



**DPP v Ogada (Criminal Revision E010 of 2022)
[2023] KEHC 19041 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19041 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL REVISION E010 OF 2022**

PJO OTIENO, J

JUNE 16, 2023

BETWEEN

DPP APPLICANT

AND

EDWIN OGADA RESPONDENT

RULING

1. The Respondent herein was charged with the offence of Defilement contrary to section 8(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence were stated to be that on diverse dates between August 1, 2019 and August 26, 2019 in Kakamega Central Sub-County within Kakamega County, the respondent unlawfully and intentionally caused his penis to penetrate the vagina of MS, a minor, aged 11 years.
2. In the alternative, the Respondent faces the charge of indecent act with a child contrary to section 11(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence are that on diverse dates between August 1, 2019 and August 26, 2019 in Kakamega Central Sub-County within Kakamega County, the Respondent unlawfully and intentionally caused his penis to come into contact with the vagina of MS aged 11 years.
3. The hearing commenced on the June 9, 2021 when two witnesses testified and the prosecution sought an adjournment to call the remaining two witnesses being the Doctor and investigating officer. The defence conceded to the adjournment and the matter was stood over to the September 1, 2021 when it was once again adjourned due to absence of the accused who was reported sick. Even though the record show that the adjournment was at the instance of the defence, there was an order for last adjournment to the prosecution and summons being issued to the investigating officer to avail the police file as well as the remaining witnesses.



4. It appears that the summons was never honoured by the investigating officer who not only failed to avail witnesses but equally failed to attend court and was reported to have travelled to Bungoma for no disclosed reason. The defence was however willing to indulge the prosecution and there was then ordered a final adjournment. The prosecution never stood warned even with the order of final adjournment because on the next attendance the police file was still missing and no witness was present in court. The court stood its ground and ordered the case to proceed or be closed and matter reserved for a decision on a case to answer.
5. The prosecution felt aggrieved with that order and thus invoked the court's jurisdiction on revision by a letter dated June 6, 2022 contending that it was
Irregular to ask for submissions when the prosecution's case had not been closed.
6. The question the court is called upon to determine in every request for revision is whether the decision by the trial Magistrate refusing an adjournment and directing the matter to proceed was correct, legal or proper or if the proceedings were regular.¹
7. Looking at the proceedings and the letter by the Applicant, the directive by the trial Magistrate was driven by the fact that she had on numerous occasions granted a last adjournment to the prosecution. It must be reiterated that it is not the mandate of the court to adjourn cases at will and indiscriminately. The mandate is to hear and determine cases in an expedient and proportionate manner. That is the reason section 205(1) of the Criminal Procedure Code commands that once hearing commences, matter ought to be heard on a day today basis and where a longer time is given it ought not be more than 30 days. The provision reiterates that an adjournment is granted at the discretion of the court.
8. A perusal of the proceedings of the trial court show that the matter was first set down for hearing of September 14, 2020 during which date the court on its own motion adjourned the matter to November 9, 2020 for hearing. On November 9, 2020 the prosecution counsel indicated that he did not have the any witnesses in court, there was no objection from the accused and the matter was adjourned to January 28, 2021 for hearing. On January 28, 2021, the prosecution sought for an adjournment on the basis that they neither had the police file nor witnesses which application the accused objected on the ground that the matter had taken too long. The court granted the prosecution a last adjournment and the hearing was postponed to May 12, 2021. On May 12, 2021 the prosecution was ready to proceed but the accused sought an adjournment on the ground that his advocate was attending to another matter in Kisumu. The next adjournment sought by the prosecution was on June 9, 2021 to enable them avail the investigating officer and the clinical officer. Further hearing was deferred to September 1, 2022. The prosecution then again sought an adjournment on January 19, 2022 and March 16, 2022 and the court ruled that the prosecution must proceed or close its case. On May 5, 2022, the trial magistrate ordered that the prosecution case be marked as closed and that ruling was slated for May 25, 2022.
9. The Court of Appeal in the case of *Japheth Pasi Kilonga & 8 others v Mombasa Autocare Limited* [2015] eKLR observed as below on the adjournment of cases:

“The singlemost drawback in the administration of justice in this jurisdiction is the delay in the determination of cases, resulting in the overwhelming case backlog. Adjournment has been identified as the leading contributing factor to this.

...Like never before today this policy is emphasized more as it is underpinned in the Constitution. Article 159(2) (b) & (d) enjoins courts to ensure justice is not delayed and

¹ Section 362 and section 364 of the Criminal Procedure Code, CAP 75 Laws of Kenya,



is administered without undue regard to procedural technicalities. Sections 14(5) of the Supreme Court Act, 3A and 3B of the Appellate Jurisdiction Act and 1A and 1B of the Civil Procedure Act have also enacted the overriding objective which require the courts to facilitate the just, efficient, expeditious, proportionate and affordable resolution of disputes.”

10. Having established that the grant of adjournment is at the discretion of the court, it is proper for this court to stress that the same should be exercised in a reasonable manner balancing the interests and rights of both the accused and the complainant. In the instant case, the trial court was wholly justified in arriving at the decision declining an adjournment. The court finds no incorrectness nor illegality in that decision.
11. However, the proceedings of the trial court indicate that the Respondent is out on bond. The court appreciates the nature of the offence the Respondent faces which attracts a penalty of up to life imprisonment together with the fact that the trial Magistrate has since left the service, and determines that it would be just, fair and reasonable to allow the prosecution to tender the entire evidence it desires to tender. No prejudice would be occasioned upon the Respondent who continues to be out on bond. In any event, with the departure of the trial officer, it is only fair that the officer taking over decides how to proceed further while appreciating the age of the matter in court.
12. That said, the order issued on 5/5/2022 marking the prosecution case as closed is set aside and an order made re-opening the prosecution’s case for expeditious further hearing.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF JUNE, 2023

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms. Chala for the Applicant/Prosecution

No appearance for the Respondent

Court Assistant: Polycap

