REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 375 OF 2018

(A revision of the order of Hon. Rabera, SRM, made on 29th August, 2018

in Mombasa Chief Magistrate's Court Sexual Offence Case No. 10 of 2018)

REPUBLIC.....APPLICANT

VERSUS

PAUL MUTUKU MAGADO.....RESPONDENT

RULING ON REVISION

1. On 26th February, 2018 the respondent, Paul Mutuku Magado, was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act, No. 3 of 2006. The particulars of the charge are that on the 9th day of February, 2018 within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of SN [name withheld] a girl aged 14 years.

2. The respondent also faced an alternative 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 charge were that on the 9th day of February, 2018 within Mombasa County, intentionally and unlawfully caused his penis to rub the vagina of SN [name withheld] a girl aged 14 years.

3. The respondent pleaded not guilty to the said charges and the case commenced hearing at a later date. On 17th September, 2018, the DPP who is the applicant herein, filed a letter in court seeking orders for revision under the provisions of Section 362 of the Criminal Procedure Code and urged the court to call for the lower court file with a view of satisfying itself of the correctness, legality and propriety of the ruling and the order made by Hon. Rabera, Senior Resident Magistrate on 29th August, 2018. This court ordered for stay of the lower court case pending the hearing and determination of this matter.

4. In its letter, the Director of Public Prosecutions through Ms. Nandi, Principal Prosecution Counsel states that on the 19th June, 2018, the prosecution had 3 witnesses in court but only 2 testified since the court was constrained on that day. The applicant further states that on 18th July, 2018, there was a Doctor in court to testify but the respondent declined to proceed saying that he was unwell. The case was therefore adjourned. The applicant in its letter further states that on 8th August, 2018, there was a Doctor in court who was ready to testify but the Prosecution Counsel realized that he had not worked with the Doctor who had signed the P3 form and as such, he was not familiar with the other Doctor's handwriting. The applicant states that the Doctor explained to the court that he was new in the Hospital he was working in, where he had worked of 2 weeks but was on duty to attend to court matters that week. The court then gave the last adjournment to the prosecution and fixed the case for hearing on 29th August, 2018. Come the said date, no Doctor attended to the case in the lower court. The Hon. Magistrate declined to give an adjournment and deemed the prosecution's case closed.

5. The complaint raised by the applicant is that the trial court prematurely gave the last adjournment for the reason that on the day the said order was made, the Doctor was in court ready to testify. The applicant took issue with the court's failure to appreciate that the court had on 19th June, 2018 led to adjournment of the case due to its own constraints. Further, on 18th July, 2018 the applicant was ready to proceed but the respondent said he was unwell and the case was adjourned. The applicant points out that on 29th August, 2018 the Doctor who was available was the same one who had hardly worked for a month and that on the said date, he attended the Municipal Court alone and all the cases in other courts which required the Doctor were adjourned.

6. It is claimed that on 29th August, 2018, the trial court gave the prosecution 10 minutes to avail the Doctor and the Investigating Officer. The foregoing is however not borne by the proceedings of the lower court. It is stated that by the time the Investigating Officer arrived in court from Changamwe, the court had already ordered the case closed, yet she had been barred from testifying on 18th July, 2018 due to constraints by the trial court. The applicant states that the trial court did not consider the age of the case whose plea was taken on 26th February, 2018.

7. In the letter seeking orders on revision, the applicant states that the complainant is likely to suffer great prejudice in her quest for justice since she is a child of tender age whose interests under the Children's Act and Article 53 of the Constitution need to be protected. It is also argued that Section 283 of the Criminal Procedure Code provides for adjournments and postponement of trials when good cause is shown. This court has therefore been urged to order the reopening of the prosecution's case to give room to the Doctor and the Investigating Officer to testify.

