REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CRIMINAL DIVISION

CRIMINAL REVISION NO. E094 OF 2020

REPUBLIC.....APPLICANT

VERSUS

LS.....RESPONDENT

(Being an application from the ruling of; Hon M. Mutuku,

Chief Magistrate; in the Chief Magistrates' Court, Milimani,

in Criminal Case No. S.O. 1 of 2019; Republic vs Ledama Surtan).

RULING

1. By an application dated 1st December 2020, the Republic (herein "the Applicant"), is seeking for various orders as here below reproduced:

> *a) That, the Honourable court vacates the order of; Hon M. Mutuku; Chief Magistrate delivered on; November 26, 2020, in criminal case number; S.O. 1 of 2019, as it is bad in law and fact;*
>
> *b) That, the Honourable court be pleased to call for and examine the record of the criminal proceedings in criminal case number, S.O. 1 of 2019, so as to satisfy itself as to the legality, correctness and or propriety of the orders dated, November 26th, 2020, by Honourable M. Mutuku Chief Magistrate, (CM);*
>
> *c) That, the Honourable court be pleased to stay the proceedings in, criminal case number; S. O. 1 of 2019, pending the hearing and determination of the application herein;*
>
> *d) That, the application is extremely urgent and should be heard exparte in the first instance and the orders sought herein given;*
>
> *e) That, the Honorable court be pleased to make an order that it deems fit in interest of justice.*

2. The application is supported by an affidavit of the even date; sworn by; Caroline Karimi; the Prosecution Counsel who avers that, the Respondent LS, has been charged with the offence of; defiling his eight (8) year old step daughter (TNS), on 30th September 2018, in their own house in [particulars withheld] Estate, South C.

3. That, this incident triggered TNS to jump from the fourth floor of her bedroom window and suffered multiple fractures, leading to her admission at the Nairobi Hospital. However, while undergoing treatment, the doctors discovered that, her genitalia had injuries not related to the accident but consistent to defilement. The hospital then called in the Department of Children Services. Thereafter TNS was placed under protection and care, vide Protection and Care case number, 178 of 2018.

4. Subsequently, investigation revealed that, TNS had been defiled by the Respondent who was arrested and charged vide; Milimani Chief Magistrate's Criminal Case No. S. O. 1 of 2019, with the offence of defilement as aforesaid. He pleaded not guilty to the charge and the case proceeded to full hearing.

5. At the close of the prosecution case, the trial court ruled that, the Respondent had a case to answer and placed him on his defence. At the hearing of defence case, the Respondent presented various documents in evidence. These documents are listed at paragraph 8 of the affidavit

in support of this application. The documents include reports by; Pamela Masakhwi, photo of TNS and video of Respondent's birthday, LM's witness statement and Taxify company Computer print outs.

6. However, the Prosecution (herein "the Applicant"), objected to the production of these documents on the ground that, the production thereof as exhibits do not meet the threshold of; section 34 of the Evidence Act (Cap 80) Laws of Kenya. Further, the use of the said documents without the Respondent calling the maker(s) is prejudicial to the Applicant, who will not have an opportunity to cross-examine them, yet the makers are available to attend court. Finally, that the High court vide Criminal Revision No. 173 of 2018, delivered a ruling dated 20th December 2018 declaring the proceedings in; Protection and Care Case No. 178 of 2018, as null and void and ordered they be expunged from the record of the court. Yet all the documents the Respondent intend to produce form part of that record.

7. The Applicant avers that, despite the objection raised, on 26th November 2020, the trial court delivered a ruling and allowed the Respondent to produce exhibit numbers; 1, 5, and 6, which are part of the proceedings declared null and void, arguing that, the file in which they are contained has been produced as exhibit number 24 and therefore exhibits 1, 5 and 6, can be allowed in evidence. However, the Applicant argues that, in making that order, the trial court failed to be bound by the orders of the High Court, which expunged exhibits numbers 1, 5 and 6 from the record.

8. The Applicant further argues that, the trial court allowed other documents to be produced as secondary evidence without the Respondent satisfying the provisions of; section 63(2) and 68(i) of the evidence Act. Finally, the Applicant argues that, by order of the trial court that, there was no need to call the employee of Taxify Company, the trial court was laying a basis for future documents to be produced in contravention of the provisions of the Evidence Act, referred to herein.

