



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

HCCR APPEAL NO. 30/11

PAUL MUTEMI KANYI..... APPELLANT

V E R S U S –

REPUBLIC RESPONDENT

R U L I N G

What is coming for hearing today is the appellant/applicant's Notice of Motion filed on 10th June 2016 dated 8th June 2016.

When the matter came before Hon. Justice Mativo on 26th September 2016 the advocate for the appellant/applicant Mr. Maragia told the court that the application was for the production of the Occurrence Book. That he had served the ODPP on 28rd March 2016 and counsel for the DPP was requesting for time to contact the OCS Murang'a.

In response Ms. Jebet told the court that she was unable to reply to the application because she needed time to contact Murang'a Police Station. The matter was given a mention on 8th November 2016 to confirm whether the OB was available. The matter was mentioned before the Deputy Registrar – and the application was fixed for 8th December 2016 when it was again fixed for 30th January 2017. It is on 30/1/17 that Mr. Mutembei came on record for the appellant/applicant. When the Motion was called for hearing Ms. Jebet told the court that she had not been able to get the OCS Murang'a; that the defence had not specified which specific police station they were referring to. She sought more time.

This application was opposed on the ground that the State Counsel had had more than 6 months to contact Murang'a Police Station.

Mr. Munene, appearing together with Mr. Mutembei for the appellant/applicant proceeded to urge the court to allow the Notice of Motion and grant the prayers on the face of the motion – that is – to order the production of the stated OB evidence pending the hearing of the appeal.

He argued that the appellant/applicant is in custody, and the continuous delay by the state was violating the appellant's/applicant's right to justice.

Ms. Jebet in response expressed surprise at these submissions to the effect that the prosecution was delaying the matter. She submitted that the record would show that the appellant's/applicant's counsel is the one who was always absent. She further argued that the Motion was not for the prosecution to produce the evidence – but for the evidence to be admitted – and that the appellant/applicant ought to have attached the documents they wanted admitted to the Motion – because it was their document that they wanted admitted. She further submitted that if they intended to have the document admitted, it was up to

them to serve her with the said document so that she could see what they were talking about. She concluded by submitting that she would not be ready to proceed with the application – that the advocates for the appellant/applicant did not have clean hands when they were blaming the prosecution – that the prosecution was doing their work for them by offering to look for the document – and that the advocates ought to move slow as they did not know the history of the case.

I have carefully considered the submissions by both counsel. There are three issues; -

- 1) Whether the motion ought to be allowed as prayed?
- 2) Whether the prosecution should get more time
- 3) Who has caused delay in the matter

Starting with the last issue – I have noted upon perusal of file that a similar Motion was brought under certificate of urgency on 1st April 2015. The record is not clear as to what happened to that one – taking into consideration that this file consists of 5 files in one. With regard to this one – I am alarmed by the prosecution’s submissions – on 26th September 2016 she requested the court for time to contact Murang’a police station so that she could file a response – suddenly she does not know which police station the defence is referring to.

Secondly the motion was served. It clearly sets out everything the appellant/applicant would like admitted. The prosecution’s submission that she had not been served with the ‘document’ the appellant/applicant wished to produce is untenable – because every detail is in the Motion and in the supporting affidavit of the appellant/applicant.

In my humble view the submissions demonstrated a lack of preparedness by not reading the application and the affidavit to know –

- 1) the police station
- 2) the evidence/’document’ the appellant/applicant seeks to admit.
- 3) that she had sought more time to contact Murang’a Police 6 months ago to enable her respond.

Clearly therefore the prosecution has not demonstrated that any effort was made to contact Murang’a police, and any good reason why they have not filed a response. There is no question about it – they are the cause of this matter not proceeding as was scheduled.

I have set out the dates in the record with regard to this application there is no evidence that since Mr. Mutembei came on record for the appellant/applicant he has caused any adjournments.

Should this application be allowed without hearing the prosecution?

In as much as they are the cause for the delay – and in particular the adjournment of the matter on 3rd April 2017 they still have the right to be heard – needless to say that right ought not to be abused, or exercised to the prejudice of the other party.

The prosecution must of necessity ensure that they prepare for these matters in advance – that way they will be aware of what is happening in the file.

The other submissions on the history of the matter, appellant’/applicant lack of clean hands I found irrelevant to the matter in issue – whether the prosecution are causing delay in this matter.

Having said the foregoing, I do find that it would be necessary for the fair determination of the

application before me, to hear from the prosecution.

I order:

- 1) that the prosecution to file and serve their replying affidavit with 7 days, by 13th April 2017.
- 2) that the parties are at liberty to have the matter disposed of by way of affidavits and written submissions; if they chose the latter the same be filed on or before 20/4/17. In that event the ruling will be delivered on 4/5/17.

T. MATHEKA

JUDGE

Ruling delivered this 5/4/2017 in open court in presence of appellant, Mr. Mutembei and Munene for appellant, Ms. Jebet for State. Court Assistant/ Harriet.

T. MATHEKA

JUDGE

Mr. Munene: We are in agreement with the court's proposal

Ms. Jebet: That is in order

Mention on 20/4/17 to confirm that the pleadings and submissions are on record.

Parties need not attend.

T. MATHEKA

JUDGE