



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.1098 OF 2018

REPUBLIC .....APPLICANT

VERSUS

MOSES KAMAU MAINGI .....RESPONDENT

RULING

The Respondent, Moses Kamau Maingi, a minor is facing a charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 24<sup>th</sup> September 2017, at [particulars withheld], Ruaraka in Nairobi County, the Respondent intentionally and unlawfully caused his penis to penetrate the anus of DKK, a child aged 14 years. The Respondent pleaded not guilty to the charge. The hearing was substantially heard before the prosecution sought an adjournment to enable it call its last witness, the investigating officer. The defence objected to the application on the ground that the prosecution had previously been granted several chances to produce the witness but had failed to do so. In fact, the prosecution had been granted the last adjournment. The trial court agreed with the defence and declined the prosecution's application to be granted an adjournment. The prosecution was ordered to close its case. The Respondent was put on his defence.

The prosecution was aggrieved and by a letter dated 26<sup>th</sup> November 2018 (the same day the application for adjournment was declined) moved this court under **Section 362** and **364** of the **Criminal Procedure Code** seeking to have the decision by the trial court revised. In the application, the prosecution contended that it had not been treated fairly because the trial court had not taken into consideration the previous conduct of the prosecution. In particular, the prosecution contended that it had produced witnesses when it was required to do so by the court. The number of adjournments that the prosecution had sought was similar to the number of adjournments that the defence had sought. In essence, the prosecution was saying that there was no basis upon which the trial court declined to grant its application for an adjournment to enable it call its last witness. Mr. Momanyi for the prosecution reiterated the above arguments during the hearing of the application.

Ms. Kiarie for the defence opposed the application. She submitted that the trial court was entitled to refuse to grant the prosecution's application for adjournment because the prosecution had been granted a last adjournment. She pointed out the prosecution had on previous occasions failed to avail its witnesses despite being aware of the fact that the Respondent, being a minor, was required to be in school at the material time. It was the defence's contention that the prosecution's conduct had been less than exemplary and therefore the trial court properly exercised its discretion when it declined to grant the prosecution's application for adjournment. She urged the court to dismiss the application.

The court has read the proceedings of the trial court. It has also considered the rival arguments made by the parties to this application. The Respondent is facing a serious charge. From the proceedings, it was evident that from the time plea was taken to the time the trial court ordered the prosecution to close its case, the prosecution had produced witnesses on the scheduled hearing dates. Both prosecution and the defence sought adjournments during the course of the hearings for understandable reasons. It was apparent to this court that in declining to grant the prosecution an adjournment to call its last witness, the trial court gave undue consideration to the fact that it was on transfer and was therefore of the mind to conclude the part-heard cases pending before it. However in doing so, it was clear that the trial court failed to exercise its discretion fairly by refusing to grant the prosecution the adjournment that it had sought. It is on this basis that this court is of the view that the prosecution has made a case for this court to revise the trial court's decision refusing to grant it an adjournment and allowing it to call its last witness.

In the premises therefore, the trial court order closing the prosecution's case of 26<sup>th</sup> November 2018 is hereby set aside. The order placing the Respondent on his defence is also set aside. The prosecution is granted an opportunity to call the investigating officer to testify in the case. The investigating officer shall testify before the trial court on the day that shall be fixed for hearing by the said trial court. The trial court's file is ordered returned to the court. It is so ordered.

DATED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY 2019

L. KIMARU

JUDGE