8. The respondent filed a response on 12th March, 2019 to oppose the prayer for revision. He states that under Article 50(2)(e) of the Constitution, he is entitled to a speedy trial which is not the case here as he has been in custody since 26th February, 2018. He also states that he is being held in prison remand where he was suffering as he failed to raise the amount required for his release on bond. The respondent then delves into issues of admissibility of the Doctor's evidence in the case in the court below, which is not relevant at this point in time. He states that the prosecution failed to avail its witnesses and he was entitled to a fair trial.

9. The respondent further contends that Section 283 of the Criminal Procedure Code was complied with by the trial court as the case was adjourned severally. He submits that the delay was occasioned by the prosecution's failure to present witnesses for cross-examination. The respondent relied on 3 authorities, and prayed for the application for revision to be dismissed.

ANALYSIS AND DETERMINATION

The issue for determination is if this court should order for the re-opening of the prosecution's case.

10. The provisions of Section 362 of the Criminal Procedure Code provide as follows:-

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself 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."***

11. Section 364 of the said Code provides thus:-

> ***(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 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.***
> >
> > ***(c) In proceedings under section 203 or 296(2) Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.***
>
> ***(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:***
>
> ***Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.***
>
> ***(3) Where the sentence dealt with under this section has been passed by a subordinate court, the high court shall not inflict a greater punishment of the offence which in the opinion of the High Court the accused has committed that might have been inflicted by the court which imposed the sentence.***
>
> ***(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.***
>
> ***(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."***

12. The proceedings of the lower court case indicate that on 19th June, 2018, the prosecutor informed the trial court that she had 3 witnesses. 2 witnesses testified and the trial court proceeded to give another hearing date. Proceedings of the said court do not reveal why the 3rd witness did not testify on the said date but it is clear that the prosecution did not ask for an adjournment. On 18th July, 2018 the prosecution informed the Hon. Magistrate that the Doctor was in court but the respondent said he was feeling unwell. The matter was adjourned to 8th August, 2018.

13. On the said date, the prosecution at 12:30p.m., informed the court that there was a Doctor in court but he had not worked with the Doctor who filled the P3 form. The prosecutor asked for another date. The court granted the last adjournment and scheduled the case for hearing on 29th August, 2018. On that day the prosecutor said she was not ready to proceed because the Doctor who had previously attended court was the one who was on duty. She therefore asked for another date.

14. In his ruling, Hon. Rabera, SRM, noted that the prosecution had applied for an adjournment on similar grounds as the ones made on 8th August, 2018 and that no plausible explanation had been given as to why the Investigating Officer and the Doctor were not in court. He further stated that the prosecution had been granted the last adjournment. The application for adjournment was rejected and the prosecution's case was deemed to have been closed.

15. The relevant provisions for adjournment of cases in the lower court is Section 205 of the Criminal Procedure Code and not Section 283 of the said Code as was stated by Ms Nandi in her letter seeking revision. Section 205(1) of the said Code provides as follows:-

> ***"(1)The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may allow the accused person to go at large, or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties conditioned for his appearance at the time and place to which the hearing or further hearing is adjourned:***
>
> ***Provided that no such adjournment shall be for more than thirty clear days, or, if the accused person has been committed to prison, for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day.***
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> ***(2) Notwithstanding subsection (1), the court may commit the accused persons to police custody –***
>
> ***(a) For not more than three clear days if there is no prison within five miles of the court-house; or***
>
> ***(b) For not more than seven clear days if there is no prison within five miles of the court-house and the court is not due to sit again at that court-house within three days; or***
>
> ***(c) At the request of the accused person, for not more than fifteen clear days.***
>
> ***(3) For the purposes of this section, in relation to any case where the maximum sentence for the offence with which the accused person is charged is punishable only by fine, or by imprisonment not exceeding twelve months with or without a fine "prison" shall be deemed to include a detention camp established in accordance with the Detention Camps Act."***

16. The above provisions leave no room for doubt that an adjournment is granted at the discretion of the court. It must however be exercised fairly and justly upon reasonable grounds being advanced. It must not be forgotten that the purpose of a trial is to give parties a fair level playing field where each will be given an opportunity to present its case. The said court process should however not be subjected to abuse. In making reference to the civil jurisdiction, it has been said time and again that the court has a duty to sustain a suit by giving parties a full opportunity to prosecute or defend their cases. In drawing an analogy between the civil jurisdiction and criminal jurisdiction, a trial court hearing a criminal case has the duty to do justice to the parties that go before it by giving a reasonable opportunity to the complainant to present his/her case and for the accused person to do likewise.

