



**Republic v Limuru SPM Court & another (Criminal Revision E181 of 2022) [2024] KEHC 15197 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15197 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL REVISION E181 OF 2022  
DO CHEPKWONY, J  
NOVEMBER 22, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LIMURU SPM COURT ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH CHEGE KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Prosecution filed an application for revision through a letter dated 25<sup>th</sup> February, 2022. It is their case that the accused person, Joseph Chege Kamau is charged with an offence of Attempted Defilement with an alternative charge of committing an indecent act with a child contrary to Section 9 (1) (2) and 11 (1) of *Sexual Offences Act* respectively in Limuru Criminal Case No.307 of 2017.
2. According to the Prosecution, the trial commenced before the trial whereby several witnesses were heard. That on 22<sup>nd</sup> February, 2021, the court granted the prosecution a last adjournment and the matter was fixed for hearing on 22<sup>nd</sup> June, 2021 whereby the medical officer testified. But when the last witness being P.C Mwititi was called to testify on behalf of P.C. Masaba who was said to be on transfer, the Defence Counsel objected to this and the case was adjourned to 4<sup>th</sup> November, 2021. On this day P.C Masaba was said to be on maternity leave and consequently the court adjourned the hearing to 7<sup>th</sup> February, 2022.
3. On 7<sup>th</sup> February, 2022, the prosecution indicated that that the witness P.C Masaba had not been bonded and thus could not attend court for the hearing but she had opted to testify virtually. However, she encountered internet challenges and thus could not log into the proceedings. Knowing it had a last adjournment, the Prosecution opted to abandon the testimony of the investigating officer and instead recall PW4, the mother of the complainant so that she could produce the birth certificate before it could



- close the case, but the Defence Counsel objected to this and the trial court dismissed the Prosecution and forced it to close its case on 21<sup>st</sup> February, 2022.
4. According to the Prosecution, it was aggrieved by the trial court ruling and has urged this court to invoke its supervisory jurisdiction and examine the record of the trial court to satisfy itself as to correctness, legality and regularity of the proceedings pursuant to Section 362 and 364 of the *Criminal Procedure Code*.
  5. The prosecution has raised the following issues for determination:-
    - a. Whether the Court was right to dismiss the Prosecution's Application recalling the mother of the minor to produce the minor's Birth Certificate.
    - b. Whether the Court was right in insisting that the Birth Certificate ought to be produced by the I.O despite the Prosecution having dropped the I.O as a witness due to difficulties she had in attending Court.
    - c. Whether the Court was right in compelling the Prosecution to close its case without the Birth Certificate, which is a crucial piece of evidence in cases of Sexual offences.
    - d. Whether the Trial Court failed to take into consideration the provisions of the *Evidence Act* concerning production of public documents.
  6. The Accused person filed a Replying Affidavit on 12<sup>th</sup> October, 2023 in which he stated that the case in the trial court was severally listed for hearing most of which were adjourned by the prosecution. He argued that the trial court granted the prosecution the last adjournment. He holds that on 7<sup>th</sup> February, 2022 the prosecution informed the court that the Investigating Officer was available to testify virtually and they were given time allocation but the prosecution again informed the court that it was unable to proceed. That consequently the prosecution informed the court that the Investigating Officer had a problem joining the virtual platform and applied for the mother of the victim to be allowed to produce the birth certificate on behalf of the Investigating Officer which his Advocate objected to and the court upheld the objection.
  7. It is the accused person's argument that litigation must come to an end and that the prosecution is simply seeking to have this court compel the trial court to grant them an adjournment. He has therefore urged the court to dismiss the application.
  8. Equally, the prosecution filed Skeleton submissions on 22<sup>nd</sup> September, 2023 reiterating the arguments raised in the Petition. The prosecution urges the court to invoke its supervisory jurisdiction in the matter. The Prosecution further wishes the court to rely on Section 33 of the *Evidence Act* which gives leeway for the production of documents and expert evidence if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstances appears unreasonable. The prosecution holds that it sought to recall PW4 to produce the birth certificate of the minor when it saw that it was difficult to have the Investigating officer testify in court.
  9. The Prosecution has urged the court to reverse the order of the court compelling the prosecution to close its case and reverse the decision by the Magistrate barring the prosecution from recalling PW4 for purposes of producing the birth certificate.

