REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CRIMINAL APPLICATION NO. 13 OF 2015

GEOFFREY NDUNGU WAITHAKA..... APPLICANT

- V E R S U S –

REPUBLIC.....RESPONDENT

R U L I N G

The proceedings in Nyeri CM CRC 476/2012 Republic vs. Geoffrey Ndungu Waithaka read like the script of real court room drama series.

The applicant was charged with the offence of stealing by servant contrary to section 281 of the Penal Code. He took plea on 25/5/12 and pleaded not guilty. His counsel Mr. Wagiita Theuri was absent, and his brief was held by Mr. Muhoho.

On 7/5/2015 his new counsel Mr. Muhoho Gichuru filed this application under certificate of urgency on the basis that;

"the applicant is aggrieved by the way the trial in Nyeri CRC no. 476/012 has been conducted since its commencement. That the continued pendency of the said criminal trial before its presiding court and the order issued on 8/4/2015 is an affront to the applicant's constitutional right to a fair hearing as envisaged in Article 50 of the Constitution."

The application was premised under section.362 of the Criminal Procedure Code which provides for the power of High Court to call for records of a subordinate court in the following terms:

> 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.

and Article 50 of the Constitution of Kenya on the right to fair trial.

When the matter came for inter partes hearing Mr. Muhoho submitted that prayer (1) and 2 had been granted that is,

(1) The application had been certified as urgent.

(2) The stay of the proceedings in Nyeri CM's Criminal Case No. 470/2012.

He was before me seeking prayers 3,4, and 5, but for prayer 5, he has asked the court to take judicial notice of the fact that then presiding magistrate had been transferred and hence the prayer was spent.

Prayer 3: -That the High Court does call for and examine the criminal proceedings in Nyeri CM Cr.C. 476/2012 **Republic Vs. Geoffrey Ndungu Waithaka** and revise the order issued on 8/4/15 in which the court ordered that a document namely cash collection sheet be considered as a produced document exhibit.

Prayer 4: -That the High Court to find that the accused person has not been afforded a fair hearing as envisaged in Article 50 of the Constitution of Kenya and does discharge the accused person.

The grounds for the application are set out on the face of the application, mainly that it has been provoked by the various orders issued by the trial magistrate. The application is supported by the affidavit of Geoffrey Ndung'u Waithaka sworn on 7/5/2015. He set out the various dramatic events in his case that made him feel that his rights as an accused person had been violated.

- That the matter commenced before the late Hon. Okato Ag. C.M. and upon his demise it was placed before Hon. C. Wekesa, S.R.M.

- That upon the taking of directions under s.200(3) of Criminal Procedure Code the matter was ordered to start afresh.

- That on 24/9/13 when the matter came for hearing his counsel Mr. Wagiita Theuri was absent, and despite his protestation that he could not proceed without his counsel the trial court proceeded with the matter and he was forced to represent himself.

- That the same day the prosecution made "wild allegations" that he had intimidated witnesses and on that ground alone the court proceed to cancel his bond and ordered that he be remanded in custody. Consequently, he had to go to the High Court under Criminal Revision Case No. 522/12 for orders that the above review of his bond terms was unreasonable.

- As if that was not enough on 8/4/2015 the court made what he considered a prejudicial order, allowing the irregular production of a document which had never been marked nor produced during the prosecution case.

The State through an affidavit sworn by Erick K. Mururu on 9/4/17 responded to the application. The affidavit reiterates what transpired as per the record of the proceedings in Cr. 476/12. He avers that the witnesses for the prosecution did refer to the said document with P.W.1 saying he had a report from the database that did not tally with the collection, P.W.3 showing a document while that cross examination.

The State urged the court to dismiss the application.

From the submissions by Mr. Muhoho for the applicant, and Ms. Jebet for the state, and the record of the typed proceedings in Cr.C.476/2012 it is evident that matter came up for defence hearing on the 28/7/2014.

The matter proceeded and the accused opted to make a sworn

statement. During his evidence in chief his counsel referred some documents to him, 1st was Prosecution Exhibits 3(a) and 3(g), then there was the disputed document, a cash collection sheet. Counsel for the accused noted that the said document, the cash collection sheet unlike Prosecution Exhibit 3(a) and 3(g) was not marked, and he pointed this out to the court. Below is the record of what transpired.

Court: -The above shall be confirmed from the record

Counsel:-In the circumstances I pray that my witness be stood down.

Court: -Application is allowed, the witness to be stood down. Hearing on 4/8/2014.

On 4/8/2014 the court was not sitting and the matter was adjourned to 1/9/2014. On that date, regarding the above issue the record shows that the following transpired;

Court:-It is now confirmed that the said document is in the court file although it was never marked neither was it produced.

Mr. State Counsel Cheboi:-We make an application to call the witness so the exhibit may be marked and produced accordingly.

