

REPUBLIC OF KENYA

High Court at Garissa

Criminal Case 10 of 2011

REPUBLIC.....PROSECUTOR

VERSUS

ABDIKADIR AHMED MOHAMED.....ACCUSED

RULING

The State has sought to reopen this case and call for further evidence. This application is being made at the stage when the defence was preparing to put in submissions following closure of the prosecution case. This case has had chequered history. It is an old case filed first in High Court at Nairobi in 2010 and later transferred to Garissa High Court. The hearing commenced on 30th January 2012 when four prosecution witnesses testified. After various adjournments and applications the prosecution finally closed its case after the court overruled further adjournments of the issue of non-availability of witnesses. The reasons advanced for seeking to reopen the case are that the prosecution intends to introduce a dying declaration. It has been submitted that the deceased made a dying declaration before she died and the said statement was taken by PC Muzungu one of the witnesses the state sought to call previously without success. It is for this reason that the state seeks to call the witness to testify if allowed to reopen the case. It has been submitted that the defence will not suffer any prejudice. The learned State Counsel has relied on **Prosecutor v. Jovica Stanisic Franco Simatovic September 2011** a decision from the UN Tribunal for former Yungoslavia where the Prosecutor was allowed to re-open his case to admit fresh evidence. The reliance of this case by the prosecution was criticized by the defence that it is a foreign case outside the Common Law jurisdiction. The prosecution defended his reliance on this case that it is relevant and that he could not get local authorities on this point. Be that as it may, the issues in the above case related to fresh evidence that the prosecution could not have obtained before closing its case. It varies with our case whose circumstances are totally different. The record of proceedings is clear that the failure to call the remaining witnesses was occasioned by the officers responsible for securing their attendance in court. The prosecution in this case, especially the prosecutor who formally handled this case, tried to explain his predicament and frustrations every time the case would come for hearing because even when notices to bond witnesses were sent, these witnesses would not be bonded. It was indicated that the police officers in question had been transferred from their former stations. Even in such circumstances, these are officers working within the country and no serious efforts seem to have been taken to secure their attendance in court to give evidence.

The application is opposed by Mr. Keengwe for the accused on grounds that the prosecution had been granted the final adjournment by the court and therefore closed its case; that to bring this application at this stage is an afterthought because the prosecution did not bring this issue up on 15th October 2012; that section 150 of the Criminal Procedure Code clarifies situations when cases can be reopened. Mr. Keengwe relied on the case of **Murimi v Republic [1967] E.A** to support his submissions.

Briefly the history of this case is that the accused appeared in court in Nairobi first on 8th November 2011 and the plea taken ten days later on 18th November 2011. The file was transferred to Garissa. The accused appeared in Garissa High Court on 28th November 2011 and the first hearing scheduled for 15th December 2011 but hearing did not take place until 30th January 2012 when four witnesses testified. On that day the learned state counsel sought adjournment. The reasons for that application was to enable the state notify the defence their wish to use dying declaration in evidence. The matter was adjourned to 27th February 2012 when the prosecutor brought one witness and an adjournment sought by the prosecution. This was granted until 13th March 2012 when again the state did not avail witnesses and sought

adjournment which was granted to 18th May 2012 when again no witnesses came. The case was adjourned to 12th July 2012 when again the prosecution failed to bring witnesses. While granted the application for adjournment the court warned the prosecution that it would not entertain another application on the same grounds. On 15th October 2012 the date given for hearing the state brought two witnesses and closed the case.

I have read section 150 Criminal Procedure Code which gives the court discretionary power to call or summon any person or recall or re-examine any person who has already testified if that person's evidence appears essential for the just decision of the case provided that in such cases the prosecution and the defence are allowed to cross examine. I have also read and considered the case of **Murimi above** on the issue of re-opening the prosecution case. The tenor of that case is that unless the evidence to be tendered by a recalled witness is of a purely formal nature a case for the prosecution should not be re-opened to call a witness in order to establish the case against an accused person.

Trials must be heard and concluded in the in the shortest time possible to ensure fair trial, a fundamental right guaranteed in our law. Cases cannot go on infinitum. It is in view of this that this court is firm in that it shall not be part of the delay in the conclusion of this case. I need not repeat the circumstances that led to the closing of the prosecution case. In the circumstances therefore, I will and do hereby invoke the provisions of Articles 50 (2) (e) and 159 (2) of the Constitution that every accused person has the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay that justice shall not be delayed, respectively. To allow a case to go on and on without concluding it, especially when it is obvious that the officers responsible for securing the attendance of witnesses have failed in so doing, can be termed as unreasonable delay.

For the above reasons, I decline to allow the application. The hearing will proceed from where we left is by having submissions tendered to pave way for the ruling as to whether the accused shall or shall not be called upon to defence himself. I make orders accordingly.

S. N. Mutuku

Judge

Signed, dated and delivered this 11th April 2013 in open court in the presence of Mr.....for the State and Mr.....for the accused person.