



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL REVISION CASE NO. E007 OF 2020

D I.....APPLICANT

(made on behalf of a minor complainant/victim of sexual offence)

VERSUS

REPUBLIC.....1ST RESPONDENT

DAVID OPOLA OGORO.....2ND RESPONDENT

(Application for revision of orders made in Bondo Sexual Offence Case No. 8 of 2020 by Hon. S.W. Mathenge Resident Magistrate delivered on the 4/8/2020)

RULING

Introduction

1. This ruling determines the application filed on the 27th October 2020 by the applicant who is the advocate on record for the complainant in Bondo Sexual Offences Case No. 8 of 2020. The applicant seeks revision of the decision of the Hon. S.W. Mathenge Resident Magistrate delivered on the 4/8/2020.
2. The applicant herein came on record for the complainant in Bondo Sexual Offences Case No. 8 of 2020 where the accused therein one David Opola Ogoro was charged with the main offence of defilement contrary to section 8(1) as read with 8(3) of the Sexual Offences Act as well as the alternative count of committing an indecent act contrary to section 11(1) of the same Act.
3. The Applicant sought to have two witnesses allowed to testify prior to the prosecution closing its case. The prosecution who had previously called the complainant and 3 other witnesses had indicated of their indication to close their case after calling the investigating officer and another witness. The applicant submitted that the accused would not be prejudiced as he would be provided with the witness statements and afforded an opportunity to cross-examine the 2 intended witnesses. He further stated that one of the intended witnesses had already recorded his statement with the police though the same had not been given to the accused after plea taking. It is worth noting that the prosecution supported the applicant's case.
4. On his part, the 2nd Respondent through his counsel on record opposed the application contending that the same would prejudice the accused and that the prosecution should have presented the said witness' statement after plea taking to enable the accused prepare his defence.
5. In his ruling, the Trial magistrate found that the applicant had failed to warrant any reasons as to why the court should rule in his favour and further that allowing the application would infringe on the accused's right under article 50 of the constitution.
6. Dissatisfied by the trial court's decision, the applicant herein filed this revision application under Article 165(6) and (7) of the Constitution.
7. The parties' respective counsel made their oral submissions reiterating the submissions made before the trial court and reproducing the arguments contained in the request for revision and the replying affidavit by the accused person. According to Mr D on behalf of the victim/complainant minor, the two witnesses N and B had recorded their statements with the police and that the two were bonded to attend court on several occasions. Further, that their statements had been supplied to the defence, were not allowed to testify yet their testimony is crucial in the pending case. It was argued that the prosecution had not closed their case hence there was no prejudice to the defence. Further, that the two witnesses are parents to the minor victim whose rights must be protected as well.

8. The accused/respondent relied on his counsel's replying affidavit opposing the request for revision and on his behalf, Mr Oduol Advocate argued that during the pre-trial, the defence were not supplied with the statements of the intended witnesses and that the two witnesses were not listed as witnesses in the charge sheet hence there was no reason of bringing them on board after the other witnesses had testified. Counsel submitted that the court should consider whether the application was in line with Article 50 of the Constitution on the rights of the accused persons and whether the right to fair trial can be limited. He urged this court to dismiss the request for revision of the order of the trial magistrate.

9. On behalf of the state, Mr Okachi submitted that the prosecution had not closed its case and that it was within their powers to present to court all witnesses to support their case. Further, that the statements of the two witnesses were supplied to the defence, it was in the interest of justice that they be allowed to testify as no prejudice will be occasioned to the defence.

10. In a brief rejoinder, Mr. D I for the applicant submitted that the issue of fair trial entails the interests of the accused, the victim and the society.

Analysis of the Law and Determination

11. The powers of the High court in revision are contained in Sections 362 to 366 of the **Criminal Procedure Code**. Sections 362 and 364 are relevant herein and provide 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.”

12. What the High Court can do under its revision jurisdiction concerns proceedings in in subordinate courts as stated under **section 364 and 367** of the Criminal Procedure Code Cap 75, as follows:-

“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-

(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.

(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.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction”

.....;

“367. 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.”

