



**Ochwang' v Republic (Criminal Revision E1211 of 2024)
[2024] KEHC 11037 (KLR) (Crim) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E1211 OF 2024
LN MUTENDE, J
SEPTEMBER 23, 2024**

BETWEEN

JESUSA NAWADE OCHWANG' APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Jesusa Nawade Ochwang' through a Notice of Motion dated 14th June 2024 seeks inter alia an order vacating and setting aside the lower court order issued on 20th May, 2022 refusing to allow the applicant to recall witnesses indicated as PW2 and PW3 for cross-examination; and, directing the court to re-open the prosecution case so that the two (2) witnesses are cross examined.
2. The substratum of the matter is that the applicant is indicted for sexual assault contrary to Section 5(1) (a) as read with Section 5(2) of the *Sexual Offences Act* (Act) with an alternative count of committing an indecent act with a child contrary to Section 1(1) of the *Act*.
3. That Counsel for the appellant came on record on 27th November, 2023, after PW1, PW2 and PW3 had already testified; prior to that date the applicant did not have the benefit of legal representation and being a lay person, she did not properly cross examine the witnesses due to the inability to bring out properly points in her favour as a result of being tongue-tide, nervous and inexperienced.
4. That upon taking up the matter counsel in cross examination of PW4, PW5 and PW6 was limited as some questions could only be answered by PW2 and PW3. Thereafter, Counsel applied to have the two (2) witnesses recalled but the court declined to grant the order on the ground that the case had been closed by the Prosecution. That the application was not opposed by the Prosecution but the trial court directed that the applicant could seek redress from the High Court. This hence made the proceedings irregular and illegal as they violated the applicant right to fair trial.



5. That there was no legal justification warranting the court to refuse to recall the witnesses for cross-examination. It is therefore in the interest of justice for the witnesses to be re-called to clarify issues surrounding the account of events on the diverse dates between 16th and 21st November, 2022, the job description of the applicant (accused); the delay in reporting the matter; and, the decision to proceed with the offence in the instant case and abandon the charge of assault reported by PW2 against the applicant as stated by PW6.
6. That having been charged with an offence that attracts imprisonment of a term of not less than ten (10) years upon conviction, the applicant should be granted all avenues available to enable her prepare the defence.
7. It was indicated that the State/Respondents filed grounds of opposition which however is not on record. Pursuant to directions given, parties were to file submissions. However, only the Respondent filed submissions.
8. It is submitted that the applicant did not have a benefit of Counsel when PW2 and PW3 testified. And, that the Counsel did inform the court in time of his intention to recall PW2 and PW3 after close of the cross-examination of PW6 and made the application to that effect; an application that was not canvassed because the court directed him to seek redress in the High Court. That the offence is a serious one that attracts imprisonment hence the need to accord the applicant time to adduce and challenge evidence.
9. The respondent is conceding the applicant urges that the application is merited.
10. I have considered the application, the affidavit in support and submissions by the respondent. The Constitution of Kenya provides for fair hearing. The right to fair trial is emphasized since an accused person is presumed innocent until the contrary is proved. This right includes an accused person being granted an opportunity to be represented by an advocate. (See Article 50(2) (a) and (g) of the Constitution).
11. It is not in dispute that when three of the witnesses testified, PW2 and PW3 inclusive, the applicant did not have legal representation.
12. Looking at the lower court record, upon the defence Counsel coming on record he proceeded with the case until the last witness testified. The record indicates that the Prosecution closed case prior to Counsel making an application to the court. The record reads thus:

“Wangalwa: I wish to make an application for this court to recuse the application”

Court: Formal application be made and be served to the State.

By consent submissions on 17/6/2024”
13. The record is not clear as to the actual application made by Counsel. It is erroneous. However, before this court it is stated that the order sought was to recall of witnesses.
14. Section 146 (4) of the Evidence Act provides thus:

The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.



15. This court is seized of revisionary power as provided by Article 165(6) and (7) of the *Constitution* and Section 362 as read with Section 364 of the *Criminal Procedure Code* (CPC). The alluded to enactment provide thus:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair.

Section 362 of the CPC.

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

16. It is entirely within the discretion of the court to recall witnesses. The stated power is also enshrined in Section 150 of the CPC which provide thus:

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.

17. Clearly the trial court has power to recall witnesses before the defence closes its case. The argument that the application had to be made before the High Court was a misconception of the law.

18. I have afore pointed out that the record of the court was not able to be discerned perceptibly. This was an irregularity which calls for correction as stipulated by Section 362 of the CPC.

19. The upshot of the above is that the applicant has demonstrated the need to have the order corrected. Accordingly, I call to this court the order of the trial court issued on 20th May 2022, which I quash and set aside, then, substitute it with an order recalling PW2 and PW3 for further cross examination; and, the State/Prosecution shall be at liberty to re-examine the witnesses recalled.

20. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 23RD DAY OF SEPTEMBER, 2024.

L. N. MUTENDE

JUDGE

