



**Sapra v Republic (Criminal Revision E187 of 2023)
[2023] KEHC 17489 (KLR) (Crim) (15 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17489 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E187 OF 2023
DR KAVEDZA, J
MAY 15, 2023**

BETWEEN

NISHA SAPRA APPLICANT

AND

REPUBLIC RESPONDENT

(Being an application for revision of the ruling delivered by Hon. R.A Onganyo C.M on 23rd February 2023 at Nairobi City Court Criminal Case No. 523 of 2008 Republic vs Nisha Sapra)

RULING

1. The applicant filed the notice of motion dated March 10, 2023 seeking revision of the orders of the subordinate court delivered on February 23, 2023. The applicant prayed that this court calls for and examines the record of the subordinate court for purposes of satisfying itself as to the correctness, legality and regularity of the orders of the subordinate court. She also prayed that this court exercise its supervisory and revisionary jurisdiction to revise, vacate, vary and/or set aside the finding of the subordinate court.
2. The application is supported by the grounds on the face thereof and reiterated in the supporting affidavit dated March 10, 2023 sworn by the applicant. In her application, she contends that she is the accused in subordinate court where is was charged with the offence of manslaughter. The charges emanated from the findings of inquest proceedings in inquest no. 19 of 2005. The matter is part heard. During the trial, the prosecution made an application under section 33 and 34 of the *Evidence Act* (cap 80) Laws of Kenya to rely on the evidence adduced by two witnesses in the inquest. The subordinate court granted the orders sought and the matter is scheduled for hearing.
3. The applicant avers that the reliance of a testimony given before a court other than the trial court takes away her constitutional right to challenge evidence in her trial. She maintains that the reliance on such



evidence violates her right to a fair trial. Further, that the evidence of one of the witnesses (Rishi Supra) can be obtained through video link without violating her right to a fair trial. In addition, there is no conclusive evidence adduced to prove that the other witness (Rose Khasandi) is deceased. she urged the court to grant the orders sought.

4. The respondent filed grounds of opposition dated April 11, 2023. The grounds raised are that the application lacks merit. The application herein is meant to defeat the ends of justice. Both parties in trial have equal rights and non-supersedes the other.

Applicant's submissions.

5. Senior Counsel Kioko Kilukumi filed written submissions for the applicant. He argued that section 33 and 34 of the Evidence Act cannot limit the applicant's absolute constitutional right to challenge the evidence of the two witnesses at her trial. He maintained that the inquest proceedings was not the applicant's trial and as such she did not exercise her right to challenge evidence therein. Additionally, the provisions of the Evidence Act must be construed in a manner that conforms with the Constitution of Kenya, 2010 insofar as the right to a fair trial is concerned.
6. Senior Counsel submitted that the legal requirements under sections 33 and 34 had not been met. This is because the statement by the witnesses are not dying declarations and therefore inadmissible under section 33(a) of the Evidence Act. Secondly, the other witness in question is alive and living in Canada. He can therefore be availed to testify and the applicant be allowed to challenge the evidence as a right. On whether Rose Khasandi is dead, counsel maintained that there was no conclusive evidence that she was dead. He opined that the legal requirements of section 34 of the Evidence Act were not met.
7. In conclusion, learned senior counsel for the applicant submitted that the evidence of Rose Khasandi Shibuyanga and Rishi Patel Supra as tendered in inquest no. 19 of 2005 as witness number 4 and 12 respectively is unconstitutional and does not aid the fair administration of justice. He urged the court to grant the revisionary orders sought.

Respondent's written submissions.

8. Mr. Kiragu, learned prosecution counsel filed written submissions for the respondent. He submitted that the trial court was supplied with sufficient evidence that one of the witnesses is deceased while the other is outside the jurisdiction of the court. He maintained that the parties herein are the same as those who participated in the inquest. Consequently, the victims in the matter need closure and the trial should conclude without delay.
9. It was the respondent's case that sections 33 and 34 of the Evidence Act provided a cure to the challenges faced in availing the two witnesses to testify in the trial court. Counsel submitted that the trial court's ruling was sound and the present application should be dismissed.

Issues for determination.

10. Having considered the application, the submissions of the applicant, and the applicable law, the issue for determination is whether the applicant should be granted the revisionary orders sought.



Analysis and determination

11. The power of this court in its revisionary jurisdiction is founded under section 362 of the [Criminal Procedure Code](#) (cap 75) Laws of Kenya which provides that:

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

Article 165(6) of the [Constitution](#) provides that:

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.

12. On the merits of the application, the applicant seeks a revision of the orders of the subordinate court allowing the evidence of two witnesses to be adduced without calling them. The impugned orders were made pursuant to an application by the prosecution under the provisions of sections 33 and 34 of the [Evidence Act](#). In the said application the prosecution sought to introduce the evidence of Rishi Sapra and Rose Khasandi.

13. Section 33 of the [Evidence Act](#) provides for statements for persons who cannot be called as witnesses. It reads thus:

Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves

admissible in the following cases —

- (a) relating to cause of death
- (b) made in the course of business
- (c) against the interest of maker
- (d) an opinion as to public right or custom
- (e) relating to existence of relationship
- (f) relating to family affairs

14. The provisions of section 33 clearly give leeway for the production of admission of statements if the makers cannot be found or whose attendance cannot be procured without an amount of delay or expense which in the circumstance appears unreasonable. Consequently, in the scenarios where parliament has not created a statutory exception to the hearsay rule, it is assumed that admissibility of statements which will not be subjected to cross-examination or confrontation is prohibited as it amounts to a violation of article 50(2)(k) of the [Constitution](#) of Kenya. This provision guarantees every accused Person the right to “adduce and challenge evidence.”

