REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION C NO. 852 OF 2018

AMM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Upon arraignment, **AMM,** the Applicant, was charged with the offence of incest contrary to Section 20(1) of the Sexual Offences Act, following allegations that he had sexually violated his biological daughter. Having denied the charge, the matter proceeded to trial. In the course of trial, the court made an order for alteration of the charge by way of an amendment.

2. Aggrieved, the Applicant filed an Application dated 19th October 2018, seeking revision of the Ruling. Secondly, he sought to be released on reasonable bail terms.

3. The application is premised on grounds that: - The trial magistrate erred by allowing the application for amendment of the charge sheet; contents of the charge sheet were changed after the prosecution found that it could not prove the case; Section 134 of the Criminal Procedure Code (CPC) was not complied with; allowing the Applicant to plead to the charge on the same file was erroneous; the integrity of the trial magistrate is questionable for allowing a DNA test to be conducted after the prosecution's case had been closed; the refusal of the complainant's mother to attend medical examination at Kenyatta National Hospital could not hinder DNA examination being done; failure to avail the complainant should have prompted the trial court to acquit the Applicant; and, that the Applicant's application to be supplied with documentary evidence for purposes of trial was disregarded by the prosecution.

4. At the hearing, the Applicant relied solely on the content of the Application and grounds set out.

5. The State through learned Counsel Ms. Akunya opposed the Application. She urged that **Section 214** of the CPC allows the court to order an amendment of the charge sheet prior to closure of the case. That the Applicant was granted time to plead afresh and re-call witnesses hence he failed to demonstrate any injustice that was caused by the amendment. She called upon the court to allow the trial court to proceed with case.

6. At the outset, I do appreciate the fact of the application having been filed in person, which was indicated as an appeal and was rectified to read, an application. Appreciating the fact of lack of knowledge of the process, I must identify what is relevant in the circumstances.

7. This court has been called upon to invoke its revisionary jurisdiction as set out in **Section 364** of the CPC. In this particular case, the provision applicable would be **Section 364(1)** of the CPC that provides as follows: -

> **"(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.**
>
> **(c) In proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic**

Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.....''

8. Most of the reasons given as the basis of the relief sought by the Applicant should have been a foundation of an appeal. **Waweru J.** was confronted by such a situation in the case of **Republic vs Samuel Gathuo Kamau (2016) eklr** and he observed as follows: -

"Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal Procedure Code). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See Article 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code."

9. Therefore, looking at the entire application the crucial issue is whether there was a miscarriage of justice or if substantial justice was occasioned when the trial court allowed the State to amend the charge from one of incest to defilement.

10.Section 214 (1) of the CPC provides as follows: -

"(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

Provided that—

(i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

(ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination."

11.This is a case where six (6) witnesses had testified prior to the State seeking to amend the charge. The step by the Prosecution was prompted by evidence that became available following a DNA test that was conducted on the child that was born, allegedly, consequent to the act of penetrative sex.

12. In her ruling dated 27/7/2018, the trial magistrate opined that allowing the application would not be a miscarriage of justice as she had taken the best interest of the minor into consideration. Further, she granted the Applicant fourteen (14) days within which to appeal.

13. The ruling was within the law since the prosecution had not closed its case. What the court was required to do was to call upon the applicant to plead to the amended charge and inform him of his right, if he so wished, of demanding re-calling of witnesses to tender evidence afresh, or to be cross-examined further.

14. It is important for me to point out that the amendment may not have been necessary because, in the case of incest, other than proof of the act of penetration as an ingredient required in the case of defilement, what was necessary was an additional element of the relationship between the offender and the victim. From the reading of evidence adduced, the applicant had not denied the fact of having been the complainant' s father. This meant that evidence of results of the DNA, if positive, would have been a corroborating fact.

15. From the foregoing, the order by the trial court did not cause any substantial injustice.

16. The Applicant contends that **section 134** of the CPC was not complied with. The stated provision of law provides as follows:

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

16. Other than faulting the prosecution for amending the charge upon realization that the case could not be proved, there is absolutely nothing to suggest that the law was contravened.

17.The applicant also complains that he was not supplied with necessary documents by the prosecution. Ordinarily, a matter proceeds to hearing after pre-trial directions are given and on the stated date the trial magistrate ensures documents that enable the accused to prepare for his defence are supplied. The plea herein was taken on the 26.2.2015 when the trial magistrate directed the State to furnish the Applicant with witness statements. The matter came up severally but could not be heard for one reason or another. When the case came up for hearing on the 13.7.2016, the Applicant was not ready to proceed following allegations that he had reduced his questions into writing on a paper that he had misplaced. As a result, he was given time to prepare. When the matter came up on the 25.7.2016, he was ready to proceed. This clearly means that his allegation is baseless.

18. On the issue of reasonable bail terms, the Applicant was granted bond that I find reasonable in the circumstances.

19. The upshot of this is that I find the Application lacking merit. Accordingly, it is dismissed. The file shall be placed before the trial court for hearing on a priority basis.

20. It is so ordered.

Dated, signed and delivered virtually this 28th day of January 2021.

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L. N. MUTENDE

JUDGE