REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL REVISION 54 OF 1994

JOGINDER SINGH MEHTA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original order in Criminal Case No 3591 of 1992 of Principal Magistrate's Court at Nairobi)

RULING

Mr Ojiambo filed this chamber summons on 4.8.94 under ss 362 and 364 of the Criminal Procedure Code in relation to this Court's powers of revision.

In paraphrase, the application is referring to the Chief Magistrate's Criminal Case No 3591/1992 in which the applicant Joginder Singh Mehta is standing trial before the Principal Magistrate Mrs J Lesiit for manslaughter. Without going into the aspects of the case before the lower court Mr Ojiambo in the body of the application and the affidavit in support said that the learned trial magistrate heard all the evidence from the prosecution as well as the defence. Final submissions were filed. A day for judgment was set down – 21.7.94. On that day judgment was not delivered but instead the learned trial magistrate ordered this:-

"This case was for judgment. However on considering evidence on record it is apparent to me that it will be unjust to decide this case without calling for more expert witnesses to give evidence on issues that are essential to this case. For that reason I invoke s 150 of the CPC to call one pathologist and one government gynaecologist to be summoned through the Executive Officer of the Court to come and give evidence."

In the affidavit aforesaid and the submission before me it was stated on behalf of the applicant that after the lower court's hearing the defence case, and accordingly having closed that case the learned trial magistrate should not have, as it were, reopened the case by calling new and more evidence at all. If such be allowed, it prejudices the accused person because if the trial magistrate has had doubts about the innocence or otherwise of the accused, she should go ahead and acquit him. Indeed the Court was asked to order that the lower court proceed to acquit the accused/applicant. Mr Ojiambo argued that no new case or matter was raised by the defence in its case to necessitate the calling of the two witnesses as ordered on 21.7.94. Therefore even if s 150 affords a wide discretion to the subordinate court to call witnesses at any stage, the anticipated witnesses should not be called at all and the order to that effect (as quoted above) should be reversed and or quashed. Some cases (*infra*) were cited in support of this argument.

S 150 CPC reads:-

"S 150 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."

Without more to be said, it is clear that s 150 CPC gives a wide discretion to a trial magistrate when it comes to calling witnesses to assist in a just trial of a case. But it appears that emphasis of applying this legal provision is more to do with the way the prosecution places its case before the Court. One may venture to add that probably even after the defence opens its case but before it is closed, the Court may still call witnesses or re examine those who have already testified if such a step ensures a fair trial. But once the defence case is closed, then calling or recalling any witness appears a course not to be taken at all. This should be generally so because it is considered that the trial magistrate has the whole case before him/her and what remains is to find guilty or innocent. So unless a new matter or a whole new case or defence is made by the accused person in his case to warrant calling other witnesses to testify on that new case or matter, then it is prejudicial to the accused to call the other witnesses. Otherwise where a reasonable doubt appears at the time of composing a judgment, the same need be resolved in favour of the accused person. No steps should be taken by the Court to appear as if it is seeking further aids to resolve the doubt at all.

In this regard let us look at some of the cases in which s 150 (or its equivalent) was in issue and what line of legal position was taken. The substance or facts of each case need not be repeated here.

In *Fitalis Ogure s/o Oliech vs R* [1950] 24 KLR de Lestang J said:

"Although at first sight this section appears not only to give a wide discretion to a magistrate in calling any witness but also to make it mandatory on him to call or recall any person whose evidence appears to be essential to the just decision of the case, the Supreme Court has repeatedly held that a judge should not call a witness in a criminal trial after the case for the defence is closed. The present case goes, however much further..... The witness was called after the case had been adjourned for judgment. At the close of the case for prosecution the learned magistrate was in doubt and instead of resolving this doubt there and then in favour of the accused, he decided on this course of calling fresh witness..... In my view in doing so the learned magistrate unwillingly committed an irregularity which is fatal to the conviction because if the evidence of that witness is rejected then it is clear that the appellant should be given the benefit of the doubt and acquitted." (pp 80).

The conviction was quashed, the sentence set aside and the appellant set at liberty.

In our instant case the applicant has not waited for the lower court to go past the order to call two fresh and new witness at all. He has sought to challenge their coming before they do so by this application for review. But the principle applicable is the same. It was stated in this application that indeed two experts in the field of pathology and gynaecology testified on the side of the prosecution. They were extensively cross – examined. That the defence case introduced no "new" case. It based its own case on what the prosecution presented.

Having considered the whole matter upto this juncture, am inclined to hold and order, which I hereby do, that the learned trial magistrate's order of 21.7.94 regarding calling of 2 more expert witnesses – a pathologist and a gynaecologist, be reversed and set aside on revision. She had heard and closed the defence case. She should not have ordered calling of more witnesses, unless of course it had transpired that an entirely new case

had been argued by the defence which new case called for the expected witnesses to testify before a just

decision was arrived at. I read the learned magistrate's order of 21.7.94 and I do not discern such a state of affairs. Like in the *Fitalis Ogure* case, the witnesses here intended are to be called not only after the close of the defence case but after the case was adjourned for judgment. It is apparent that some doubt lingered in the mind of the magistrate when she adjourned to draft the judgment – hence her order for the two witnesses she desires to call. This may amount to her unwillingly committing an irregularity especially if they are heard and the case ends in a conviction. Anyway the principles enunciated in s 150 CPC include what has been stated earlier that no new witnesses should be called by the Court after the defence has closed its case unless it disclosed a totally new case.

For further reading on this principle see *Oloro s/o Daitayi & Ors vs Regina* CRJ Appeal No 369/1955 (1955) 24 EACA 493; *Wambuga s/o Njaggi & Anr vs Regina* [1962] EA 63; *Omari s/o Ramadhani vs R* [1962] EA 486.

The two last cases propound the law in more or less similar terminology:

In *Wambuga's* case

"Held: The powers of the court to call a witness after the case of the defence has been closed should be limited to those cases where something has arisen *ex improviso* on the part of the accused, which human ingenuity could not foresee lest injustice be done. The calling of the witness was not justified by these considerations" (pp 63).

In *Omari*

"Held: The calling of witnesses after the close of the defence should be limited to cases where something has arisen *ex improviso*, which no human ingenuity could foresee; in the instant case the witnesses were not so called." (pp 486).

In our instant case the 2 witnesses anticipated by the trial court should thus not be called. The learned trial magistrate should go ahead and deliver judgment on the law and all the evidence placed before her as at the close of the defence.

In conclusion:-

1. The learned magistrate's order of 21.7.94 is reversed and quashed.

2. The learned trial magistrate to proceed and deliver the awaited judgment based on the relevant material placed before as at the end of the defence.

Orders accordingly.

Dated and Delivered at Nairobi this 12th day of August 1994.

J.W.MWERA

JUDGE