



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

APPELLATE SIDE

CRIMINAL APPLICATION NO. 283 OF 1998

MARY OKWARA.....APPLICANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

RULING

This application by way of Notice of Motion seeks order that the order of the Resident Magistrate in Criminal case number 7611 of 1997 made on 18th June, 1998 be reviewed.

The applicant and a criminal trial before the Resident Magistrate Nairobi in which the hearing commenced on 27.4.98 but could not proceed because the prosecution's witness were not available.

The case was sent for reallocation. When it came for hearing on 9.6.98. Counsel for the accused was not present but the learned trial magistrate proceeded in her absence and recorded evidence from 3 prosecution witnesses. When the case resumed counsel for the accused applied for an order to recall the said prosecution witnesses whose evidence had been recorded in her absence for further cross-examination which application was refused. The accused was present when the case proceeded in the absence of his counsel. In such circumstances he ought to have been asked if he was prepared to proceed in the absence of his counsel or else he ought to have been given an opportunity to engage another lawyer.

Legal representation is the accused's constitutional right which he ought not to be deprived. Section 77 (1) (d) of the constitution provides that every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative to his own choice. In the present case the accused had chosen to defend himself by a legal representative and therefore it was not proper for the trial magistrate to deny the accused that right unless the accused himself elected otherwise.

For the above reasons, I allow this application and order that the order made by the trial magistrate on 18.6.1998 be set aside.

The prosecution witnesses whose evidence was recorded in the absence to the defence counsel should be recalled for further crossexamination.

This is the order of the Ruling.

Dated and delivered at Nairobi this 16th day of September, 1998

J.L.A. OSIEMO

JUDGE

16.9.1998