



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL REVISION NO. 177 OF 2020

REPUBLICAPPLICANT

VERSUS

COLLENIUS MIHESO.....RESPONDENT

R U L I N G

1. The Respondent herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006 on 1st November 2018 at Shanzu Senior Principal Magistrates Court.
2. When the case came up for hearing for the 1st time on 22/1/2019 the accused/Respondent herein asked for adjournment on the ground his advocate was attending to a murder case in the High Court. The prosecuting counsel didn't object and case was adjourned to 12/3/2019.
3. On 12/3/2019 the state didn't have police file and witnesses in court and the defence counsel was also said to have gone to High Court in Malindi, hearing was adjourned to 18/4/2019.
4. On 18/4/2019, the prosecution indicated that one witness who was bonded was not in court. It appears from the record that the defence counsel was also absent but the accused submitted that it appeared that the complainant was not interested in the case and the same should be dismissed. The trial Magistrate adjourned the trial to 4/6/2019.
5. On 4/6/2019, the prosecution didn't have witnesses in court and the accused asked that the matter be dismissed. The prosecution was granted last adjournment and summons issued to witness for hearing on 20/8/2019. On 20/8/2019 when the prosecution was not ready to proceed for reason the file returned back to the station without a hearing date the trial Magistrate acquitted the accused under Section 210 of the Criminal Procedure Code.
6. The state was aggrieved by the order of the court acquitting the Respondent and they applied for revision of that order on the ground the Section under which the trial Magistrate acquitted the accused person envisages a situation where at close of evidence in support of the charge, a case is not made out to warrant, the accused to make a defence.
7. The state argued that the trial Magistrate was not moved by either the accused, his advocate and never sought to hear sentiments by the prosecution counsel. The prosecution acknowledged that there was a last adjournment but the same is not cast in stone and the trial Magistrate ought to have exercised his powers in a judicious manner taking into account the interest of all parties.
8. The state suggested that there were other ways the trial court could have dealt with the matter such as withdrawing under Section 87(a) Criminal Procedure Code or dismissing under Section 202 Criminal Procedure Code for non-appearance of the complainant at hearing.
9. The Applicants counsel argued that the complainant and her mother and uncle were indeed present in court when the matter was dismissed and accused acquitted.
10. In affidavit in opposition to application for revision the Respondent said that the prosecution had been given ample time to prosecute the charge against him and on 4th June 2019 a last adjournment was granted and summons issued to witnesses. He argued that reinstating the case would be infringing on his constitutional rights as enshrined in Article 159(2) (a) & (b).
11. I have perused the record of the trial court and confirmed that the Section under which the Respondent was acquitted is Section 210

Criminal Procedure Code which provides:-

“If the close of the evidence in support of the charge and after hearing such summing up, submissions or argument as the prosecution and the accused person or his advocate may wish put forward it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him”.

12. Section 210 Criminal Procedure Code is not applicable where the prosecution has failed to avail witnesses in support of its case. Section 210 Criminal Procedure Code is only applicable where evidence has been adduced and the court finds that a prima facie case has not been established against the accused person either because the evidence is irrelevant or it is not sufficient. Where the prosecution fails to avail witnesses totally the trial Magistrate ought to have acquitted the Respondent under Section 202 Criminal Procedure Code.

13. This court finds that there is an error apparent on the face of the record as the trial Magistrate based his acquittal on the wrong Section of the law. The order made on 22nd June 2020 in Shanzu SPMC Sexual Offence Case No. 138 of 2018 is hereby revised. The trial of the Respondent is hereby reinstated. The trial court file is remitted back to Shanzu before the Head of Section (SPM) to assign to any other judicial officer other than the former trial Magistrate for hearing and determination within a limited period of time. Mention on 30/12/2020 before Hon. SPM Shanzu.

14. Orders accordingly.

Dated, signed and delivered online by MS TEAMS, this 17th day of December 2020

HON. LADY JUSTICE A. ONG'INJO

JUDGE