



**Ruto v Republic (Criminal Revision E205 of 2023)  
[2023] KEHC 22609 (KLR) (Crim) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22609 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E205 OF 2023  
DR KAVEDZA, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**KELVIN KIBET RUTO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant herein, Kelvin Kibet Ruto, is the accused in Kibera CM Criminal Case No. E002 of 2023 where he is facing the charge of sexual assault contrary to section 5(1)(a)(i) as read with section 5(2) of the *Sexual Offences Act* No. 3 of 2006 (the 'Act'). By an application filed in this court dated 31/3/2023, the applicant has sought revision of the trial court's decision dated 7/3/2023, wherein the defence's request to visit the alleged scene of crime in order to cross-examine PW2 was disallowed.
2. A brief background of the facts is necessary to conceptualize the instant application. During trial, PW2, a minor of 15 years told the court that she had gone to pick the victim, NMN aged 4 years old, from a neighbour's house where she had gone to play with her friends. Upon arriving at the said house, she knocked the door but when no one answered, she opened it and went inside to the call box within the same house. The call box was described as having been a small room made of cardboards. PW2 then tried opening the door to the call box and it is then that she realized the victim was also trying to open the door from inside. Following the said testimony, the defence counsel, Mr. Nzaku, made an application to court to visit the scene to verify the opaqueness or transparency of the call box and whether it was possible for PW2 to have seen the victim opening the door from inside. However, the court disallowed the application and held that it was unnecessary as the issue could be addressed by cross-examination.
3. The application was canvassed by way of written submissions. Counsel for the applicant submitted that it was pertinent for him to cross-examine PW2 at the alleged scene in view of article 25(c) as read



with article 50(2) of the Constitution. He argued that the trial court's decision rejecting the defence request to visit the scene of crime infringes on the rights of the accused person to a fair trial.

4. In response, the state opposed the application. It was argued that visiting the scene would be wasting the court's time and resources. More so, it was submitted that the applicant has not demonstrated any prejudice he is likely to suffer by not visiting the scene. It was further argued that PW2 is a minor in need of protection and that taking her back to the scene would be a violation of her rights as she will not only be frightened but also highly exposed. The state relied on article 53 of the Constitution and section 94 of the Children's Act to support this argument. The state is also apprehensive that the scene may not be in the same state as it was during the commission of the alleged offence. The court was therefore urged to dismiss the application.

#### **Issues for consideration**

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

#### **Analysis and determination**

6. 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.

7. In exercising supervisory jurisdiction under article 165(6), the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.

8. In Veerappa Pillai v Remaan LTD the Supreme court of India has this to say: -

“The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made.....”

9. At the onset, I wish to state that the decision of whether or not to visit a scene of crime is a matter of discretion of the trial court. As stated above, a superior court will not interfere with the exercise of the



trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result, arrived at a decision that was erroneous, or, unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion, and that as a result, there has been injustice.

10. In *Black's Law Dictionary* 5<sup>th</sup> Edition, "Judicial and Legal discretion" is defined as "discretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained." Judicial discretion does not therefore provide a license for a judicial officer to merely act as he or she chooses.
11. Ideally, judicial decisions will involve minimal discretion as judges apply proven facts to the established law, and a case could be given to any judge and the results would be the same. However, legal issues are not always clearly defined as black and white, right and wrong. It is not possible to create laws for every possible issue that could come up in a given case. Therefore, judicial officers must make many discretionary decisions within each case that influence the outcome of the case or the legal recourse of the parties.
12. The main issue herein is whether the trial court properly exercised its discretion. I note from the proceedings that the trial court was of the view that a scene visit is expensive, time consuming and should only be conducted when extremely necessary.
13. Furthermore, the trial court felt that it was necessary and in the interest of justice as well as expeditious disposal of the matter for the issue of transparency or opaqueness of the chat box door to be addressed by cross-examination, and evidence of other witnesses. Indeed, the defence has the option of challenging the evidence of other witnesses, cross-examining PW2 in court as directed by the trial court, or, even further, recalling PW1 for cross-examination. It is noted that the applicant is yet to do so and there is no evidence that such a request has been declined by the trial court.
14. In the circumstances, I find that the judicial officer properly exercised judicial discretion in arriving at her decision. I do not find the same to be irregular nor was there miscarriage of justice. The rights of the applicant under article 50 of the *Constitution* have not been violated nor infringed. To my mind, the trial magistrate duly exercised her discretion according to the circumstances of the case and the exercise of such discretion may be best challenged during appeal, if any.
15. In view of the foregoing observations, I find that that the applicant's application for revision lacks merit. The same is dismissed. The lower court file shall be returned to the respective station forthwith and the matter set down for hearing.

Orders accordingly.

**RULING DATED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023.**

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**D. KAVEDZA**

**JUDGE**

**In the presence of:**

