing of Criminal Case No. 38 of 2016. He avers, that:

The hearing commenced on **17th October, 2016**.

On 8th November, 2016 Counsel for the accused failed to attend court. The case proceeded on when the accused was, first asked, if he had any objection for the case to proceed without his counsel, the accused gladly and happily acceded to proceed with the two witnesses **PW8 & PW9** and happily cross-examined with some reasonable control of the matter, even though he is not a lawyer.

Upon the lawyer's arrival, the lawyer made an application to recall the **two expert witnesses**.

The court refused. Hence this Appeal.

The Respondents filed FOUR (4) Grounds of Opposition, namely:

1. Article **50 (2) (4)** of the constitution.
2. Section **150** of the Criminal Procedure Code.
3. Section **146 (4)** of the Penal Code.
4. The Appellant has not demonstrated the prejudice he will suffer if the expert witnesses are not recalled, as their evidence will not change.

SUBMISSIONS

The Appellant's Counsel submitted as follows:

1. To recall the witnesses **PW8 & PW9**, as their evidence is crucial.
2. That his absence was not intentional. His vehicle was detained for excess speed. He paid cash bail of **Ksh. 5,000** to police, see

Exhibit 1.

3. Cited:

a. Section **146 (4)** of Evidence Act.

b. Section **150** of the Criminal procedure code.

c. Article **50** on fair hearing.

4. That the ruling of The Trial Magistrate be set aside and the Appellant be allowed to recall the two witnesses.

5. Therefore he prays that the court do allow the appeal.

The Respondent's Counsel Opposing the Appeal

Submitted as Follows:

1. Relies wholly on the replying affidavit and his grounds of opposition.

2. That **paragraph 3, 4, 5, and 6** of his affidavit brings out the conduct of both the appellant and his client.

3. Their conduct are aimed at derailing the expeditious disposal of this matter but also brings to disrepute, the integrity and impartiality of the trial Magistrate.

4. This court should note that at all the time this matter has not proceeded, it has been at the behest of the defence. The prosecution has always been ready to proceed. For example;

On 4th May, 2016, the State had three **(3)** witnesses. The defence applied for adjournment on grounds that he was unwell.

On **17thOctober, 2016** prosecutor had three **(3)** witnesses, defence counsel was absent. The court proceeded with the case notwithstanding.

On **19th October, 2016** defence counsel applied to recall the three witnesses who testified on **19th October, 2016**. The court upheld the ruling in his favour. The three witnesses were recalled for cross-examination on **7th November, 2016**.

5. On **8th November, 2016** two witnesses, **PW8 & PW9**, expert witnesses. The defence counsel was, again absent.

The court proceeded with the hearing but first asked if the accused was comfortable proceeding without his counsel, he answered in the affirmative.

On **30th November, 2016** counsel, was present, conducted several witnesses but made an application to recall the two expert witnesses for cross-examination.

The court refused the application.

6. That the recall is not the first, is well calculated pattern to derail and delay the hearing.

7. Respondent cited several authorities:

- a. Art. **50 (2) (e)** Every accused person has the rightwhich includes the right to have trial begin and conclude without unreasonable delay.
- b. Section **150** of Criminal procedure code.
- c. Section **146 (4)** of Evidence Act.

The operational word is that the court may recall witnesses, not shall recall witnesses.

- d. Court of appeal, criminal appeal **No. 9 of 2015 Githinji, Sichale and Kantai, JJA.**
 - e. High court, Criminal **No. 10 Of 2015, Busia, W. Korir J.**
 - f. High court, Criminal **No. 12 of 2012, Eldoret, Munyao Sila J.**
 8. In corruption matters, pressure to expedite is generally intense on all institutions involved, Judiciary, DPP, UDCI and EACC
- Therefore, the actions and the defence are manifestly meant to derail, slow and delay the speedy conclusion and also embarrass the court.
9. Therefore, the counsel urges the court to dismiss this Appeal.

FINDINGS.

The court has read the supporting affidavit of the Appellant. It has also read the replying affidavits of the respondents together with his grounds of opposition.

It seems clear, that since the hearing of **Criminal Case No. 38 of 2016** began, two patterns have emerged, either defence counsel would be absent, or would apply to be excused. And if absent, and the matter proceeded, on next appearance, he would make an application to recall the witnesses for cross-examination.

This, if granted, slows the progress of the case.

It is true, from the respondent submissions, every adjournment has been at the behest of the defence counsel. The prosecution has always been ready and willing to proceed.

On **08/11/2016**, the hearing had to commence at 2 o'clock. When the court was ready at 2 o'clock, counsel was absent. The Appellant was unable to reach him. His phone was switched off.

When he arrived at 5.30, the witnesses had testified. He gave some explanation, produced a cash bail receipt as evidence that the police traffic arrested them on the way to Nyamira.

However, the court on realizing that counsel was absent, asked the accused if he would be happy for the matter to proceed. He said yes. This means by asking the accused, the court had a latitude to adjourn if the answer was in the negative. But the answer was positive.

Why didn't defence counsel ring his client and inform him of his difficulty he had encountered?

This was a simple thing to do. Or get a lawyer to rush and explain his predicament.

To recall a witness for cross-examination or otherwise is permissible both under the law of evidence and under Criminal Procedure Code. However, the party applying must lay sufficient ground for the recall, a desire to clarify a point, must point out the point he needs to clarify in the evidence so far adduced. A mere statement that **"I recall PW8 & PW9"** for cross-examination is not sufficient.

Two legal authorities will buttress this point:

“The application was not grounded on any reasons or justifiable facts, or on a desire to clarify any previous issues. It was an application which any prudent court could not grant.”

Must demonstrate that there would be a miscarriage of justice, see **Criminal Appeal No. 9 of 2015, Between Elijah Kaigwa Nyambura Vs Republic. By Githinji, Sichale and Kantai, JJA.**

In Criminal Appeal No. 10 of 2015, Otigbu Vs Republic by W. Korir J.

The court declined a recall and said: **“I find that the appellant’s counsel did not establish any basis for recall of PW3.”**

In conclusion, this appeal dated **14th December, 2016** has no merit and therefore, it be and is hereby dismissed.

Dated and delivered at Nyamira this 1st day of March, 2017

C.B. NAGILLAH

JUDGE

In The Presence of:-

Bonwonga hold brief for Sagwe for Accused /Appellant

Imbale for Respondent state

Mercy for Nancy - Court Clerk