



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL REVISION NO. 5 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

HASSAN RANDU NZIOKA.....ACCUSED

(Revision Application Against the Court Order by Hon L. N. Wasige (Mrs)(PM) Issued On 15th April, 2019 at the Principal Magistrate's Court At Kaloleni Law Courts in Criminal Case No. 509 of 2016 Republic Hassan Randu Nzioka.)

CORAM: Hon. Justice R. Nyakundi

Ms. Wamae for the state

Respondent in person

RULING

Laws of Evidence

Application for the re-opening of the Application case and recall of witnesses' considerations to be taken into account.

Introduction

The Respondent **Hassan Randu Nzioka** was charged with the defilement of a child contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. The brief particulars were that on the diverse dates of July 1st and 11.7.2017 at [particulars withheld] Village in Kaloleni- Sub County intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ being the vagina of **HKR** a minor aged 16 years.

The trial commenced in earnest on various dates in which the prosecution summoned five witnesses to prove the allegation against the accused person.

As the record bears me witness the respondent was unrepresented. At the close of the prosecution case on consideration of the evidence and issues by the learned trial magistrate he was placed on his defence under Section 211 of the Criminal Procedure Code.

The defence was scheduled to be heard on 14.3.2019. Apparently on this particular accused person had retained legal counsel **Mr. Gichana** to represent him when the defense was set to be heard.

It appears from the record that learned counsel **Mr. Gichana** made an application seeking the following orders: -

- 1. That he be placed on record as representing the accused.***
- 2. That in view of the stage of the proceedings, he requested an order to be made to recall the complainant, the Doctor and the Investigating Officer for purposes of cross examination over certain aspect of this matter.***
- 3. After that, we can have a defence hearing.***

To this, the prosecution counsel raised an objection to the effect that:

- (i) The accused was charged on 30.4.2018 and the matter proceeded for hearing.*
- (ii) The accused is an adult and he had a chance to cross-examine all the witnesses.*
- (iii) That the prosecution has closed its case, the court has already made its ruling*
- (iv) That the accused has a case to answer and he objects the witnesses being recalled for cross examination.*
- (v) That the counsel has not indicated the aspects he wishes to cross examine on.*
- (vi) That the proceedings on the application were adjourned for a ruling on 15.4.2019.*

In her ruling, the trial magistrate invoked the provisions of Section 146(4) of the Evidence Act and Article 50(2) (G) of the Constitution to the effect that there would be a breach of the accused's Constitutional rights to a fair trial to his right on legal representation if the objection is upheld.

Furthermore, the prosecution has not demonstrated what prejudice it shall suffer if the application to recall witnesses is allowed.

Being aggrieved with the order learned prosecution counsel preferred a revision to this Court.

The Law, Analysis and Determination

The Questions for Determination in this revision is precise whether an accused person who has been called to offer his defence under Section 211 of the Criminal Procedure Code, can be allowed to have the prosecution case re-opened before commencement of the defence case?

It is worth referring to the relevant provisions of the law in this matter. Section 150 of the Criminal Procedure Code provides as follows: -

“A court may, at any stage of trial or other proceeding under this court, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case. Provided that the prosecutor or the advocate for the prosecution or the defendant of his advocate shall have the right to cross examine any such person and the court shall adjourn the case for such a time if any as it thinks necessary to enable the cross examination to be adequately prepared if, in its opinion either party may be prejudiced by the calling of their person as a witness.”

Further Section 146(4) of the Evidence Act reads: -

“The court may in all cases permit a witness to be recalled either for examination in chief or for further cross examination, and if it does so, the parties have the right of further cross examination and re- examination respectively.”

In our system of criminal justice as embodied in Article 50 2(a) of the Constitution all accused persons charged of an offence are presumed innocent until the prosecution prove their guilt beyond reasonable doubt for the indictment.

“The scope of the right to a fair trial under Article 50 ranges from right to a fair and public hearing, right to an interpreter, right to adduce and challenge evidence, right to be informed in advance of the evidence the prosecution will rely on, right to legal representation of one's choice, and if substantial injustice would be occasioned, legal counsel be provided by the state at its own costs etc.”

