



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CRIMINAL APPLICATION NO. 15 OF 2016

**IN THE MATTER OF AN APPLICATION BY DENIS ONSASE NYAUNDI FOR REVISION
FROM FAILURE TO RECALL A WITNESS FOR CROSS EXAMINATION**

IN CRIMINAL CASE (S.O.) NO. 18 OF 2013 AT MAVOKO LAW COURT

DENIS ONSASE NYAUNDI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

[1] This is a ruling on an application brought under sections 150, 362, 364, 365, 366 and 367 of the Criminal Procedure Code and Article 50 (1) of the Constitution of Kenya 2010 for revision of an order of the trial court made on 15th July 2015 declining to allow the recall and further cross-examination of the complainant in the criminal case no. 18 of 2015 in which the applicant is accused of defilement of a girl contrary to section 8 (1) of the Sexual Offences Act No. 3 of 2006.

THE APPLICATION

[2] The application by Notice of Motion before this court dated 18th February 2016 sought the following orders and was based on the grounds set out in the application as below:

“NOTICE OF MOTION DATED 18TH FEBRUARY, 2016

ORDER

- 1. This application be certified urgent, service be dispensed with thereof and the same be heard ex parte in the first instance.*
- 2. This Honourable Court be pleased to stay any further proceedings pending the hearing and determination of this application in Mavoko Principal Magistrate’s Court Criminal S.O. 18 of 2013.*
- 3. That the whole Ruling of the Hon. Mrs. L.A. Mumassaba Resident Magistrate, delivered on 15th*

July, 2015 be revised.

4. This Honourable Court do compel the complainant (Josephine Munyila Makau “PW1”) in Mavoko Principal Magistrate’s Court Criminal S.O. 18 of 2013 to attend court for cross examination.

5. That application be heard inter parties on such date and time as this Honourable court may direct.

Grounds

1. That the prosecution in Mavoko Principal Magistrate’s Court Criminal S.O. 18 of 2013 closed its case.

2. That on 11th March, 2015 the complainant (Josephine Munyila Makau “PW1”) in Mavoko Principal Magistrate’s Court Criminal S.O. 18 of 2013 testified on oath after a voire dire examination concerning the events of 13th December, 2013 allegedly involving the accused/applicant herein.

3. That on 20th March, 2015, the Complainant (Josephine Munyila Makau “PW1”) wrote and filed a letter at the Mavoko Law Court’s Registry in Mavoko Principal Magistrate’s Court Criminal S.O. 18 of 2013 stating that the Evidence she had given in court on the 11th March, 2015 was all false.

4. That unless further proceedings in this matter are stayed pending the hearing and determination of this application in Mavoko Principal Magistrate’s Court Criminal S.O. 18 of 2013 then the entire application shall be rendered nugatory thus denying the accused a fair hearing.

5. That it is in the interest of justice the application be granted as prayed and issues herein be assessed afresh as aforesaid to adduce evidence crucial in aiding court reach a just and fair determination of this matter.”

Decision of the trial Court

[3] An application before the trial court for recall of the child complainant is shown on the record of that court of 30th June 2015 to have been made as follows:

“Ms. Jeruto:We have received a letter served in our Offices. On 20/3/2015. It was served by a Gentleman around 9.00am. I wish to make an application to recall PW1 for further cross-examination in respect of this matter because it appears she has recanted her testimony.”

[4] The trial Court having heard the Prosecutor and counsel for the Applicant and after calling for a response from the Executive Officer of the Court as to receipt of the letter at the court registry made a ruling on the 15th July 2015 as follows:

“Court:

I have read the Executive Officer’s letter dated 15/7/2015. I do not see the reason why PW1 should be recalled in this case. The reasons advanced by the defence to recall PW1 are not sufficient. The said letter is not properly on record. Hearing 4/8/15.

L.A. MUMASSABBA – RM.”

THE RESPONSE

[5] In response to the accused/applicant's application dated 18th February 2016 before this court, counsel for the Director of Public Prosecution (DPP) filed Grounds of Opposition dated 12th March 2016 were filed setting out at paragraphs 3-6 its principal grounds as follows:

"3. That there is no sufficient reason advanced by the applicant to warrant recall of PW1 under section 150 of the Criminal Procedure Code.