9. However, the Respondent filed a replying affidavit dated 1st February 2021, sworn by himself in which he deposed that; after the child was admitted in hospital as stated herein, a theory developed that, she jumped out of the window due to the events happening in the house. However, following examination by the hospital psychiatrist and psychologist and meetings held on several occasions, the psychologist was unable to establish the reasons of the fall, but, the office of Director of Public Prosecution initiated proceedings in; Protection and Care Case No. 575 of 2018 and the child was placed at; Thomas Bernados children Home, with parents barred from visiting her.

10. That, the court made further orders that, the child be examined by various medical personnel procured by the Prosecution. The reports thereof were produced in court, as such the Applicant had an opportunity to cross examine the makers of those reports. That, upon admission, the reports become a permanent record of the court. As such, it is dishonest and deceitful to denounce the reports; and avoid to produce the makers to testify despite the facts that the reports featured prominently in the cross examination of PW1.

11. The Respondent further deposed that, as a Respondent, he cannot trace and find the alleged maker(s) of the report(s), as their letter head has no physical address and the Applicant is unwilling to serve summons to the witnesses. Similarly, the Applicant has deliberated omitted to call one; LM a class teacher of the child who spent the whole day with her on the 1st October 2018, post the alleged offence and did not notice anything unusual. As such, the Applicant has been selective, suppressive and failed and/or neglected to produce all the evidence gathered in the cause of investigations especially, evidence pointing to the Respondent's innocence.

12. The Respondent averred that, the video evidence was backed by the necessary certification and his original phone was available in court. He is also ready and willing to be cross examined. Finally, the court file produced as exhibit 24, was duly admitted in evidence without objection and therefore its contents including the report therein are relevant. There is no need to produce the makers of the documents relied on in the said exhibit. In conclusion, the Respondents averred that, the application herein is an abuse of the court process, intended to delay the just and fair conclusion of the proceedings in the trial court and should be dismissed with costs.

13. The parties relied fully on the documents filed to canvass the application. I have considered the same. However, before I delve into the merits of the matter, I note that, prayers 1,4, and 5, of the application are already spent. Therefore, the only and main prayers for consideration are; prayers 2 and 3, which generally relate to the legality, correctness and or propriety of the ruling and/or made by the trial court on; 26th November 2020.

14. The power of the High Court to supervise proceedings in the subordinate court are provided for under; Article 165(6) of the Constitution of Kenya, 2020, which states as follows: -

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

15. Similarly, the provisions of; 362 of the Criminal Procedure Code states that; -

> ***"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. In the same vein, the provisions of; section 364 of the Criminal Procedure Code states that: -

> ***"(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may;***
>
> ***(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;***

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed."

17. In the instant matter, the Applicant is challenging admissibility in evidence of several documents. The first set of documents are marked; "DMF,1,5 and 6". In admitting these documents, the trial court stated that;

> *"It is not in dispute that, DMF I,5 and 6, are all reports contained in Dexh 24. in a court file, which has already been admitted in its entirety before court. As such, these reports form part of judicial proceedings which was used to arrive at a decision the same cannot be severed from the original records.*
>
> *In any case, it would not be expected, as the evidence clearly lead by accused, that the accused would be allowed to give expert opinion on these reports, but his evidence would only be admissible to the extent of existence of these reports.*
>
> *It is also clear that the said reports were sought to and produced by the prosecution in the previous proceedings. As to the nullity or otherwise of the proceedings in application number 143 of 2018, this court will have an opportunity to study the proceedings and appreciate the findings of the Honourable High Court Judge and how such findings will impact the instant trial. On this limp of objections, I do hereby dismiss the objection, and admit DMFI, 1, 5,6 as Defence exhibit 1, 5, and 6 respectively".*

18. However, the High court in dealing with the subject revision stated clearly as follows:

> *"The trial court is receiving evidence from doctors and specialists who examined the child. These doctors and specialists were appointed by the court at the instance of the parents of the child, despite protestation from the prosectution. The aim of the parents of the child is to absolve themeselves from blame in relation to the injuries suffered by the child, so that ultimately the child is released to them. The exercise in which the court is engaged, I find, is well beyond the determination whether the child is in need of care and protection under sections 119 and 120, of the Children Act. It is an exercise that is serving the purposes of the parents of the child who are suspects in the matter. It is a process that is compromising the investigations that the police were asked, throught the report made at Langata Police Station, to conduct. The proceedings are interfering with the responsibility that the Constitution has bestowed on the police, and which the police cannot share with any other person or authority. It is a responsibility the police cannot share with the court. I determine that the proceedings going on before the Children's Court are irregular and illegal." (emphasis added)*