These rights to a fair hearing are not subject to restriction or limitation on any aspects within the trial to conclusion.

The enforcement of the right to a fair hearing in a trial is both to ensure the duty of a prosecutor and the trial judge or magistrate. The fact that an unrepresented accused person in criminal trial was facing highly trained professionals in matters of law may create prejudice or disadvantage unless there is judicial enforcement of the rights to a fair hearing in Article 50 and which I have come to refer to as equality of arms. Indeed, there is no dispute that this would achieve the constitutionally authorized end to fair and public hearing before a court or impartial tribunal.

It is not simply enough to take the parties through motions of a hearing, without fair observance and attainment of right to a fair trial. The criteria on equality of arms was considered in by the **African Commissioner on Human Rights and Peoples Rights in Frontier v Burundi Communication No. 231 of 99** as exemplified on the following statement: -

“The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial.”

The maxim that it is better that ten guilty persons escape than one innocent suffer is a standard and a measure to be realized by observance of

procedural substantiate further due process.

In the case at hand, can it be said that legal representation came in too late after the prosecution had closed its case?

In order to appreciate this fundamental right to legal representation, Article 50 2(H) and (G) is of critical importance. By the provisions of this Article, every accused person has a right to be informed promptly the existence of the right to legal representation.

Under 50(H) the right to have an advocate assigned by the state at its own cost if substantial injustice would result in the trial of an accused person is also enshrined.

This same question on legal representation was considered by none other than **Lord Denning** in **Pett –vs- Greyhound Racing Association [1968] 2 ALL E. R 545, at 549** where he stated: -

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favor or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task.”

In the circumstances of the case before lower court, accused initially did have legal representation. The record is also scanty whether he was informed promptly his right to secure legal assistance of his choice before the commencement of the trial.

The case proceeded with the accused conducting his own defence until the close of the prosecution case. There was also no inquiry by the learned trial magistrate whether the trial process would result in substantial injustice to the accused so as to accord him legal representation at the state expense.

In assessing this application, I agree with the learned magistrate that although the accused instructed legal counsel at the defence stage of the proceedings, an adjournment and stay order granted was to ensure fairness to recall the key witnesses for counsel to have the opportunity to cross-examine.

The reasoning by the learned trial magistrates resonates well with the holding in the case of **Chaouk 2013 40 V Republic 356, 369** where the courts stated as follows: -

“When it comes to legal representation, a decision to stay a trial reflects the court’s assessment of what is necessary to ensure that justice is done. We find it difficult to imagine on the particular facts of this case. That his honor could properly have come to any other conclusion in both the finding and the path of reasoning from it to his honors conclusion are unimpeachable. We see no reason to doubt that the lack of instructing a solicitor at the trial would be result in a very real and substantial risk of improper conviction.”

The right to a fair trial being a central pillar to our criminal justice system cannot be derogated during pretrial or trial.

I found the exercise of discretion by the learned trial magistrate to ensure overall process of the criminal trial remains fair commendable.

Further this latest action to cross examine the prosecution witnesses is in line with the principles in **Pett –vs- Greyhound case(Supra)**. The accused was entitled to have his legal counsel cross-examine witnesses and the prosecution counsel to have an opportunity to carry out re-examination.

All what was required of the prosecution counsel was to serve summons requiring attendance for the defence to clarify gaps which may have arisen when the accused conducted his own defence. In **Dietrich –vs the Queen 1992 177 CLR 292** Glisson CJ held in this issue as follows: -

“Fairness is not an abstract concept. It is essentially practice. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.”

In adopting this view, the constitution light and spirit in terms of Article 50 is an overall framework of rights for an accused person to meet the exigencies and due process of case against him and a determination of all issues resolved in accordance with the rules of evidence.

The distinctive features of this application is the aspect of recall of the witnesses when accused person engaged legal counsel at the time of the defence case. The application for review by the state was that the exercise of discretion by the trial court to grant the order was wrong in principle. Unfortunately, from the record I find no sufficient reasons given why an objection was raised to curtail accused rights to legal representation for recall of witnesses for cross-examination.