4. That the trial magistrate was right in dismissing the application to recall PW1 since the application was made on a document that was improperly before the Court and contrary to the rules of evidence.

5. That the origin of the purported letter is unknown to date and cannot be a basis of recall of a prosecution witness as it is contrary to section 70 of the Evidence act.

6. That this application is meant to interfere with a Prosecution witness, who is a minor who should be protected by this Honourable court as spelt out in sections 4(2) and 4 (3) of the Children Act. Such an application is not in the best interest of the child."

[6] Counsel for the accused/applicant Mr. Mugwimia and Ms. Maingi for the DPP made oral submissions on their respective contentions and ruling was reserved.

DETERMINATION

[7] The letter the subject of this application was partly in English and partly in Kiswahili languages and is set out verbatim herein below:

*"Josphine Muniyiva,
P.O. Box 29,*

MATUU

20th March, 2015

To the Judge,

Mavoko Law Court,

P.O. Box

Dear Madam,

REF: (CASE AGAINST DENIS ONSASE NYAUNDI 18/2013)

Mimi ni Josphine Muniyiva. Nimeandika barua hii kwa kuomba mahakama ya Mavoko msamaha. Mnamo tarehe 11th March, 2015 nilindanganya mahakama kwamba Denis Onsase Nyaundi alikuwa amelala na mimi ilhali haikuwa hivo kwa sababu niliogopa dada yangu kwamba atanichapa na vile alikuwa ameniambia niseme ni Denis kumbe alikuwa rafiki mwingine ambaye nilikuwa nitemtembelea hiyo siku.

Kusema ukweli vile dada yangu alikuwa amekosana na Denis ndio sababu akaniambia niseme ni Denis.

Mimi Wako

Josphine Munyiva Makau

[8] The applicant did not attach an official translation of the letter but directly translated, the letter is to the following effect:

“Translation from Kiswahili to English

Josphine Munyiva,

P.O. Box 29,

MATUU

20th March, 2015

To the Judge,

Mavoko Law Court,

P.O. Box

Dear Madam,

REF: (CASE AGAINST DENIS ONSASE NYAUNDI 18/2013)

I am Josphine Munyiva. I write this letter to pray for forgiveness from Mavoko Law Courts. On 11th March, 2015 I lied to Court that Denis Onsase Nyaundi had slept with me which was not like that, because I feared my sister that she would beat me up and that she had told me to say that it was Denis but it was another friend whom I had visited that night. To speak the truth, my sister had differed with Denis and that is why she told me to say it is Denis.

Yours,

Josphine Munyiva Makau

[9] With respect, the counsel for the applicant in seeking to cross-examine the complainant was not trying to put in a letter contrary to rules of evidence as contented by the DPP. It was sought only to further cross-examine the complainant on the basis of the letter which would be put to the complainant to respond to and confirm or deny its authenticity and the letter would be formally produced by the Defence, if necessary when the accused was put on his defence. It may be that the complainant was pressured to write the letter or that she did not write the letter at all. But that is not for the trial court, or this court, to determine at the stage upon, or when, the application for recall was made. It is a determination that could only be made upon hearing of the matter by having the complainant cross-examined on it.

[10] Although in addressing the letter of 20th March 2014, the author gave the impression that the court was being asked to act on the new evidence set out in the letter, and the court may properly have rejected such overture as the evidence was not produced in accordance with the rules of evidence, the application before the court was not one for admission of evidence but rather for recall, not to adduce evidence but to be cross-examined on the basis of the letter, which the accused or his witness could properly adduce in the course of the defence case should he be put on his defence.

[11] Section 70 of the Evidence Act relied upon by the DPP is in the following terms:

“70. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.”

With respect, it was not sought to adduce the letter in evidence at the stage of the application for cross-examination. The defence could only produce the letter at the defence hearing.

[12] Section 150 of the Criminal procedure Code gives the trial court a discretion to recall witnesses in the following terms:

“150. 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.”

[13] It is trite that an appellate court will not interfere with the exercise of discretion by a trial court as held by the Court of Appeal for East Africa in *Mbogo v. Shah* (1968) EA 93, per Newbold, P. that:

“[A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that **the judge was clearly wrong in the exercise of his discretion** and that as a result there has been misjustice.”

