**Muite v Attorney General**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 31 March 2006

**Case Number:** 188/02

**Before:** Nyamu J

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Constitutional law – Principles in constitutional applications – Need for speedy and flexible*

*determination of the case – Whether* viva voce *evidence assists in this.*

*[2] Constitutional law – Submission of evidence – Use of affidavit evidence as opposed to* viva voce

*evidence.*

*[3] Practice and procedure – Whether* viva voce *evidence is contemplated by Order XXXVI.*

**Editor’s Summary**

The applicant filed a constitutional application. Later, he made another application seeking to be allowed to give *viva voce* evidence. The respondent however opposed the same on the grounds that Order XXXVI of the Civil Procedure Rules did not provide for the giving of *viva voce* evidence and that the applicant had also not laid a basis in order for the application to be granted. Application dismissed.

**Held** – The wording of Order XXXVI, rule 9 and 10 do not give room for giving of *viva voce* evidence. The two Rules emphasise that courts have power to order that evidence may be adduced by an order for further affidavits. A party may also be allowed to apply for particulars of the affidavits filed where an order has been made for them to stand as pleadings. The court would not allow the applicant to adduce *viva voce* evidence because the application was by way of Originating Summons and in fact, a collateral attack on the criminal proceedings in the lower court and the Constitutional Court must of necessity steer clear away from any temptation to deal with detailed matters of fact which might have a bearing or influence the conduct of the criminal proceedings in the lower court. A Constitutional Court must never descend into the arena of a lower court by allowing the giving of *viva voce* evidence as this could give rise to possible prejudice. The objectives behind the enforcement of the fundamental rights and freedoms set out in Chapter 5 of the Constitution include unhindered accessibility to the court, speed and expedition in obtaining redress. This explains why the rules made under section 84(6) of the Constitution were specifically tailored to advance these objectives by incorporating the provisions of Order XXXVI where practicable. Proof by affidavit evidence is what was contemplated and is what can assist in meeting the above objectives. *Sunip Mazudar v State of Madya Pradech* [1994] Supp 2 Supreme Court case applied. The court especially in constitutional matters needs to aim at achieving a fair but a speedy determination of the cases. This in turn calls for easy accesss to the court, relaxed requirements on standing and speedy determination. *Viva voce* evidence would not be conducive to the above objectives in most cases. Affidavit evidence has served us well.

Application dismissed.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*Jared Benson Kangwana v Attorney General* [1995] LLR 4493 (HCK)

*Rashid Odhimbo Aloggoh and others v Haco Industries Limited* civil appeal 110 of 2001 (UR)

*Sunip Mazudar v State of Madya Pradech* [1994] Supp 2 Supreme Court case 327 – **AP**