15. In addition, section 34 of the [Evidence Act](#) reads thus:



34. Admissibility of evidence given in previous proceedings
- (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—
 - (a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;
and where, in the case of a subsequent proceeding—
 - (b) the proceeding is between the same parties or their representatives in interest; and
 - (c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and
 - (d) the questions in issue were substantially the same in the first as in the second proceeding.
 - (2) For the purposes of this section—
 - (a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and
 - (b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.
16. It was submitted by the respondent that Rose Khasadi Shabuyanga of ID No. 262158 has passed away and thus could not testify in court. In Kenya, death is evidenced by a death certificate. A death certificate was produced in court and confirmed that indeed Rose Khasadi Shibuyanga is deceased. This fact was further confirmed by the Principal Registration Officer of the National Registration Bureau (NRB). She was therefore not available to be called as a witness. Additionally, she had already tendered her evidence under oath during the inquest proceedings as witness number four (4) (see proceedings dated 2.11.2018). During the said inquest, the applicant was a suspect and had an opportunity to challenge the evidence of the deceased by her advocate Billing Majid. As such, her statement under oath falls within the exceptions provided for admission of evidence under the provisions of sections 33 and 34 of the *Evidence Act*.
17. The second witness is Rishi Patel Sapra. From the record, he is currently domiciled in Toronto, Canada. Before the subordinate court, the prosecution argued that he cannot be availed as a witness because it is expensive and he cannot face his mother who is the applicant herein. Further, he is trying to overcome his past which still traumatises him. The applicant proposed that the prosecution should conduct a virtual hearing if the witness is not in a position to travel to Kenya and physically attend the hearing.
18. The inquest was held more than 10 years ago and that being the case, it goes without saying, these witnesses who invariably would be the ideal witnesses in the present case may either be dead, or cannot be found, or their presence cannot be secured without delay or expense which in the circumstances would be unreasonable. By its very nature an inquest is not a trial but as noted by the trial court, the applicant participated in the inquest whose substratum was to establish the cause of the death of the deceased. The lower court record clearly shows that the accused had the opportunity to cross-examine



the witnesses and more importantly, the questions in issue here are substantially the same questions that were raised and addressed in the inquest. Again, the inquest no doubt settles the definition of what amounts to a “judicial proceeding” as the evidence on oath was taken by a magistrate.

19. That notwithstanding, the applicant has argued that his constitutional right to challenge evidence would be violated if the evidence of the witnesses is admitted without the witnesses being called to testify. She proposed that the witnesses should adduce their evidence through video conferencing. I take judicial notice that on March 20, 2020, the Chief Justice issued Practice Directions on Electronic Case Management (see G. N. 2357). Among the directions made was taking of evidence through video conferencing. Rule 6(2) of the said Practice Directions provides that in every judicial proceeding, the court shall employ the use of technology to expedite the proceedings in order to make them more efficient. Some of the technology listed is video conferencing. Section 63A (1) of the *Evidence Act* expressly empowers courts to receive oral evidence through teleconferencing and video conferencing.
20. The right to a fair trial is an absolute right that is non-derogable, and it includes the right to adduce and challenge evidence. As such, this right cannot be limited. I do not find any requirement in law that denies the applicant an opportunity to challenge the evidence of the prosecution witness virtually on cross-examination. Denying such a right would be a violation of the right to access to justice. The court has the authority to regulate its own proceedings both nationally and internationally and can issue appropriate directions on the modalities of taking the evidence of any witness via teleconferencing and video conferencing.
21. A perusal of the record of the subordinate court clearly reveals that the prosecution has been in communication with the said witness. His evidence is necessary for the prosecution to prove their case. I take Judicial notice of the fact that all courts in Kenya are conducting court business virtually with witnesses testifying through electronic media (video conferencing/ teleconferencing). This platform is therefore readily available to enable the court to take both evidence in chief and cross-examination of witnesses. I dare say that Canada is more technologically advanced than Kenya, and therefore, proceeding virtually would not pose any challenge to both the prosecution and the defence.
22. In *Dietrich v the Queen* 1992 177 CLR 292 Glisson CJ held in this issue as follows: -

“Fairness is not an abstract concept. It is essentially practice. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.”
23. I adopt the above holding which is in tandem with the spirit of article 50 of the *Constitution*, which is the overall framework of the rights of an accused person.
24. The upshot of the above analysis is that the application is merited and is partially allowed in the following terms:
 - i. The trial court shall admit the evidence of Rose Khasandi Shibuyanga (deceased) as tendered in Inquest no. 19 of 2005.
 - ii. The order by the trial court to admit the evidence of Rishi Patel Sapra as tendered in Inquest no. 19 of 2005 is hereby set aside and vacated.
 - iii. The evidence of Rishi Patel Sapra shall be taken via video or teleconferencing. The trial court shall issue directions with respect to the conduct of the proceedings as it deems appropriate.
 - iv. The Information Communication Technology (ICT) department is directed to facilitate the trial court to conduct a smooth trial, at an appropriate location without any interruptions.Orders accordingly.



RULING READ AND DELIVERED THIS 15TH DAY OF MAY, 2023

D. KAVEDZA

JUDGE

In the presence of:

Mr. Otieno for the state Ms. Mwanzia

Joy court assistant

Applicant – absent.