[14] The principle applies both in civil as well as criminal proceedings: see for instance, with respect to sentencing in criminal cases *Wanjema v. R* (1971) EA 494 –

“An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into consideration some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

[15] In criminal proceedings, however, the discretion of the trial court must be defensible in the light of constitutional protection of an accused’s fair trial rights under Article 50 of the Constitution. Article 50 (2) of the Constitution secure the fair trial right of an accused person to cross-examine his accusers in terms as follows:

“(2) Every accused person has the right to a fair trial, which includes the right—

(k) to adduce and **challenge evidence;**”

[16] Article 53 (2) of the Constitution requires that the Court gives paramountcy to the best interest of the

child in these terms:

“(2) A child’s best interests are of paramount importance in every matter concerning the child.”

[17] Constitutional provisions must, in my view, be read in such a manner as to maintain harmony rather than conflict. The inquiry must not be whether to give effect the one at the expense of another, even where, as in the welfare of the child, paramountcy of a right is decreed. It would only mean that the court must give effect to the two constitutional rights and paramountcy to the appropriate one. In the context of this case, the best interests of the child will be given paramount consideration despite the constitutional right of the accused to a fair trial right to cross-examine his accusers.

[18] What does this mean in practical terms? It means, in my view, that the court must consider whether, and the extent to which, the best interest of the child is affected by upholding the accused’s fair right to cross-examine the child in the circumstances of the case. The best interests of the child must be legitimate interests. Could there best interest of the child in denying an accused person his right to a fair trial? Supposing the letter of 20th March 2016 was truthful, could there be a legitimate interest of the child in denying the accused a right to challenge the untruthful evidence previously adduced by the child and, consequently, in convicting the accused on untruthful testimony of the child complainant? I do not see the legitimate interest of the child to be served in denying an accused person the right to challenge the evidence given by the child implicating the accused in wrongdoing as there cannot be a right to protection for untruthful accusations.

[19] In refusing the application for recall of the complainant for cross-examination in the light of the letter of 20th March 2016, the learned trial magistrate was plainly wrong, and this court is entitled in accordance with authorities to interfere with the trial court’s discretion. There is, however, a sense in which the court’s discretion is taken away by the proviso to section 150 of the Criminal Procedure Code, as the recall was essential for determination of the matter at hand. If the letter of 20th March 2016 was truthful, the accused could never be convicted of the charge before the court. In the material parts, section 150 of the CPC provides in mandatory terms that the court **shall** recall a witness as follows:

“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”

[20] There can be no just decision in the matter if the accused/applicant is convicted on untruthful testimony of the child/complainant. The complainant must be allowed, as she has sought, to correct the testimony that she gave before the court. If it turns out that the complainant was pressured into telling an untruth either in the testimony before the court or in the letter subsequently written to court, the court as a court of law and justice must be able to deal with the situation and reach a **‘just decision of the case.’**

Jurisdiction of the High Court

[21] The High Court has revisionary jurisdiction and powers under section 364 of the Criminal Procedure Code, in so far as relevant, 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 -

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

Section 364 (5) provides that –

“(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

[22] Under section 347 of the Criminal Procedure Code, the right to appeal flows from a conviction as

follows:

“347. (1) Save as is in this Part provided -

(a) a person **convicted** on a trial held by a subordinate court of the first or second class may appeal to the High Court; and

(b) *(Repealed by 5 of 2003, s. 93.)*

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law.”

The accused/applicant herein could not have appealed from a refusal to recall a witness and the application for revision was the appropriate procedure in terms of section 364 (5) of the Criminal Procedure Code.

ORDERS

[23] For reasons set out above, the Court makes an order setting aside the decision of the trial court dismissing the application for the recall and cross-examination of the complainant and substituting therefor in accordance with section 364 (1) (b) of the Criminal Procedure Code and order for the recall of the complainant (PW1) for cross-examination by the Defence on the basis of the letter allegedly written by the complainant to the Court dated 20th March 2015.

[24] Accordingly, the Court shall certify this order on revision for compliance by the trial court in terms of the provisions of section 367 of the Criminal Procedure Code which provides as follows:

“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.”

[25] For this purpose, the matter will be mentioned before the trial court for directions as to further hearing on a date to be fixed in consultation with Counsel for the DPP and the Applicant.

DATED AND DELIVERED THIS 26TH DAY OF MAY 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Applicant

Ms. Saoli for the Republic

Mr. Moruri- Court Assistant.