



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

REVISION NO. 3 OF 2018

MCS.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

JOSEPH KIMELI CHEBII.....ACCUSED

RULING

[1] This revision application was filed herein on **5 February 2018** by the firm of **Wambua Kigamwa & Company Advocates** on behalf of one **MCS** who was the Complainant in **Senior Principal Magistrate's Criminal Case No. 862 of 2014: Republic vs. Joseph Kimeli Chebii**. The accused therein had been charged with the offence of defilement contrary to **Section 8(4)** of the **Sexual Offences Act, No. 3 of 2006**. He also faced an alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The accused denied the charges and after trial was acquitted thereof on **24 January 2018**.

[2] Subsequently, on the **5 February 2018**, this revision application was filed on behalf of the Complainant by **Mr. Kigamwa**, invoking the jurisdiction of the Court under **Section 362, 364 and 365** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. He prayed therefore that the record of the lower court be called for and examined as to the correctness, legality and propriety of the findings made therein by the learned trial magistrate in the light of the following questions:

[a] Whether the rights of the victim as enshrined in **Section 9** of the **Victim Protection Act, No. 9 of 2014**, were taken into consideration in arriving at the decision to acquit the accused by the court;

[b] Whether the rights of the victim under **Section 10** of the **Victim Protection Act** were duly fortified by ensuring that there was no tampering of evidence during the DNA sampling exercise at Kisumu;

[c] Whether the rights of the victim under **Section 17** of the **Victim Protection Act** were observed by the court, granted the failure by the court to consider and declare the victim a vulnerable victim due to intellectual impairment, disability and the nature of the offence committed against her;

[d] Whether the rights of the victim under **Section 17** of the **Victim Protection Act, No. 17 of 2014** were taken into account by the court, given the failure to summon an expert to appear before it and advise it on the vulnerability of the victim;

[e] Whether the trial was conducted fairly in view of the non-consideration of the vulnerability of the victim.

[3] In his submissions before the Court, **Mr. Kigamwa** expounded on the five grounds aforementioned and highlighted the fact that the Complainant was a vulnerable person who required the assistance of an intermediary in the person of her father throughout the prosecution of the lower court case; and in particular, during the DNA sampling exercise; and that, in disregard of the constitutional and statutory underpinnings of such protection, the lower court issued orders excluding the Complainant's parents as well as her Advocate from the exercise. It was therefore his contention that, since the tenets of a fair trial as anchored in **Article 50** of the **Constitution** were overlooked by the trial court, an impropriety was committed, which requires amelioration by an order of revision.

[4] **Ms. Mokuu**, learned Counsel for the State, on her part, explained that after the lower court delivered its Judgment, their office reviewed the same with a view of filing an appeal, and were satisfied as to its correctness; especially on account of the DNA report. In the same vein, **Mr. Mwetich** for the accused argued that, since the State was satisfied that the decision to acquit the accused was premised on sound basis, there would be no justification for revision. He further pointed out that the DNA sampling process was so protracted and hampered by interferences that it was necessary for the trial court to intervene; hence the court order to exclude the parties from the process. Instead, the lower court caused the Complainant to be escorted to Kisumu by a court official. In his view, no prejudice at all was visited on the

Complainant whose interests were ably and well taken care of throughout the trial by an Advocate. Thus, in **Mr. Mwetich's** submission, the revision application is not only misconceived, but also amounts to an abuse of the court process, granted that it is not within the jurisdiction of this Court to convert the accused's acquittal into a conviction, as has been sought by the Complainant.

[5] In his rejoinder, **Mr. Kigamwa** urged the Court to bear in mind that, in Kenya, a victim of a crime has no direct right of appeal; and that the only avenue is via revision. He also pointed out that **Section 364(4)** of the **Criminal Procedure Code** only bars the conversion of an acquittal into a conviction; and that it does not bar the Court from ordering a re-trial if that is found necessary in the interests of justice. He thus concluded his submissions by urging the Court to review the record with a view of ascertaining whether the rights of the victim were taken into account.

[6] Pursuant to the provisions of **Article 165(6) and (7)** of the **Constitution**, the High Court is vested with supervisory jurisdiction over the subordinate courts; which power includes the mandate to call for the records of any proceedings before any subordinate court and to make any order or give any direction as appropriate to ensure the fair administration of justice. Thus, **Section 362** of the **Criminal Procedure Code** recognizes that:

"The High court may call for and examine the records 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."

[7] Likewise, **Section and 364(1)(b)** of the **Criminal Procedure Code** stipulates that:

"In the case of a proceeding in 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 ... in the case of any other order other than an order of acquittal alter or reverse the order."

[8] To my mind, the provision is explicit enough that, in the case of an acquittal, the review jurisdiction is ousted, no matter the merits. Thus, in **Bichange vs. Republic [2005] 2 KLR**, the Court of Appeal took the following view regarding the import of Section 364 that:

"The meaning of this section is plain. Where an accused person has been acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction. The trial magistrate had acquitted the appellant on the main charge of defilement under section 145 of the Penal Code. In view of the provisions of section 364(4) of the Criminal Procedure Code, Tuiyot, J had no power and was not entitled to convert that acquittal into a conviction."

[9] Thus, where the outcome is an acquittal, the only option available is well set out in **Section 348A** of the Criminal Procedure Code, thus:

(1) When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complainant or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Director of Public Prosecutions may appeal to the High Court or to the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under section (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately.

[10] On behalf of the Director of Public Prosecutions, **Ms. Mokuia** told the Court that, after the lower court delivered its Judgment, they reviewed the same with a view of filing an appeal and were satisfied as to the correctness of the said decision; especially on the basis of the DNA report. Thus, that marked the end of the road for the Complainant in so far as the criminal process is concerned.

[11] **In the result, it is my finding that, there being no jurisdiction to review a finding of acquittal, this application is misconceived and is for dismissal.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF JULY 2019.

OLGA SEWE

JUDGE