



**CNM v Republic (Criminal Revision E103 of 2023)
[2024] KEHC 2950 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2950 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL REVISION E103 OF 2023
RPV WENDOH, J
MARCH 14, 2024**

BETWEEN

CNM APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. By a Letter dated 7/8/2023, the Applicant CNM seeks an order that this court be pleased to revise the charges of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, preferred against him in Rongo PMCRC MCSO No. E004/ 2020 and find it fit to reject the said charges.
2. The application is premised on grounds on the face of the letter. It is the Applicant’s contention that the decision by the Office of the Director of Public Prosecution to charge him with the said offence amounts to discrimination on the basis of gender in clear contravention of Article 27(1), (4) of the Constitution as well as Article 2(5) of the United Nations Convention on the Rights of the Child.
3. It is his claim that he is aged 16 years and he was suspected to have defiled a girl aged 12 years at the time of the alleged offence and both of them are thus minors. He maintained that the Director of Public prosecutions acted maliciously in preferring the charges against him and therefore urged the court to exercise its powers pursuant to section 362 of the CPC in confirming the legality, correctness and propriety of the trial court’s decision in prosecuting him.
4. Mr. Kaino, the Prosecution Counsel appearing for the Respondent opposed the application by a Preliminary Objection dated 15/11/2023; dismissing he Application as incompetent, misconceived and an abuse of the court process. He contends that the court’s supervisory jurisdiction pursuant to section 362 of the CPC is strictly limited on ascertaining the correctness, legality and propriety of any findings, sentence or order passed but does not extend to the decision to charge an accused person



- and which may amount to usurping powers solely vested on the ODPP under Article 157 of the Constitution.
5. It was counsel's contention that the Applicant ought to have filed Judicial Review proceedings for purposes of quashing the decision to charge him and not an Application for review as in the instant case. He further averred that allegations of discrimination should be ventilated via a constitutional petition and remedies therein are provided under Article 23 of the Constitution.
 6. The Application was canvassed by way of written submissions. Both parties filed their rival submissions and authorities which I have read and considered. On 27/11/2023 when the matter came up for mention, Mr. Ondabu, counsel for the Applicant highlighted his submissions. He submitted that the proceedings and charges of defilement against the Applicant/ accused person, who is a minor, were defective and irregular and amount to discrimination on the basis of gender. He urged the court to allow the Application and reject the said charges preferred against the Applicant.
 7. Mr. Kaino, prosecution counsel also highlighted his submissions. He reiterated the contents of his Preliminary Objection in response to the Application. It was his submission that the Applicant had not proven any illegality and irregularity in the proceedings conducted by the subordinate court. He further maintained that the court's jurisdiction under section 362 of the CPC does not extend to the decision to charge any accused person, which is a preserve of the Office of the Director of Public Prosecution.
 8. I have considered the application for revision and the objection thereto. The Applicant's main ground for revision is that the charges of defilement preferred against him and the proceedings in the subordinate court amount to discrimination on the basis of gender, contrary to Article 27(1) & (4) of Constitution. The ODPP's main ground of objection is that the revisionary jurisdiction provided under section 362 of the CPC does not extend to the decision to charge an accused person but is limited to ascertaining the correctness, legality, regularity and propriety of any proceedings, findings, sentence or order recorded or passed.
 9. In determining whether or not there was discrimination of the accused person on the basis of gender by preferring charges against him, even though both the victim and the accused were minors this court will look at the circumstances of the commission of the alleged offence of defilement and the spirit of the Sexual Offences Act in totality.
 10. It was the testimony of PW1 (the Victim) that on 2/10/2020, she was sent to [Particulars Withheld] Centre at around 6 pm to buy food. She met the accused near [Particulars withheld] before getting to the center. He was standing near the bar and restaurant. He beckoned her and sent her to buy Safaricom credit for him from a nearby shop. She agreed and when she returned with credit, the accused pulled her inside one of the rooms and defiled her. She managed to run away and went to the hospital and thereafter reported the matter to the police. She had no prior knowledge of the accused before the incident. The accused chose to remain silent when put on his defence and did not call any witness to testify in his support.
 11. The question that therefore follows is whether the revision and the grounds relied on is sufficient to warrant the grant of orders sought. Section 14 of the Penal Code deals with criminal responsibility in relation to immature age. It provides as follows; -
 - (1) A person under the age of eight years is not criminally responsible for any act or omission.
 - (2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.



- (3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.”
12. Looking at the circumstances of the commission of the offence, it is clear that even though both the subject and the victim were minors, there was no consent to engage in the sexual activity. The subject was not known to the victim. There was no prior relationship between them. At the time of the said offence, the victim was 12 years and is presumed to be incapable of having consented to the sexual act. Therefore, the assertion by the Applicant’s counsel that both the accused and the victim ought to have been charged for defilement are untenable.
 13. The circumstances in *G.O. vs Republic* [2017] eKLR quoted and heavily relied on by the Applicant is different from the instant case. In the former, the complainant aged 17 years was senior to the Accused, who was aged 16 years and 2 months at the time of the commission of the offence while in the instant case, the victim/complainant aged 12 years is younger than the accused who was aged 16 years at the time of the offence. The complainant produced a copy of the Birth Certificate in evidence to confirm the same. The circumstances in the two cases is completely different and the Applicant cannot seek to rely on the same.
 14. The applicant did not give a contrary account of the commission of the offence from what was given by the victim as he chose to remain silent when put on his defence. He did not call any witnesses or provide any contrary evidence.
 15. In view of the foregoing, it is my finding that the application for revision is not merited. The grounds relied on of discrimination based on gender are not sufficient to warrant the grant of the orders sought. The circumstances of the case and the demeanor of the Applicant paints a picture that he took advantage of the victim and defiled her.
 16. The court has perused the lower court file and noted that before judgment was read, the accused jumped bail and has never been arrested. He was convicted in absentia. Even if the accused had been deserving of the orders sought, the same would not have been granted as he is in breach of court orders by breaching bond terms and absconding.
 17. For the above reasons, this court declines to grant an order for revision.
 18. The file is closed.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 14TH DAY OF MARCH, 2024

R. WENDOH

JUDGE

