Director of Public Prosecution v Abbey (Criminal Revision E003 of 2025) [2025] KEHC 6355 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6355 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MANDERA

CRIMINAL REVISION E003 OF 2025

JN ONYIEGO, J

MAY 22, 2025

BETWEEN

DPP ..... APPLICANT

AND

MOHAMED ISSA ABBEY ..... RESPONDENT

RULING

1. The respondent is charged before Mandera SPM' court with defilement contrary to Section 8(1)3 of the *Sexual Offences Act* No. 3 of 2006. Particulars of the offence are that on diverse dates from June to September, 2024 at xxx location within xxx Sub county in Mandera County, he intentionally and unlawfully caused his penis to penetrate the vagina of DMN a child aged 14 years.

2. In the alternative count, he is facing the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offence Act No. 3 of 2006. Particulars are that on diverse dates from June to September 2024 at xxx location within xxx Sub county in Mandera County, he intentionally touched the vagina of DMN a child aged 14 years with his penis.

3. The respondent pleaded not guilty to the charge on 12/9/2024. The matter was slated for first hearing on 16/9/24 and one witness testified and then Prosecution sought an adjournment.

4. On 26/9/24, the matter could not proceed as the defence counsel was sick. Hearing was fixed for 30/9/24 but adjournment was sought to enable prosecution supply medical report to the defence. Hearing was then fixed for 14/10/2024.

5. On 14/10/24, the prosecution applied for adjournment for lack of the medical doctor who filled the medical report and the other two remaining witnesses. The court graciously adjourned the Matter to 9/12/24.

6. On 9/12/2024, the matter was adjourned again as prosecution was not ready on grounds that the investigating officer had been re-allocated other duties. Again, the matter was adjourned to 12/2/2025.

7. On 12/02/2025, prosecution again sought for adjournment on grounds that none of the remaining witnesses was bonded. The defence opposed the application for adjournment. The court however marked it last adjournment and hearing fixed for 26/2/2025.

8. On 26/2/2025, prosecution applied for adjournment for lack of witnesses again. The defence opposed the application and the court ordered closure of the prosecution case. The court fixed a ruling for 3/4/2025 for the determination on whether there was a primafacie case to warrant accused being put on his defence.

9. Before delivery of the ruling, prosecution moved to this court under certificate of urgency filed by way of notice of motion dated 28/2/2025 seeking orders:-

    i. That this application be certified as urgent and be heard on priority basis.

    ii. That this Honourable court be pleased to issue an order of stay of proceedings and arrest of the trial court's ruling slated for the 3rd day of April, 2025 in respect to the order made on the 26th day of February, 2025 by Hon. C. Omondi marking the prosecution case as closed in Mandera MCSO/E015/2024 pending the hearing and determination of this application.

    iii. That this Honourable court be pleased to review/revise the order made on the 26th day of February, 2025 by Hon. C. Omondi in Mandera MCSO/E015/2024 and order the re-opening of the prosecution case.

    iv. That this Honourable court be pleased to issue any other orders that it deems fit and just in the circumstances.

10. The application is anchored on the particulars set out on the face of it and the content contained in the affidavit in support sworn on 28-2-25 by PC Samuel Matanda who acknowledged the number of adjournments occasioned by both the prosecution and the defence. He averred that; the victim stands to suffer if the case is thrown out; failure by the witnesses to turn up in court was out of frustrations occasioned by the defence's failure to proceed with the case in two occasions; the prosecution is ready to prosecute its case to its logical conclusion and; the victim is not to blame for the adjournments.

11. During the hearing, both counsel reiterated the content in their respective affidavits.

12. I have considered the application herein and objection thereof. The only issue for determination is whether the trial court was justified to order for closure of the case before prosecution could call all witness. It is trite that access to justice and fair hearing is a two-way traffic. Both the accused and the complainant are entitled to expeditious dispensation of justice pursuant to 50 (2)(e) of the *constitution*.

13. In this case, the prosecution is claiming that it was the defence to blame for the delay thus frustrating witnesses who decided not to attend future court hearings. From the record, defence counsel fell sick and the second round, he had not been supplied some medical documents. This was not deliberate but nature and also the prosecution for not supplying a medical report in time.

14. The above notwithstanding, prosecution occasioned adjournments on 14-10-24, 9-12-24, 12-1-25 and 26-2-25 due to non-attendance of witnesses. There is no minimum number of adjournments that must be given before the court can reject an adjournment. Even on the 1st day of hearing, if there is no good reason for adjournment a court can reject an adjournment.

15. The above not-withstanding, whether to adjourn a matter or not is a question of prudent exercise of discretion by the trial court. Under Section 362 of the *CPC*, this court can exercise its revisionary powers only for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and or as to the regularity of any proceedings of any subordinate court.

16. Therefore, it is incumbent upon the applicants to satisfy the court on whether any of those elements does exist. It is trite that revisionary orders should not be used to micro manage subordinate courts. See D*irector of Public Prosecution v Perry Monsukh Kasangara others* (2020) eKLR. Their decisional independence must not be interfered with whimsically or capriciously.

17. However, in the circumstances of this case, the court did make one procedural irregularity by closing the case suo motto. The right procedure would have been to deny an adjournment and then wait for the prosecution to make the next move to either withdraw, proceed or close the case. To that extent the court did inappropriately close the case thus usurping prosecutorial powers. See *Republic v Suleiman*(criminal revision E212 of 2022) (2022)KEHC 16042(KLR)5 December 2022)(ruling) where the court held as follows.

> 4.“ In this case, while it’s within the jurisdiction and discretion of the court to allow or deny an adjournment prayer by the prosecution, it is not within the court’s jurisdiction to close the prosecution case. The right procedure is for the court to deny an adjournment and give the prosecution a room to find a way out, proceed to withdraw the case, terminate it or otherwise close the case themselves. If they leave it to the court, in so doing they grant the court a window to close the case and move forward. Otherwise the court cannot close the case on it’s own volition.
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> 5. Given the foregoing I can only review the order for closure of the prosecution case and not for denial of the adjournment. The said order is discarded to enable the prosecution proceed, close their case or otherwise deal with it as they may find appropriate, within the law”.

18. In view of the above finding, I will not interfere with the order for denial of adjournment as it was perfectly within the court’s jurisdiction. However, the order for closure of the case suo motto and reserving it for ruling is set aside and the file shall be reopened to allow the prosecution have an opportunity to weigh its options on whether to proceed, close its case or terminate.

DATED, SIGNED AND OR DELIVERED VIRTUALLY THIS 22ND DAY OF MAY 2025

J. N. ONYIEGO

JUDGE