### **Analysis and Determination**

10. Upon considering the application for revision, the Replying Affidavit and the submissions filed, the main issue for this court's determination is whether the application has merits to warrant the court to invoke its supervisory orders.



11. The power to determine an application of this nature is made in exercise of the supervisory jurisdiction of the High Court in criminal cases as provided for under Sections 362 to 366 of the Criminal Procedure Code. Section 362 provides that:-

[362]. The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”

Section 364 states as follows:-

[364]. Powers of High Court on revision (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

12. In this case, the court has gone through the record of the trial court and notes that indeed from the time the hearing commenced, the matter was adjourned on numerous occasions on diverse dates on account of not having bonded its remaining two witnesses and the prosecution was given a last adjournment. On 8<sup>th</sup> October, 2019, it was the Accused persons Counsel who sought an adjournment on account of the accused being unwell and the court allowed the same. The prosecution sought an adjournment on 9<sup>th</sup> March, 2020 for the reasons that they were unable to get the exhibit due to transportation challenges. On 30<sup>th</sup> June, 2020, the prosecution sought an adjournment for the reasons that they did not have the police file and the accused person’s counsel stated that since it is a 2017 matter, it should be marked as a last adjournment. On 22<sup>nd</sup> February, 2021, the prosecutor indicated that he did not have any witnesses in court and again the accused person’s counsel objected. The trial court indulged the prosecution and granted them the very last adjournment while indicating that in the event that the prosecution will not be ready to proceed, they will be required to close their case.

13. When the matter came up on 22<sup>nd</sup> June, 2021, the court heard PW6 (the doctor) and PW7, P.C Mwititi who sought to testify on behalf of the investigating officer who was said to be on maternity leave but



the Accused person's counsel objected to this on the basis that the Investigating Officer is the only one who should testify. The court allowed the prosecution to adjourn the matter on this day and also on 4<sup>th</sup> November, 2021, since the witness was still on maternity leave.

14. The court further notes that on 7<sup>th</sup> February, 2022, the prosecution stated that the witness would proceed virtually but she was unable to join the Teams Platform. The prosecution then urged the court to allow it to recall them recall PW4, the mother of the minor to produce the birth certificate of the minor but this was objected to by the Defence, which culminated into the impugned ruling.
15. In this case, although it is true that the prosecution had applied for several adjournments, the trial court had been lenient to grant them despite having marked them as last adjournments on previous occasions. However, this court notes that from the events of 7<sup>th</sup> February, 2022, the efforts made by the prosecution to have the investigating officer attend court virtually were impossible due to internet challenges. The court also notes that previously, the physical presence of the witness could not be achieved due to the prosecution's failure to bond her to attend court which was also the reason for the adjournment sought. The prosecution holds that since it had a last adjournment, it had opted to recall PW4 so as to produce the birth certificate which they claim was crucial evidence to their case.
16. Section 33 of the Evidence Act states as follows:-  

[33]. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible”.
17. The court finds that the failure to have its witness testify in court and to avoid a further delay in the matter given the numerous adjournments, the prosecution was justified to have PW4 recalled to produce the birth certificate which is a critical document in proving the complainant's age in this case and they had demonstrated the difficulty in procuring the attendance of the Investigating Officer. The court ought to have exercised its discretion and allowed the prosecution's application for PW4 to produce the birth certificate. For those reasons, this court finds that it is in the interest of justice, the application for revision has merit and the same is allowed.
18. The matter to be sent back to the Trial Court for further hearing and determination.  
It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