13. The applicant herein seeks the inclusion of two witnesses who were not disclosed earlier in the charge sheet or during plea taking by the prosecution. He asserts that the accused will not be prejudiced with the inclusion as he had already been provided with the said witness statements and would be afforded an opportunity to cross-examine the new witnesses.

14. Article 50(2)(j) of the Constitution correctly interpreted means that an accused person should be furnished with all the witness statements and exhibits which the prosecution intends to rely on in their evidence in advance. The sole purpose of doing so is so is to avail the accused person sufficient time and facilities to enable him prepare his defence and challenge the prosecution's evidence at the opportune time both in cross-examination and in his defence. This provision must then be read together with Sub-Article 50(2)(c) which provides that every accused person has right to a fair trial which includes the right to have adequate time and facility to prepare a defence.

15. The latter cannot be met if the accused is not furnished with the evidence that the prosecution intends to rely on ahead of the trial. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard so as to ensure that the rights of an accused person are not violated. See the case of **Joseph Ndungu Kagiri v. Republic [2016]**

eKLR.

16. However, the provisions of Article 50(2) of the Constitution on the rights of the accused person facing trial must be read together with the provisions of Article 50 (7) and (9) of the Constitution which provides that:

“(7) in the interest of Justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.

(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

17. To give effect to the above constitutional provisions on the rights of victims of crime, more specifically sub Article 9, Parliament enacted the **Victims Protection Act No. 17 of 2014** whose preamble or long title is:

“AN ACT of Parliament to give effect to Article 50 (9) of the Constitution; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes.”

14. The Victims Protection Act provides for rights of victims of offences and stipulates at section 9:

“9. Rights during the trial process

(1) A victim has a right to —

(a) be present at their trial either in person or through a representative of their choice;

(b) have the trial begin and conclude without unreasonable delay;

(c) give their views in any plea bargaining;

(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;

(e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;

(f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and

(g) be informed of the charge which the offender is facing in sufficient details.

(2) Where the personal interests of a victim have been affected, the Court shall—

(a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and

(b) ensure that the victim's views and concerns are presented in a manner which is not—

(i) prejudicial to the rights of the accused; or

(ii) inconsistent with a fair and impartial trial.

(3) The victim's views and concerns referred to in subsection (2) may be represented by the legal representative acting on their behalf.

15. Section 20 of the Act provides for the Right to submit information and states:

(1) A victim has a right to submit any information for consideration to the-

(a) police or prosecution on a decision whether or not to lay a charge, or to appeal or withdrawal;

(b) court during plea bargaining, bail hearing and sentencing;

(c) Advisory Committee on the Power of Mercy established under the Power of Mercy Act, 2011 (No. 21 of 2011), on the

release or pardon of a convict.

(2) Where a victim gives any information to a law enforcement officer, the officer shall inform the victim that —

(a) the information shall be ascertained for submission to the Court;

(b) the victim shall ensure that any information that the victim gives is true; and

(c) the information may be recorded and signed by the victim.

3) The collection of any views from a victim under this section shall not prejudice or delay any proceedings relating to the offence complained of.

16. Further, where a victim of a crime is a complainant, the Act provides at Section 13 of the Act as follows:

“13. Victim as a complainant

Where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to—

(a) subject to the provisions of the Evidence Act (Cap. 80), adduce evidence that has been left out;

(b) give oral evidence or written submission.

17. The above cited sections with highlights must also be read with Section 150 of the Criminal Procedure Code which provides that:

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

18. Section 150 of the Criminal Procedure Code thus empowers the court to, ***at any stage of the trial***, summon a new witness or recall a witness already examined for re-examination. Thus, ***where the court determines that the evidence of the new witness or the witness to be recalled is essential to the just decision of the case, the court is under a duty to summon the witness.*** In exercising the power to call or recall a witness, the court should however ensure the protections afforded to the parties in the proviso are adhered to.

19. In ***Kulukana Otim v R [1963] EA 257***, cited by Ngugi, J in ***Stephen Mburu Kinyua v Republic [2016] eKLR***, the Court of Appeal of Uganda, in considering Section 146 of the Ugandan Criminal Procedure Code, which is similar to our Section 150 of the Criminal Procedure Code stated that:

“It will be seen that the first part of the section confers a discretion, but under the second part, if it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself....”