17. The respondent has raised a pertinent issue of his right to an expeditious trial under the provisions of Article 50(1)(e) of the Constitution of Kenya. The said provisions must however be considered alongside the rights of the complainant as well, who is entitled to a fair hearing of his/her case. The authorities the respondent referred to in his write up are not applicable to the circumstances of this case.

18. In this instance, the trial court was unable to hear the 3rd prosecution witness on the day the trial begun. The reasons for not hearing the said witness are not recorded in the proceedings. In her letter seeking orders for revision, the Prosecution Counsel has revealed that the 3rd witness was the Investigating Officer. On the 2nd hearing date the respondent herein said he was unwell, the case was therefore adjourned although the Doctor was in court. On the 3rd hearing date, the Prosecution Counsel realized that the Doctor who was in court was not familiar with the handwriting and signature of the Doctor who had filled the P3 form and as such he could not testify. At the 4th hearing, no Doctor turned up in court but the prosecutor explained that the Doctor who was on duty is the one who had been previously availed to testify. An adjournment was denied.

19. The above facts indicate that the court, the respondent herein and the prosecution had at one time or another led to the case not proceeding as required. When the prosecutor was given an opportunity to avail another Doctor, she should have taken it upon herself to explain to the relevant Hospital Administration that the Doctor whom they had availed was not going to be of any assistance in the case and should have requested for another Doctor. It also beats logic for a Hospital Administration to send to court a Doctor who had been recently posted to the Hospital to attend court to produce a P3 form that was filled by a Doctor he had never worked with. It is indeed counter-productive to do so.

20. The respondent herein is facing a serious charge of defilement of a girl aged 14 years. The punishment provided under Section 8(3) of the Sexual Offences Act is imprisonment for a term of not less than twenty years. This court bears in mind that the length of sentence of imprisonment signifies the seriousness of the offence. This court takes judicial notice of the fact that defilement not only violates a child but also her/his innocence, dignity and chastity. It may lead to long life trauma for a victim. It is therefore necessary for a trial court to look at the bigger picture and consider many factors in order to determine if it is in the interest of justice to grant or to deny either the prosecution or an accused person an adjournment. Whereas each application for adjournment depends on its own special circumstances, some of the common factors to guide a court in making a decision are:-

> **(i) The length of time a case has taken undergoing hearing from the time the plea was taken;**
>
> **(ii) Whether the accused person is out on bail/bond pending hearing or if he/she is in custody;**

(iii) The number of applications for adjournment an accused person or the prosecution has made;

(iv) If the reasons given for adjournment are plausible;

(v) The commitment of the parties to have the case heard expeditiously;

(vi) If any exogenous factors have contributed to delay in the hearing of a case;

(vii) If new or additional compelling evidence has come to the attention of the prosecution or the accused person in the course of hearing the case; and

(vii) The nature of the charge and consequent sentence if an accused person was to be convicted.

21. Taking into consideration the facts of this case and the applicable law, I am of the considered view that the Hon. Magistrate failed to exercise his discretion judiciously by denying the prosecution an opportunity to call its last 2 witnesses and by prematurely ordering the closure of the prosecution's case. I therefore set aside the order made by the Hon. Magistrate on 29th August, 2018. I hereby make an order re-opening the prosecution's case for further hearing.

22. Consequently, Mombasa Chief Magistrate's Court Sexual Offence Case No. 10 of 2018, Republic vs Paul Mutuku Magado will be mentioned before Hon. Rabera on 23rd April, 2019 for directions as to the further hearing of the case. It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of April, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Marindah, Prosecution Counsel for the DPP- applicant

Respondent present in person

Mr. Oliver Musundi - Court Assistant