



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL CASE NO. 41 OF 2012

REPUBLICPROSECUTOR

VERSUS

KHALPHAN RASHID MARJAN.....ACCUSED

RULING

On 19.11.2015, M/s Ocholla, counsel for the state applied for summons to issue upon

1. Chief inspector Munyiri
2. Inspector Kimanzi
3. Rashid Omar

Mr Aboubakar, counsel for the accused objected to this on grounds that they had been supplied with a list of witnesses exhibits together with witness statements who the prosecution intended to call in their evidence and the name of Chief Inspector Munyiri and Rashid Mohammed were not among them. He also submitted that the investigating officer had testified. He averred that this was unfair and in contravention of Article 50 of the Constitution, where it is required that sufficient notice be given to the defence so that they can prepare for their defence.

M/s Ocholla responded by saying that this was not the first time the application was being made for summons to issue upon these witnesses. She indicated that such application was made before Justice Muya on 18.9.2015 and 12.1.2015 and the court issued summons for the three witnesses. She also indicated that on 12.11.2015, Chief Inspector Munyiri was even before court but the counsel for the accused alleged that he had not been supplied with witness statements. She undertook to supply counsel for the accused statement so they could prepare for their defence, if at all they had not been supplied. She also added that they were not barred from calling other witnesses just because the investigating officer had testified.

Mr Aboubakar for the defence responded to this by stating that he objected to the application for summons on both occasions and so it was not correct for the prosecution to say that he did not object to these applications before.

Upon listening to both counsels in their submissions in respect to the application by M/s Ocholla counsel for the state for summons to issue upon the aforementioned three witnesses, I have perused the court records.

I have established that the case has proceeded before justice Muya substantially and there is conflicting information as to how many witnesses are yet to testify.

On 22.5.2015, it was indicated by Mr Masila that there were 4 more witnesses to be called. On 30.6.2015, he indicated that there were three witnesses. But on 16.9.2015 and 18.9.2015, he indicated that there is one witness to be called.

However on 1.10.2015, the prosecution applied for summons to issue upon IP Munyiri and one Rashid and the same were issued as there was no objection by the defence counsel. This again happened on 9.10.2015 and Justice Muya ordered that it be the last adjournment. However when the matter came up for hearing on 12.11.2015 before Justice Muya though C I Munyiri was present, counsel for the defence indicated that they did not have statement of IP Munyiri and that they were being ambushed. The state through M/s Ogwenyo undertook to furnish the defence with the witness statements upon which Justice Muya then directed the matter to be placed before me for directions.

In my considered opinion since Justice Muya had allowed the prosecution's application to call C I Munyiri and Rashid, and proceeded to issue summons, it would not be proper for me to give orders to the contrary.

All I would urge is for the prosecution to furnish the defence with statement of these three witnesses in good time to enable them prepare their defence further and to expedite the matter by being clear on how many witnesses they wish to call.

Ruling dated, signed and delivered on this 2nd day of December 2015.

D CHEPKWONY

JUDGE

In the presence of

M/s Ocholla for the state: present

Mr Aborbaker for the accused: present

C/Assistance Mr Kiarie

Court: hearing on 22.12.2015