



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**MISC. CRIMINAL APPLICATION NO. E001 OF 2022**

**MARTIN MUGENDI NJUE.....APPLICANT**

**VERSUS**

**PROSECUTION.....RESPONDENT**

*(Being an application for revision of orders of Hon. Nyakweba (S.P.M.)*

*in Embu Sexual Offences No. 22 of 2020)*

**RULING**

1. The applicant herein moved this court vide a Chamber Summons filed on 05.01.2022 and brought under **Article 49(1), (2) and 51 (1) and (2) of the Constitution of Kenya 2010 and all other enabling provisions of the law wherein he sought for orders that:**

*a) Spent.*

*b) This Honourable Court be pleased to issue stay orders in Criminal Case No. 22 of 2020 which is in the Chief Magistrate's Court at Embu.*

*c) This Honourable Court be pleased to call the lower court file and peruse for the reasons of ascertaining the applicant's averment and order the Criminal Case No. 22 of 2020 to proceed from where the previous court stopped.*

*d) This Honourable Court be pleased to give any other order(s) that deem just and fair in the circumstances of this application.*

2. The Chamber summons is supported by an affidavit sworn by the applicant, wherein, he deposed that he was arrested on 24.05.2020, arraigned in court on 26.05.2020 and pleaded not guilty. That for all the time he has been in lawful custody, he has attended all court proceedings and at no time has he delayed the matter herein. He proceeded to state that the matter was partly heard by Hon. Chief Magistrate Gicheru (as he then was) and the same is currently before Hon. Nyakweba (S.P.M.) who proceeded to hear the matter from where it had reached given that the applicant agreed to the same.

3. It was his case that four witnesses had already testified and the complainant had refused to talk and as such, she had been declared a hostile witness; further that, the prosecutor could not trace the remaining witnesses. He further deposed that the prosecutor made an application to have the case start afresh in blatant disregard of his rights having suffered in remand for 1 year and 7 months. That he did request for proceedings from the trial court but he was informed that there were no previous proceedings; that by looking at the evidence of the prosecution already adduced, the same is either forged or interfered with in that there are additional details not captured in the original copy. He pleaded with the court to completely stop the proceedings in the lower court since the initial court conducting the hearing had pronounced itself by ruling that the child was intelligent and consistent but could not testify as she refused to talk and thus, the court declared her a hostile witness and the prosecution did not appeal against that order. Reliance was made on the case of **Rosemary Wanja Mwangiru & 2 Others v Attorney General & 2 others**. It was his prayer that this court exercises its power to stop the proceedings completely.

4. On her part, the learned prosecutor swore a replying affidavit in which it was deposed that the applicant herein had not set out the grounds for revision as required by the law because there is nothing at all in the proceedings to suggest that this matter falls under legitimate requirements for revision by this Honourable Court. She deposed that the trial court has a constitutional duty to ensure that justice is not only done but must be seen to be done in that, the court is bound to exercise its discretion judiciously when deciding whether or not to allow an application to recall a critical witness in a case of the nature herein. That the circumstances under which the alleged offence was committed, require that the victim testifies even if it is done through an intermediary. That the only parties yet to testify are the investigation officer, medical doctor and the victim and so, there is nothing incorrect, improper or illegal in allowing an application to have the victim testify through an intermediary since the same will go a long way in ensuring that the ends of justice are met. She therefore prayed that the same be

dismissed for want of merit.

5. I have carefully considered the application at hand, the supporting and the replying affidavits. The main issue is whether the application herein is merited.
6. The applicant herein was charged with the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.
7. From the record, the prosecution made an oral application to recall the victim since her testimony had been dispensed with by the court due to her age and in reply, the applicant herein had no objections. But in the subsequent hearing, the accused/applicant herein seems to have changed his mind and he filed the application herein.
8. Though the application has been brought under Article 49(1)(2) of the Constitution, the same seeks revisionary orders under Section 362 of the Criminal Procedure Code.
9. Under Section 362 of the Criminal Procedure Code provides 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.”*

10. Section 367 of the Criminal Procedure Code, on the other hand, provides as hereunder:

*When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.*

11. The case of **Joseph Nduvi Mbuvi v Republic [2019] eKLR** provides a persuasive authority on the revisionary jurisdiction of the High Court as provided under Section 362 of the Criminal Procedure Code. In that case, **Odunga, J.** was of the view that:

*“A strict reading of section 362 of the Criminal Procedure Code, however, does not expressly limit the High Court’s revisionary jurisdiction to final adjudication of the proceedings. The section talks of “any criminal proceedings”. “Any criminal proceedings” in my view includes interlocutory proceedings. In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with.”*

12. However, Section 364 of the Criminal Procedure Code provides that:

*“(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) ....*

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

13. From the foregoing, it is clear that the High Court is therefore empowered to exercise supervisory jurisdiction and the court will intervene through its revisionary powers in order to correct mistakes, illegalities and irregularities and/or to prevent the miscarriage of justice.

14. I will therefore proceed to determine whether the trial court was within its discretion to allow for recall of the victim witness to testify in as much as the previous court had directed otherwise.

15. It is trite that the prosecution bears the burden of proving every element of the offence an accused person is charged with and in this case, prove that the accused herein attempted to defile the minor contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006 and an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.(See **Woolmington v DPP (1935) AC 462**).The standard of proof which is required of the prosecution is that of “beyond any reasonable doubt” (See **Miller v Ministry of Pensions, [1947] 2All ER 372**).

16. It is also given that a court has a discretion to summon any witness and equally, the prosecution is at liberty to avail evidence at any stage before the close of the prosecution case.

17. Since the prosecution is yet to close its case, the defence will have an opportunity to challenge and test the evidence. In this case the prosecution has stated that the only witnesses yet to testify are the investigating officer, medical doctor and the victim and so, there is nothing wrong in allowing an application to have the victim recalled and to testify through an intermediary since the same will go a long way in ensuring that the ends of justice are met.

18. Section 145 of the Evidence Act, permits recalling of witnesses for examination by the party who calls him for exam in chief. In this case, the prosecution has confirmed that the witness in question has been traced and is now available to give evidence.

19. The Court of Appeal in **Julius Kalewa Mutunga v Republic Criminal Appeal No. 31 of 2005** held:-

*“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”*

20. The guiding principle here is whether the accused/applicant herein will be prejudiced if the witness is recalled. It is also to be remembered that the trial court must balance the scales of justice between the complainant and the accused. I agree with the holding in **Republic v Salim Mohamed (2016) eKLR**, where the court stated that:-

*“Recalling a witness is part of the right to a fair hearing. It should not be felt that the court shielded the witness from further cross-examination unless it can be shown that the request to have the witness called is based on an ulterior motive.”*

21. Article 50(2) (K) gives an accused person an unfettered right, **“to adduce and challenge evidence.”** *The accused/applicant herein shall have an opportunity to test the veracity of the evidence adduced by that witness through cross-examination.*

22. In view of the foregoing, I hold that the application for revision is unmerited and it is hereby dismissed.

23. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF FEBRUARY, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent