REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL REVISION NO. 60 OF 2019

ZEFFA MWENDA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. **Zeffer Mwenda ("the applicant")** was on 5th May, 2016, arraigned before the Maua Chief Magistrate's Court in **Criminal Case No.1290 of 2016 Republic vs Zeffer Mwenda,** with the offence of assault causing actual bodily harm contrary to ***section 251 of the Penal Code, Cap 63 Laws of Kenya***

2. It was alleged that on 24th November, 2014 at Laare township in Igembe North Sub-County, within Meru County, the applicant unlawfully assaulted **Elosy Kaari** thereby occasioning her actual bodily harm.

3. The prosecution tendered its evidence and on closing its case, the court ruled that the applicant had a case to answer. On being put on her defence, the applicant chose to keep quiet and the trial court reserved the matter for judgment.

4. The applicant has now sought a revision of that decision. In her letter for revision dated 14th February, 2019, she stated that after the prosecution closed its case, a ruling was made that she has a case to answer. That she did not understand why she was not allowed to give her testimony before the trial court could give a date for judgment.

5. The jurisdiction of this court to set aside and revise decisions of a subordinate court is anchored in ***sections 362 and 364 of the Criminal Procedure Code. Section 362*** provides:-

> ***"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"***

6. I have examined the lower court record. The prosecution called four (4) witnesses and closed its case. The applicant submitted on *"a no case to answer"* and on 12/12/2019, the trial court delivered its ruling holding that the applicant had a case to answer.

7. The record shows that the trial court explained to the applicant her rights under ***section 211 of the Criminal Procedure Code*** The applicant is recorded to have stated in Kiswahili, **"Nitanyanza".** The court then recorded that the applicant had chosen to remain silent and let the court decide on the evidence before it. The court then reserved its judgment for 6th March, 2019.

8. The issue for determination therefore is, whether the trial court satisfied the conditions set out in ***section 211 of the Criminal Procedure Code, Cap 75 ("CPC")***. That section provides:-

> ***"(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).***

9. This provision finds its bearing in ***Article 50 of the Constitution*** which provides for the right to fair hearing. ***Article 50 (2) (j)*** provides

that an accused person has the right to remain silent and need not to testify during a trial.

10. The record shows that not only did the trial court explain to the applicant the provisions of ***section 211 of the CPC,*** but that it clearly recorded what the applicant responded to that explanation. The applicant chose to exercise her right to remain silent.

11. To my mind, there was no irregularity at all in the trial court's decision to reserve the matter for judgment after the applicant expressly told it that she had chosen to remain silent. That was her choice and she had to live with it. Accordingly, I find that there are absolutely no grounds whatsoever to interfere with the decision of the trial court of 12th February, 2019 as there was nothing illegal or irregular with it.

12. Be that as it may, since the applicant is a lay person, the applicant may not have comprehended the consequences of her decision. It must have struck her later that her decision had condemned her to eternal silence and that she may never have the opportunity to tell her side of the story, This is borne by her having applied for the revision of the order only two days after the impugned decision.

13. In this regard, having in mind that the trial court has not yet delivered its decision, for the interests of justice, I am of the opinion that save for the time already lost, there will be no violence that will be occasioned to the law and no prejudice whatsoever will be suffered if the applicant is given the opportunity she seeks.

14. Accordingly, this court will affords the applicant the benefit of doubt and orders and direct that: -

a) the order of the trial court closing the applicant's case and reserving the matter for judgment be and is hereby set aside;

b) the trial court do re-open the case and allow the applicant to tender her defence.

It is so ordered.

DATED and DELIVERED at Meru this 6th day of June, 2019.

A. MABEYA

JUDGE