



REPUBLIC OF KENYA



**Otieno v Republic (Criminal Revision E275 of 2023)
[2023] KEHC 20631 (KLR) (Crim) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20631 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E275 OF 2023
K KIMONDO, J
JULY 24, 2023**

BETWEEN

DISHON ANGOYA OTIENO APPLICANT

AND

REPUBLIC RESPONDENT

(Revision from the orders in Makadara Criminal Case No. 164 of 2018 by M. Thibaru, Resident Magistrate, dated 23rd June 2022)

RULING

1. This revision on was requested on June 8, 2023 by the learned trial magistrate sitting at Makadara.
2. The facts are fairly straight-forward: The applicant was charged with defilement of a minor contrary to section 8 (2) of the *Sexual Offences Act*. The trial is at the stage of defence hearing. To be specific, the applicant was placed on his defence on June 17, 2022. He elected to give sworn testimony on the same day and was cross-examined at length.
3. His newly appointed counsel then applied to have the prosecution case re-opened to recall some witnesses for further cross-examination. In a considered ruling dated 23rd June 2022, the learned trial magistrate allowed the recall of the doctor (PW4) and the investigating officer (PW5). The two testified afresh on October 5, 2022. It is that order and those proceedings that have precipitated this revision.
4. I readily find that the ruling and order of June 23, 2022 were highly irregular for the following principal reasons. Firstly, the prosecution having closed its case; the accused having been placed on his defence; and, having testified in his defence on oath, it was no longer permissible to re-open the prosecution's case even at the request of the accused.



5. Secondly, having been placed on his defence, the accused gained certain rights: for instance, any withdrawal of the case by the Republic from that point would amount to an acquittal and not a mere discharge. To re-open the prosecution's case would undoubtedly infringe on the constitutional dictates of a fair trial.
6. Thirdly, the futility and dilemma of the impugned order was what the learned trial magistrate would now do with the fresh evidence of PW4 and PW4. She would have no power to revisit her earlier ruling placing the accused on his defence. The order was thus illegal and mired in serious procedural quagmire.
7. This is not to say that the applicant was completely shut out of remedies. For instance, he retains the right to lodge a final appeal if he is aggrieved by the eventual judgment in the case. But the less I say about it the better.
8. In the upshot, I am not satisfied of the propriety or correctness of the impugned order. I accordingly set aside that part of the order of June 23, 2022 that recalled PW4 and PW5 to the stand well after the accused had been placed on his defence. I also find the subsequent proceedings of October 5, 2022 in which those two witnesses were further cross-examined to be irregular and a nullity. Those proceedings are equally set aside.
9. The original file of the lower court and a copy of this ruling shall be transmitted to the trial court to enable the accused to close his defence; and, and for the court to render its final judgment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2023.

KANYI KIMONDO

JUDGE

Ruling read in chambers in the presence of-

Mr. E. Ombuna, Court Assistant.

