



**Republic v Litembekho (Criminal Revision E239 of 2023)
[2024] KEHC 15959 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL REVISION E239 OF 2023**

AC BETT, J

DECEMBER 19, 2024

BETWEEN

REPUBLIC APPLICANT

AND

CEDRICK LITEMBEKHO RESPONDENT

RULING

1. The Respondent, Cedrick Litembekho was arrested on 1st October 2021 and arraigned in court where he was charged with various offences. The first count the Respondent was charged with was robbery contrary to Section 295 as read with Section 296 (2) of the *Penal Code*. The particulars of the offence are that on 29th September 2021 at (particulars withheld) not before court (sic) he robbed FN of a mobile phone Samsung blue in colour valued at Kshs. 17,000/= and cash Kshs. 200/= and after such robbery wounded the said FN.
2. He was further charged with rape contrary to Section 3 (1) (a) (b) (3) of the *Sexual Offences Act* No. 3 of 2006 the particulars being that on 29/9/2021 at around 2110 hours at (particulars withheld) intentionally and unlawfully causes (sic) his penis to penetrate the vagina of FN without her consent. As an alternative to the second count of charges, the Respondent was charged with committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act* No. 3 of 2007 (2006).
3. As a preliminary point, I note that the charge sheet was not properly drafted but the defects in the drafting are curable and therefore the charge sheet was not incurably defective.
4. The Respondent denied ever committing the offence and consequently, trial commenced on 29th September 2021 when the Complainant, who was the only prosecution witness that day, testified and was cross-examined by the Respondent. Thereafter, the case was adjourned severally then proceeded again with two prosecution witnesses on 13th June 2022. The witnesses who adduced evidence was a Clinical Officer and a Police Officer. The Clinical Officer gave evidence and produced the



Complainant's treatment notes, PCR form and P3 form duly filed. The Police Officer confirmed that he received the incident report on 30th September 2022. The witness was stood down at the instance of the prosecution albeit with some objection from the Respondent. The case was scheduled for further hearing on 21st June 2022.

5. On the scheduled date, an Advocate who had come on record for the Respondent applied for recall of the Complainant for re-examination. The Prosecution did not object and the application was allowed but it later transpired that the Complainant, was now said to be living in Eldoret and did not attend court. On 18th July 2022, she was absent despite being informed to attend court. On 22nd August 2022, she was stated to have given birth recently. The Applicant's Advocate opposed the application for adjournment on the ground that the Complainant had recently given birth arguing that there was no proof that the Complainant had given birth. He urged the court to allow the adjournment as a last one.
6. On 27th October 2022 the case was adjourned at the instance of the Respondent due to absence of his Advocate. Hearing was scheduled for 13th December 2022 when the Complainant was still absent. The matter was adjourned to 24th January 2023 when the Prosecution applied to close the prosecution's case on account of the fact that all witnesses had testified. The bid to close the prosecution's case was successfully resisted by the Respondent's Advocate who said that the Complainant had been recalled and the Respondent who had been in custody for two (2) years had a right to an expeditious hearing. He urged the court to discharge the Respondent under Section 87A of the [Criminal Procedure Code](#). The court granted a last adjournment.
7. On 14th March 2023, the Prosecution submitted that they had closed their case before the Respondent's Advocate applied for recall of the Complainant. They further submitted that the Complainant had relocated from Kakamega and could no longer be traced as her phone is off. They accused the Respondent of using tactics to recall a witness who had disappeared and could not be traced as no one knew where she is. The Prosecution urged the court to find that the Respondent had a case to answer.
8. In rejoinder, the Respondent through his Counsel recounted the instances when the matter had been adjourned since the order for recall had been made and urged the court to find that the reasons for adjournment were insufficient as they were ready to proceed. Ruling was reserved and parties granted leave to file submissions on the application for review of its order for recall.
9. On 15th May 2023, the trial court declined to review its order of recall and discharged the Respondent under Section 87A of the [Criminal Procedure Code](#). In its ruling, the trial court rightly pointed out that PW3, the Police Officer had been stood down on 13th June 2022 and had not produced the exhibits in the case because PW3 was never recalled to testify. The trial court did not give any reasons for declining to review its order for recall of witnesses, nor did it make any reference to the parties' submissions filed on 13th April 2023 and 18th April 2023.
10. The Applicant was aggrieved by the ruling of the trial court and filed an application for review vide a letter dated 25th May 2023 seeking revision of the orders of the trial court on the following grounds:-
 1. The Honourable Magistrate erred in law when he withdrew the matter under Section 87 (a) of the [Criminal Procedure Code](#) (CPC) as it is an application made by the State.
 2. The Honourable Magistrate ought to have given directions on whether the matter to proceed from where it had reached or the complainant to be recalled.
 3. On various occasions the Investigating Officer had informed the court that the Complainant could not be traced.



4. The failure of production of any exhibit by the investigating Officer and cross-examination is not a reason to withdraw and or discharge an Accused person. Furthermore, the Accused was facing a capital offence charge of robbery with violence and on other counts he was accused of sexual offences to which the sexual offences are to be withdrawn as read with Section 40 of [Sexual Offences Act](#) (SOA).
11. The power of revision that is vested in the High Court is derived from Article 165 (6) and (7) of the [Constitution](#) which states as follows:-
- “ 165
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
12. In criminal matters, Section 362 of the [Criminal Procedure Code](#) states as follows:-
- “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.”
13. Since the Applicant has invoked the revisionary powers of this court, I am therefore obligated to consider the orders made by the trial court to ascertain its legality and/or propriety.
14. From the proceedings, there is no express prayer for review by the Applicant but since the trial court recorded it as a prayer for review and the Respondent’s submissions alluded to it as such, then no prejudice was occasioned to the Respondent by the stated failure.
15. In the case of [Prosecutor -v- Stephen Lesinko](#) [2018] eKLR, the court enunciated the principles that court must observe on revision as follows:-
- “
- “a. Where the decision is grossly erroneous
- b. Where there is no compliance with the provisions of the law.
- c. Where the finding of fact affecting the decision is not based on the evidence or it is result of mis-reading or non-reading of evidence on record
- d. Where the material evidence on the parties is not considered.
- e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence, (See Article on Revision in civil and criminal cases by Rabia Tus–Sarela and Marya



http://www.academia.Edn/24795/revision is in Civil and Criminal Cases)”

16. In view of the above, it is clear that this court has power to call for records from the subordinate courts in order to satisfy itself on the legality, propriety and corrected thereof but the power to review.
17. I have considered the application carefully and do not find any impropriety irregularity or illegality in the trial Magistrate’s decision. It is the Prosecutor who did not appraise himself of the file properly and failed to realise that the prosecution had not closed its case since a witness had been stood down. Instead of applying to re-open the case, the Prosecutor should have placed the witness who had been stood down on the stand.
18. In the end, I find that the application lacks merit and therefore dismiss it.
19. Those are the orders of the court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 19TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Ms. Chala for the Applicant

The Respondent in person

Court Assistant: Polycap