Court:-It is noted that the prosecution had closed its defence (sic).

State Counsel Cheboi: -File may be placed aside for me to consult with my colleague first

Court: - Mention later.

LATER:

SC Cheboi:-I wish to request for a mention date for the purposes of doing some research to see whether P.W.3 can be recalled to testify and produce the documents.

Court: -Mention on 25/9/14.

On 29/9/14 the state was represented by Mr. Njue who informed the court that the matter was for the purpose of confirming whether a certain witness who had not produced a certain document could be recalled. He submitted that though Mr. Cheboi had sought time to do research on the subject, he had not given him any instructions on the same. His prayer was for the court to do justice in the matter by ruling on the issue of the document. He now sought two weeks to enable him make an application for consideration by the court. Mr. Muhoho indicated he too would need have to look at the issue.

The matter was back in court on 9/10/14. Mr. Njue now made an application to recall a witness because a crucial document had not been marked. He based his application on s.150 of the Criminal Procedure Code which provides that;

> A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such 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 a witness.

He asked that P.W.3 be recalled to appear, mark and produce the said document. He sought one month to file written submissions the issue.

On 19/3/15 when the matter came up next the state was represented by Mr. Wanjohi who sought another mention date to confirm filing of submissions. The matter came up next on 8/4/15 when the state was represented by Mr. Njue. There were no written submissions except the court proceeded to entertain oral submissions from Mr. Njue to the effect that although the court had made orders for written submissions on the propriety of the prosecution recalling a witness to mark and produce a certain document, the state counsel himself had perused the court file and found that the document was acknowledged by and

produced by **P.W. 1 Dishon Ngare**. That it was his honest belief that the mistake was made by the court clerk when marking the exhibits and filing them in the court file. He urged the court to revoke its earlier order in the interests of justice, have the record corrected and note that the said exhibit was produced. He took the court through the testimony of all the prosecution witnesses saying that P.W.2 is the one who had marked the document as MFI-1 and it had been produced by P.W.5 the Investigating Officer.

The submissions took the defence by surprise. Mr. Muhoho reminded the court that it had *suo motu* gone through its own file and found that the document had never been marked nor produced, and had already ruled on that. He defence submitted that the application by prosecution was an abuse of the court process with the prosecutor giving evidence from the bar that a court clerk had failed to mark an exhibit. He argued that prosecution had not pointed out where in the court record the document had been marked and produced.

The court upon considering the submissions above went on to make a ruling that the issue of the production of the document was a procedural technicality curable under the requisite constitutional provisions and that it had the inherent jurisdiction to set the record straight. The document was ordered marked and produced. The court went on to state that;

> "the case for the prosecution is closed since the above was the only issue that remained to addressed".

It is the applicant's contention that that document was never marked, was never produced. That the court's finding was contrary to the record. That the court's order closing the case for the prosecution denied him accused his right to cross examine the maker or producer on the document's contents hence violating his right to a fair trial as provided for under Article 50 of the Constitution.

It was submitted further that the court's arbitrariness towards the applicant was very clear from the record.

> (1) Ordering him to proceed in the absence of his advocate despite his right to representation.
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> (2) Refusing to give his counsel the opportunity to have the witness recalled and cross examined by his counsel prompting the filing of High Court Misc. App. 99/2013 where the High Court ordered that his counsel be allowed to have the witnesses recalled for cross examination.

(3) Having his bond arbitrarily cancelled on allegations made from the bar by the state that he was intimidating witnesses forcing him to go to the High Court in Revision no. 522/12.

He relied on the case of **Barnaba Kipsongok Tenai V. R. [2014] e KLR**

In their response the state filed written submissions which Ms. Jebet did not see any need to highlight.

The state relied on the Court of Appeal case of **Kenneth Nyaga Murage vs. Augustin Kiguta & 2 others [2015] eKLR**

The state submitted that the application was frivolous and vexatious and referred the court to the testimony of P.W.5.

Where he said,

> "I went to the super market where I got collection sheets from cash teller. They entail what each teller had collected and then handed over to the manager for purposes of banking."

Further that P.W.1 and P.W.3 identified the document. The state also submitted that the accused had severally and successfully obstructed the cause of justice by intimidating witnesses up to the "extend of bond cancellation."

I have carefully considered the submissions by counsel, the authorities cited and the record of the trial court.

The issues for determination are;

(i) whether the order issued on 8/4/2015 ought to be revoked.

(ii) whether the trial was conducted in a manner that violated the accused's right under Article 50 of the constitution to warrant a discharge.

On the 1st issue:

The record speaks for itself, that the trial magistrate herself found and confirmed that the said document had never been marked or produced. The prosecution made an application to recall P.W.3 to mark and produce the said document.

