REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 6 OF 2019

KELVIN OMURUNGA ABUCHERI..... APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING ON REVISION

1. The applicant, Kelvin Omurunga Abucheri moved this court through an application for revision filed on 12th February, 2019 seeking the following orders:-

(i) Spent;

(ii) Spent;

(iii) That this Honourable court be pleased to examine and revise the order issued by the Trial Magistrate Hon. D.M. Mochache, Principal Magistrate, in the Senior Resident Magistrate's Court (sic) at Shanzu Sexual Offence No. 45 of 2016; Republic versus Kelvin Omurunga Abucheri, putting the accused person on his defence (the applicant before this High Court) substitute it with an order of no case to answer and accordingly acquit the accused person of all the charges as per the charge sheet dated 4th May, 2016;

(iv) Spent;

(v) That this Honourable court be pleased to issue such further and/or other orders in the interest of justice; and

(vi) That the costs of this application be provided for.

2. The application is anchored on the grounds in support of it and the affidavit of the applicant sworn on 12th February, 2019.

3. In his written submissions, Mr. Ngonze, Learned Counsel for the applicant submitted that his client was charged with the offence of defilement of a child aged 4 which suggests that there was penetration. He was also charged with an alternative charge of indecent act with a child. It was further submitted that the Doctor testified that when penetration takes place, the hymen breaks, yet in the evidence tendered in the lower court case by PW1, it indicates that penetration was successful but the outer genitalia was found to be normal.

4. Mr. Ngonze argued that despite the foregoing evidence, the Hon. Magistrate found that the applicant had a case to answer. He relied on the case of **Ramanlal Trambaklal Bhatt vs Republic** [1975] 1 EA 332 and **Republic vs Bernard Obunga Obunga** [2015] eKLR which demonstrate what Constitutes a *prima facie* case.

5. He also referred to the case of **Wesley Kiptui Rutto & another vs Republic** [2017] eKLR, which states that at the point of no case to answer if the prosecution has not proved its case beyond reasonable doubt, a court has no option but to acquit. He stated that Section 205 of the Criminal Procedure Code (CPC) is drafted in mandatory terms. He prayed for the application to be allowed.

6. Ms Marindah, Prosecution Counsel, opposed the application for revision. She relied on the grounds of opposition filed on 2nd April, 2019. She submitted that under the provisions of Section 211 of the CPC, a court does not need to give an explanation as to why an accused person is being put on his defence. She relied on paragraph 8 of the decision in **Wesley Kipruto Rutto & another vs Republic** (supra) to support her argument. She further submitted that when a Trial court does not give a detailed ruling, it cushions the prosecution as otherwise, the defence would have an upper hand in taking advantage of weaknesses in the prosecution's case. It was her view that no miscarriage of justice had been occasioned against the applicant. She indicated that the applicant should await the decision of the Trial Magistrate and if convicted,

he could appeal.

7. The Prosecution Counsel was also of the view that a hymen need not be broken for penetration to be proved. She added that lacerations are evidence of penetration. She opted not to argue on the evidence given before the Trial court and urged this court to allow the Hon. Magistrate to discharge her duty in determining the case.

8. Mr. Ngonze in his response stated that Section 107 of the Evidence Act provides that he who alleges must prove. He re-emphasized that penetration had to be proved as well as all other evidence. In his view, the appellant should not have been put on his defence.

ANALYSIS AND DETERMINATION

The issue for determination is if this court can revise an order of the lower court that put the accused person (applicant) on his defence and acquit him.

9. The supervisory jurisdiction of the High Court is provided under the provisions of Article 165(6) of the Constitution of Kenya and Sections 362-367 of the CPC. Section 364(1)(b) of the CPC provides that the High Court can in case of any other order other than an order of an acquittal, alter or reverse the order of a subordinate court. It is based on the above provisions of the law that this court is being requested to alter or reverse the ruling made on 30th November, 2018 which put the applicant on his defence.

10. Offences under the Sexual Offences Act are heard by the Magistrates' Courts. Any findings made on the case that was filed against the applicant on his complicity in the offence(s) he was charged with, fall squarely under the purview of the Magistrates' courts.

11. It is therefore premature for the applicant to move this court and ask it to set aside the ruling made by the Trial Magistrate which placed him on his defence. The applicant in so doing is inviting this court to step into the arena of a Magistrate's court, peruse the evidence that was tendered before the said court and make a determination on whether or not the prosecution adduced sufficient evidence to warrant his being put on his defence. If this court was to do so, it would be usurping the powers of the Trial court.

12. The law is very clear on the cases which a High Court has jurisdiction to hear to the extent of ascertaining at the trial stage if accused persons should be put on their defence. The trial for an offence of defilement or indecent act with a child, does not fall in the ambit of the High Court.

13. The case cited by the Counsel for the applicant of **Ramanlal Trambaklal Bhatt vs Republic** (supra) is not applicable to this case as the High Court is not seized of the case that the applicant was charged with. This court can therefore not go through the evidence adduced in the lower court to establish if it has met the threshold required to put the applicant on his defence.

14. In the case of **Bernard Obunga Obunga vs Republic** (supra) which was cited by Counsel for the applicant, the trial took place in the High Court. The said case was at first heard by Judge Muchemi who was transferred to another station from Nairobi and the case was taken over by Judge Mutuku who found that the evidence adduced by the prosecution was weak and did not establish a *prima facie* case. She then acquitted the accused therein. The said case was heard by 2 Judges of concurrent jurisdiction. The Judge who took over the case had the powers to make a determination on the evidence that had been adduced after the close of the prosecution case on whether or not the accused had a case to answer.

15. The above case is therefore distinguishable from the present case which is being heard in the Magistrate's court, with the High Court being requested to set aside the ruling of the Trial court on a case to answer. Logically, the only way this court would do that is by analyzing the evidence that was tendered by prosecution witnesses. This court has no jurisdiction to acquit accused persons who are undergoing trials in subordinate courts. An order to set aside Hon. Mochache's order putting the applicant herein on his defence, would conversely result to an acquittal of the applicant. It is the considered view of this court that is not the intended purpose of revisionary powers of the High Court.

16. The decision cited by both the applicant's and the respondent's Counsel of **Wesley Kiptui Rutto and another vs Republic** (supra) articulates the extent to which a Trial court should go after closure of the prosecution's case when making a finding on whether there is a case to answer or not. This court holds a similar view as that of Judge Muriithi, that the Trial court does not have to give a detailed ruling on the reasons why an accused has been put on his defence.

17. The Trial court hearing the applicant's case after going through the evidence adduced by the prosecution came to the conclusion that he could not be acquitted at the stage of whether he had a case to answer or not. It was well within the jurisdiction of the Hon. Magistrate to make such a decision since she heard the witnesses testify and they were subjected to cross-examination. In the event that the applicant will be convicted and sentenced, he will have the right of appeal. I decline to set aside the decision of the Trial court of 30th November, 2018.

18. I order that Shanzu Senior Principal Magistrate's Court Sexual Offence No. 45 of 2016 shall proceed for further hearing. The said case shall be mentioned on 3rd October, 2019 in the said court for purposes of taking a hearing date. The applicant shall attend court on the said date without fail.

It is so ordered.

DELIVERED, **DATED** and **SIGNED** at **MOMBASA** on this **27th** day of **September, 2019.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Khisa for Mr. Ngonze for the applicant

Mr. Muthomi, Prosecution Counsel - for the respondent

Ms. Peris Maina - Court Assistant