19. Therefore, the High Court clearly arrived at the conclusion that, the proceedings in; Protection and Care Case No. 525 of 2018, were "null and void" save for the order that, the child be kept and accomondated at Thomas Barnados Children Home to allow for investigations into the alleged sexual assult. In that case, the proceedings are in that matter are "dead". They are not "alive" and available for use. As such, any documents, in the Protection and Care Case No. 575 of 2018, having been declared null and void, cannot be used in any subsequent proceedings.

20. With outmost due respect, in the given circumstances the argument by the trial court that; "DMF 1, 5 and 6, which form part of the High Court Revision Number 173 of 2018, are documents contained in file which has already been produced and admitted as evidence before court as defence exhibit 24, is not tenable. The documents were declared null and void. In that case, I concur with the Applicant's submissions that, the order of the trial court admitting the said documents is in contravention of the High Court order. I therefore respectfully, set aside the order admitting exhibits 1, 5 and 6 in exhibit marked "Dexh 24"

21. As regards the production of a video clip, the trial court had this to say:

> *"A look at section 106 B (2) does not impose a duty on the person producing the document to prove ownership of the device that was used to produce the evidence in question. What is supposed to be demonstrated is that the person seeking to produce that piece of evidence had lawful control over the use of the computer, and that the information in question was fed into the computer in the ordinary course of the said activities. It was to be further proved that throughout the material part of the said period, the computer was operating properly and that the same fed during the ordinary course of business.*
>
> *At no time does this section require the prove of ownership nor the production of the general device or computer or impose the requirement of the document/evidence to contain a time and date stamp. I do agree with Mr Mwendwa that the issue of time and date depending on circumstances may be contextual, and would be corroborated by the evidence of other witnesses.*
>
> *The accused person being the person seeking to produce this evidence will also be cross examined on his evidence by the prosecution. The second limb of objection is also dismissed, and the defence is allowed to produce MFI 6(a) (b) as defence exhibit 6(a) and 6(b) respectively".*

22. I have considered the provisions of section 106 of the evidence Act and the reasons given by the trial court in allowing the subject evidence to be used and I find no merit in the objection raised. Indeed, as the Applicant should wait to examine the witness and therefore the objection is premature. Thereafter, any other that may arise, can be dealt with in submissions or on appeal, if need arises.

23. I find that, it is always proper to allow the trial court to proncounce itself on the matters before it, and the Appellate court must guard against unnecessary interference with orders that may prejudice the trial. In that regard, I decline to set aside the order allowing the use of video clips.

24. The third document objected to relate to the statement of; LM. In addressing the same, the trial court stated as follows:-

> *"On this limb of objection, the prosecution does not dispute that this was a statement supplied to the defence. The prosecution chose not to call the witnesses. The accused is entitled to be supplied with all information relating to the charges, both inculpatory and exculpatory. The prosecution witnesses having confirmed that the so recorded witness statement of the teacher, I will allow the defence to produce the witness statement marked as 12 as defence exhibit 12"*

25. I concur with the trial court that, if the prosecution is not using the subject witness as the prosecution witness, then the defence can use her as such. However, the law is very clear that, a statement can only be used in evidence when formally presented by the maker. It is then that the veracity of its contents can be tested through cross examination and re-examination. The argument that the prosecution has declined to summon the witness is neither here nor there, as the defence has not sought for court's assistance to get the witness. In that case, I set aside the order allowing production of the statement without calling the maker.

26. The final documents objected to; is the receipts of taxify company. In that regard the trial court stated that, 'I do find that in the absence of certificate of evidence, the receipts marked DMF5 are not admissible and the objection is upheld' Therefore I don't understand what the objection herein is all about.

27. In conclusion, I allow the objection in relation to orders made in the ruling dated 26th November 2020, in relation to; DMFI 1, 5, and 6, and the statement of; LM, which orders I hereby set aside. The other orders therein remain the same.

28. Those then are the orders of the court.

DATED, DELIVERED AND SIGNED ON THIS 15TH DAY OF MARCH 2021 AND DELIVERED VIRTUALLY.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms Karimi for the Applicant

Mr Mwenda for the Respondent

Kinyua the Court Assistant