It is noteworthy that Mr. Njue in his submissions said that it was produced by P.W.1 David Ngare. The record shows that P.W.1 was Maina Ngunjiri. He testified on 24/9/2013. No such document was marked or produced by P.W.1

P.W.2 Dishon Ngari Mathenge testified about a report he made but again even that was never marked nor produced.

P.W. 3 Patrick Njogu Muiruri who was to be recalled to mark and produce the document simply states in his testimony,

"Director came and I gave him the sheet I had prepared''

No document is marked or produced by this witness.

When the investigating officer No.48967 CPL. Fredrick Mbingu testified, he told the court that he "collected collection sheets from cash tellers". When he attempted to produce the said documents Mr. Muhoho objected as the documents had not been marked for identification. This is what the record shows:

Prosecution: - "They were marked. Counsel is new in this matter and may not know".

Court: - "The above is confirmed. The documents were marked for identification".

The prosecution proceeded to produce the documents as PEX no. 3; cash flow statements, a report from the civil registry, his letter of request, the list of cash flows and the MPESA record remained as MFI 5 after serious objections by the defence that the I.O could not produce it because he was not the maker and could not be cross examined on it.

Under cross examination the witness says;

"I have produced Prosecution Exhibits 3(a)-(g), they have a cash flow statement and collections sheet from tellers".

The collection sheet mentioned here is said to be in the cash flows.

It is noteworthy therefore that the record does not support the State's contention that alleged document was marked and produced. Where is it Marked For Identification? as MFI no.? Where is it produced? As Prosecution Exhibits no? The court confirmed it had not been produced. The Prosecution attempted to blame omission on the court clerk, as issue that the court never followed up or attempted to resolve. The prosecution herein did not act diligently. They failed to mark the document, failed to produce it then bombarded the court with multiple approaches to remedy the issue. Despite there not being a lacuna in the

law on what ought to have been done, the court, in my humble view, misdirected itself that the issue was a technicality, and turned to its inherent jurisdiction in an attempt to remedy the situation.

The case of Kenneth **Nyaga Murage vs. Augustin Kiguta & 2 others [2015] eKLR** relied on by the prosecution does not support this case. In fact, it clarified the process through which a document must pass before it can be counted as an exhibit, and demonstrates that that production of documentary exhibits is not a whimsical act. It is governed by the law and procedure. There is a procedure and it is clearly set out at paragraph 23 of the judgment.

The Judges said;

> "…in the instant case we are of the view that the failure and /or omission by the respondent to formally produce the documents marked for identification… MFI-1, MFI -2, MFI-3 is fatal to the respondents' case. A document marked for identification is not part of the evidence…". (emphasis added)
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> At paragraph 22 the court explains how a document becomes part of the evidence as
>
> "… when formally produced as an exhibit by a witness…"

Clearly the marking and production of documentary evidence is not a matter of technicality.

There is no evidence on the record of proceedings in the lower court that the disputed document was ever marked as MFI anything or produced and marked as PEX anything. The court and prosecution cannot arbitrarily decide that a document is part of the evidence when it is not. That arbitrary decision violated the accused person's right to challenge the contents of that document through the cross examination of the maker.

Consequently, that order, as issued on 8/4/2015 then is not based on evidence on record. The court's act of allowing the document's production when the prosecution closed its case denied the accused person was any chance to cross examine the maker on its contents. That order cannot stand.

The case of **Barnaba Kipsongok Tenai V. R. [2014] e KLR** cited by the applicant supports the issue of transfer of a case from one judicial officer to another due to perceived bias. In this case the trial magistrate was transferred and hence the issue of whether this matter ought to be transferred from the trial magistrate to another is spent.

On the 2nd issue:

It was argued that the conduct of the whole trial was such that the right of the accused to a fair trial was violated to the extent that this court ought to discharge him of the charge facing him.

The right to fair trial and hearing is guaranteed to every person. Article 50 of the Constitution protects both the accused person and the complainant. It provides that every person has the right to have their decided in a fair and public hearing before a court.

Hence even the complainant in this case deserves a fair hearing as well. And that will be achieved when the matter is allowed to proceed to its logical conclusion. The court must balance the right of the two by lifting the veil that is the prosecution and seeing that there is an actual victim whose interests the prosecution represents as well.

Having said the foregoing, I find that;

> 1. The order of 8/4/2015 stating that the impugned document was marked and produced was not correctly arrived at and is irregular. The same is accordingly revoked.

2. There are no sufficient grounds to warrant a discharge of the applicant.

3. The file to be returned to the trial court to hear and determine the matter.

4. Right of Appeal 14 days.

Orders accordingly.

Dated, delivered and signed in open court at Nyeri this 7th June 2017.

Teresia Matheka

Judge

In the presence of:

Court Assistant Hariet

Mr. Muhoho for the applicant

Ms. Jebet for the State