Accordingly, to **Wigmore** on evidence in trials at common law **Boston 1979 s 1367: “cross-examination is the greatest legal engine ever invented for the discovery of the truth.”**

That which is now elevated to a fundamental right as derived from Article 50 2(K) of the Constitution **“an accused person has a right to adduce and challenge evidence.”**

In a persuasive authority from the US in **US –vs- Crawford B Washington 541 U 536 (2004)** held that: **“the right to cross-examination was constitutionally enshrined as part of fair trial.”** While the Nigeria Court of Appeal in a similar situation in **Chief Raphael Onuwuka – vs Hukuman O Wolewa CA 10 of 99** stated that: **“denial of the right to cross-examination amounts to denial of fair hearing.”**

In the instant case on the basis of the foregoing parliament enacted Section 146(G) of the Evidence Act and Section 150 of the Criminal Procedure Code to confer jurisdiction for courts to admit evidence at any stage of the trial as an essential element of the process and fair hearing. The infirmity in the defence case might have come about as a result of the accused person not being able to ask the right questions to advance his defence.

Justice of the matter therefore demanded that a second opportunity be given to the defence counsel to probe through cross- examination the testimony of the three witnesses. The fact that the prosecution witnesses had earlier testified was not sufficient reason to warrant an objection by the state. The special nature of cross-examination has been succinctly stated by the court of **Swaziland in Republic V Dominic Mngome Zuru & Others CR Case No 94 of 1990 at page 17** as following **Hannah C.J.** stated as follows:

“It is, I think from the foregoing that failure by counsel to cross-examine on important aspect of a prosecution testimony may place the defence at risk of adverse comments being made and adverse inferences being drawn if he does not challenge a particular item of

Evidence, thus an inference may be made that at the time of cross-examination his instructions were that the challenged item was not disputed by the accused, and if the accused subsequently goes into the witness box and denies the evidence in question, the court may infer that he has changed his story in the intervening Period of time. It is also important that counsel should put the defence case accurately. If he does not and the accused subsequently gives evidence at variance with what was put, the court may again infer that there has been a change in the accused’s story”.

From the above principles and application of Article 50 of our Constitution, an accused person right to defend himself against a criminal charge is mainly underpinned on the right to cross-examine the prosecution witnesses and further to adduce evidence in support of his case.

The desirability to obtain the fullest possible access to the prosecution witnesses to probe into the relevant issues in the charge is not derogated by the trial court or prosecution under the mandate given under Article 157 of the Constitution.

I am of the conceded view as clearly articulated in terms of Article 50 2(k) to challenge evidence through cross-examination of the prosecution witnesses is an indefeasible right of an accused person.

The explicit requirements which come primarily from Article 50 on the right to a fair hearing to adduce and challenge evidence and legal representation in the determination of the charge of defilement against the accused person was at stake if the trial court had succumbed to the objection raised by the state.

In terms of the provisions of Section 146(G) of the Evidence Act as read with Section 150 of the Criminal Procedure Code they reflect an enabling legal tools provided by parliament in realization of fair trial rights on adducing and challenging evidence by the accused.

Again, I do not think as a country that the right to a fair hearing as embodied in Article 50 of the Constitution would ever be achieved where there is no equality of arms between the prosecution under its mandate under Article 157 and the defence in any criminal trial.

The Constitution under Article 27 recognizes equality before the Law. At the heart of our criminal justice system is the right of every accused person to be presented in court unless the contrary is proved. That simply means that an accused person has a right to have full disclosure of the material which the state is relying to require him face a criminal charge. The evidence adverse to the accused can only be confronted by way of cross-examination.

For the above reasons, I find no merit in the objection by the prosecution counsel and the resultant revision is denied. The original record is remitted back to the trial court to proceed accordingly with speed to conclude the trial within reasonable time.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF JULY, 2019

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R. NYAKUNDI

JUDGE

In the presence of:

Ms. Wamae for the state