REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL REVISION NO. 11 OF 2019

DAVID NGUMBAU DANIEL....APPLICANT

VERSUS

REPUBLIC..............................RESPONDENT

RULING

1. The applicant was charged with the offence of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act. He was facing trial in Criminal SO 60 of 2018 before the Principal Magistrates Court at Kithimani and made an application dated 5.3.2019 seeking that the trial magistrate recuse herself from hearing the case or proceeding further and which application was found as lacking merit vide decision that was made on 24.4.2019. The applicant has now applied to this court under Section 362 of the Criminal Procedure Code and Article 22, 25 and 50 of the Constitution for review of the decision made on 24.4.2019.

2. The applicant in his affidavit in support of the application averred that the ruling omitted material facts that were raised by the applicant which if considered would have led to the recusal of the trial magistrate

3. There is no indication of a reply by the state.

4. The application was disposed of by way of written submissions. The applicant's counsel submitted that the applicant was dissatisfied with the ruling of the trial magistrate and that the concrete reasons raised by the applicant as to why the trial magistrate should recuse herself were not considered. Counsel prayed that the court directs that the file Kithimani 60 of 2018 be transferred to another court. Mr. Cliff Machogu, prosecution Counsel opposed the application. It was his submission that bias was not demonstrated from the proceedings in the trial court hence the application is devoid of merit and ought to be dismissed.

5. The issue for determination is whether the decision of the trial court merits a review and or revision.

6. The enabling law for revision is **Article 165(6) and (7) of the Constitution** and **Section 362** as read together with Section **364** of the **Criminal Procedure Code**. They provide that the High Court may call for the record of any case which has been decided by a subordinate court and revise the case. Reproduced as follows:

> **"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."**
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> **364.(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**
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> **…….**
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> **b.in the case of any other order than an order of acquittal, alter or reverse the order.**
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> **(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.

ensure that justice is not only done, but also seen to be done.

12. Having had due regard to **Article 165(6) and (7) of the Constitution** and **Section 362 as read together with Section 364 of the Criminal Procedure Code** I find that the application by the applicant has no merit because the issues raised herein could be raised in appeal so as to enable the court analyze the facts and reevaluate them and come up with its independent finding and that this is not possible in an application for review. From the record of the trial court, I am not convinced that there were errors in the procedure, illegalities in the decision or irregularity in the proceedings of the trial court that are material to the merits of the case that will occasion miscarriage of justice that will warrant this court to correct. The applicant is challenging the decision not to transfer his suit to another court and this is beyond what is envisaged in a revision application.

13. I note from the record that the trial court has not even been given a chance to hear the case on its merits and this will delay the determination of the matter. It would be in order that the trial continues and that the trial court takes the evidence and if the applicant is dissatisfied with the findings of the trial court on the merits of the case then he may file an appeal. Otherwise to attempt to arrest a criminal trial by way of several applications that are evident from the record will only occasion injustice to the complainant and to the applicant who are entitled to speedy justice. It is proper for this matter to continue being heard before the trial court and that the applicant will be at liberty to challenge the eventual outcome on appeal if need be. It is prudent for courts to be circumspect when dealing with issues of recusal so as to prevent litigants from engaging in forum shopping.

14. The upshot of the above observations is that the applicant's application dated 21.5.2019 lacks merit. The same is ordered dismissed. The lower court file is hereby returned to the trial court to continue with further proceedings.

It is so ordered.

Dated and delivered at Machakos this 29th day of January, 2020.

D. K. Kemei

Judge