20. Ngugi, J further held, in the above cited case and I concur that it was necessary for the court to form an opinion that ***it would be essential to the just decision of the case to call or recall a witness.*** The learned judge stated:

“This is important because it would appear that the second part is triggered when the Court itself forms the opinion that the evidence to be called is essential to the just decision of the case. Section 150 implies that once a Trial Court comes to that conclusion, the duty to call that witness is triggered. This is not the situation we have here. The Trial Court did not make any assessment or finding that the evidence of the three witnesses it permitted to be called were essential to the just determination of the case. Instead, the Trial Court acquiesced to the Prosecution request to call the three witnesses. We must therefore conclude that the Trial Court acted pursuant to the first discretionary part of section 150 of the CPC.”

21. The accused person was entitled to know of all the prosecution witnesses intended to be availed prior to the commencement of hearing of the prosecution evidence. However, it is clear that after the victim of the offence had testified and mentioned some of the persons who assisted her after the alleged offence, she sought legal counsel which she was entitled to and counsel established that key witnesses in her complaint had been left out by the prosecution. Her counsel followed up the matter and one of the witnesses whom the complainant mentioned to have assisted her after the alleged ordeal recorded his statement with the investigators and was willing to testify to assist the court in arriving at a just decision.

22. In my humble view, and as supported by cited case law and statutory as well as constitutional provisions, the evidence intended to be

called is essential to the just decision of the case. Justice is better served when all parties are accorded an opportunity to ventilate their grievances fully as stipulated in Article 50(1) of the Constitution.

23. It would be in violation and injurious to the rights of the victim of offences if the prosecution or investigators deliberately left out essential witnesses to a case despite section 143 of the Criminal Procedure Code. Such deliberate omission of essential evidence is likely to prejudice the prosecution's case and therefore the victim of the offence on whose behalf the prosecution is mounted.

24. The intended witnesses having been named by other witnesses in their testimonies in court, and especially the complainant minor who could not have forced the investigators to ensure that all essential witnesses are listed in the charge sheet and their statements supplied to the defence, it would be a travesty of justice if the trial court gave a blind eye to the request by the complainant's plea. This not a case of the prosecution trying to patch gaps but that the prosecution's case is still pending closure and I find no prejudice being occasioned to the accused person if the intended witnesses are called to testify in the case as their evidence will aid the court in reaching a just decision. The accused person reserves his right of innocence until proven guilty but he is not expected to obstruct the cause of justice. In this case, the rights of the accused are not prejudiced as he was given an opportunity to be heard through his counsel on the objection and the statements intended to be relied on are already with his counsel. He will have sufficient time to read them and cross examine the witnesses.

25. There is no reason given by the investigators why those witnesses were not, in the first instance asked to record their statements as they were named by the complainant.

26. As earlier stated, Victims of offences have rights too. I do note that the prosecution had after plea taking supplied the accused person with the witness' statements that it intended to rely on. The Charge sheet dated 29th January 2020 has listed six witnesses and the persons now alleged to have recorded statements with the police to be witnesses are not listed in the said charge sheet. In my humble view, no prejudice will be occasioned if the witnesses in question testify as their written statements, from the application herein, have been supplied to the accused person's counsel, to enable him peruse and prepare to cross examine the witnesses on the same and prepare adequately for his defence in the matter. It will be upon the trial court to assess that evidence on its merits.

27. Consequently, I find and hold that the instant application for revision is meritorious. The same is hereby allowed.

28. I therefore order and direct that it would be essential to the just decision of the case to call the two witnesses N J and B A who recorded statements with the police, which statements were supplied to the defence and if not so supplied, should be so supplied, and the two witnesses being competent and compellable witnesses, shall be allowed to testify before the trial court and the defence shall have an opportunity to cross examine them.

29. The trial court file be forthwith resubmitted to Bondo Principal Magistrate's Court for further hearing and determination as directed by this court.

30. This file is closed.

31. Orders accordingly.

Dated, signed and delivered at Siaya this 16th Day of December, 2020

R.E. ABURILI

JUDGE