

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

REVISION CASE NO. 134 OF 2017

JOSEPH MWOLOLO MUTUNE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. Kimandu & Ndegwa Advocates who have the conduct of **Kangundo Principal Magistrate Criminal Case Number 24 of 2016 (S.O)** on behalf of the accused herein **Joseph Mwololo Mutune** have written a letter dated 1st December, 2017 seeking the High Court to examine the proceedings before the Magistrate's court and satisfy itself as to the correctness, legality or propriety of finding and to order the reversal of the same.

2. The genesis of the complaint is that on 14/09/2017 the accused was compelled to proceed with the hearing of two witnesses in the absence of his counsel on record despite having asked to be granted time to engage alternative representation since the charges facing him are serious. A further complaint is that a request to recall the witnesses by the present counsel on record for the accused was declined by the trial court. It is thus the contention of the defence counsel that the rights of the accused as enshrined under Article 50 (2) (a), (c) and (g) of the Constitution to be presumed innocent until the contrary is proved, to have adequate time and facilities to prepare a defence and be represented by an Advocate have been infringed upon and violated.

3. Upon receipt of the counsel request aforesaid, this court called for the proceedings from the lower court regarding the case in question namely **Kangundo Senior Principal Magistrate's Court Criminal Case Number 24 of 2016 (S.O)**. In that case the accused had been charged with an offence of attempted defilement and committing an indecent act with a child contrary to Sections 9(1) (2) and 11(1) of the Sexual Offences Act No.3 of 2006 respectively. The proceedings reveal that the case proceeded for hearing on the 14/09/2017 after the accused indicated to the court that he was then ready to proceed on his own in the absence of his advocates as he had not paid fees. The accused participated in the trial and duly cross – examined all the three witnesses called by the Prosecution and agreed to the prosecution's request for adjournment to the 19/10/2017. On the 19/10/2017 the new counsel came on record and sought to recall the witnesses for further cross – examination which request was declined by the trial court. The trial court noted that the accused had chosen on his own free will to prosecute the matter on 14/09/2017 and had fully cross – examined the witnesses. The trial court felt that the request for recall would not augur well with the spirit of expeditious just and fair disposal of the case.

4. The power of revision is conferred upon the high Court vide Section 362 of the Criminal Procedure Code which provides as follows:-

“The High Court may call for and examine the record of any Criminal proceedings before any subordinate court 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.”

The gist of the complaint revolves around the rationale behind the trial court compelling the accused to proceed with the hearing of the case in the absence of his Advocate and subsequently refusing to allow

for recall of two of the witnesses. I have looked at the record of the lower court for the 14/09/2017 and note that the accused upon being informed that the prosecution had witnesses stated to the trial court that he was ready to proceed on his own as he had not paid his Advocate. The accused thereafter cross-examined three witnesses at length and when the prosecution requested for another date, he indicated that he had no objection. Accused did not raise any issue with the court that he was not done with the witnesses thereby meriting recall of them for further cross-examination. The fact that the accused did not make such a request on that date confirmed that he was satisfied with the cross-examination of the three witnesses. It is therefore not correct that the accused had been compelled to proceed with the hearing against his will as now contended. It was on that basis that the present counsel for the accused's request for recall of witnesses was declined by the trial court. The trial court indicated that the request for recall of witnesses was meant to delay the just, fair, and expeditious disposal of the matter which is to the benefit of both prosecution and defence. Under those circumstances, I am unable to find fault at the trial court. I find there is no irregularity in the lower court proceeding which were conducted on the 14/09/2017 and 19/10/017 as contended by counsel for the accused. I find the rights of the accused under Article 50 of the Constitution have not been violated or infringed upon.

In the result I find the request for review of the subordinate court's order declining a request for recall of witnesses lacks merit. The same is declined. Matter is ordered to proceed in the lower court as scheduled.

Dated and delivered at Machakos this 21st day of December, 2017.

D. K. KEMEI

JUDGE

In the presence of:-

N/A for the Applicant

N/A for the respondent

Kituva - Court Assistant