



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL REVISION NO. 8 OF 2019.

BENARD SIKUKU WAMALWA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING.

Benard Shikuku Wamalwa was charged with the offence of defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He pleaded not guilty to the charge and matter set for hearing. The prosecution called 4 witnesses and closed its case on 9.5.2019. The accused was put on his defence and on 10.6.2019 he gave evidence together with his 3 witnesses and closed his defence. The prosecution then made an application to re-open the case for the reason that the defence has raised new issues in their defence which the prosecution wanted to adduce evidence to rebut. The application was objected by Musumba learned Counsel for the defence on the grounds that the prosecution have not explained the new issue raised by defence to be rebutted. Further he submitted that any re-opening of the case will prejudice the accused and the defence.

By ruling delivered on 12.6.2019 the learned trial magistrate allowed the application. The learned trial magistrate stated.

“I have considered the submissions by the state and submissions by the defence counsel. I have also considered the defence raised by the accused. He raised the defence of alibi. At the time when he was cross-examined he asserted that he informed the police that he had been working with Jackline. He however did not include that in his statement as he admitted during cross examination.”

Aggrieved by the ruling of the trial Magistrate Counsel the accused filed this application dated 27.6.2019 seeking orders;

1. **THAT** His Lordship, the Judge in the exercise of the powers donated by Articles 165(6) and (7) of the Constitution of Kenya 2010 be pleased to call for the record of the proceedings in **BUNGOMA CRIMINAL SEXUAL OFFENCE CASE No. 15 OF 2019** REPUBLIC Vs. BENARD SIKUKU WAMALWA with a view to examining the record thereof to ensure the fair administration of justice.
2. **THAT** Honourable court be pleased to review and/or revise the order of the Honourable L. ADISA (Resident Magistrate) made in the said matter of 12th June 2019 re-opening the prosecution case after the defence had closed its case.
3. **THAT** pending the substantive Ruling or Revision in the matter herein there be a stay of any further proceedings in BUNGOMA CRIMINAL SEXUAL OFFENCES CASE NO. 15 OF 2019.
4. **THAT** this court be pleased to make any further orders as it would meet the ends of justice.

The grounds of the application are that;

- a) The order to re-open the prosecution case after the defence case was closed in prejudicial to the accused.
- b) The order to re-open the prosecution case amounts to a permit for the prosecution to fill in gaps in its case.
- c) The order to re-open the prosecution case is a mockery of the trial courts.
- d) The order to re-open the case runs against the concept of a fair trial as envisaged under Article 50 of the Constitution of Kenya 2010.

The application is supported by the affidavit of Benard Sikuku Wamalwa the accused applicant sworn 24.6.2019 reiterating the grounds of

the application.

The application is opposed by the state. Abija Anakalo, a prosecuting counsel swore a Replying Affidavit and deponed that;

1. THAT on the said date, the matter proceeded for Defence Hearing, where the accused then applicant herein, raised an alibi defence, which had not been raised at any other instance or at an earlier time.
2. THAT the defence consequently raised a new matter which would not have been foreseen even after the exercise of reasonable diligence by the same.
3. THAT following the conclusion/close of the defence case, proceeded to make an application under Section 212 of the CPC to call rebutted evidence.
4. THAT I made the application in good faith and based on the facts at hand at the time.

This is an application for revision by this court under the provision of Section 362 of the C.P.C. 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.

Section 364 provides;

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 or 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) of the Panel 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 for the offence which in the opinion of the High Court the accused has committed than 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.

The application by the Sated adduce evidence in reply to an issue raised in defence was made pursuant to provision of Section 212 C.P.C. Section 212 provides;

If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut the matter.

It is clear from Section 212 that the court can allow the prosecution to call evidence in reply if (a) the defence introduces a new matter and (b) if it is in respect of a matter which the prosecution could not by exercise due diligence foresee. (c) that the evidence sought to be produced should be in reply to that new matter.

The prosecution then in an application under Sec. 212 must state the new issue raised by the defence. From the proceedings, the prosecuting counsel in making the application stated;

“I have an application. We wish to make an application under Section 212 the defence raised today raises new issues. We

rely on the case of *Rep Vs Dalmas Otieno* where the court held rebuttal evidence could be called where new evidence has been raised.”

“The new issue is apparent on the record. There is no abuse of Section 212 of the C.P.C. We urge the court to allow us call the witness. We refer to the case earlier stated where leave was granted for 30 days to allow the prosecution call their witness. The defence will not suffer any prejudice. The defence stated that, due diligence was not done by the state we submit that the new issue was not raised and could not have been discovered after the exercise of due diligence. We ask the court to allow the application.

From these submissions what is the new evidence. Is it the issue of alibi that he was not at the place where the offence occurred? If so what evidence did the prosecution seek to lead to rebut that? The evidence the prosecution needs to tender must be clear when making the application.

Even if the issue raised was an alibi; is it an issue the prosecution with due diligence would not have foreseen? The accused was charged with offence of defilement. Prosecution of offence of defilement seeks to prove by evidence the three ingredients of the offence (1) age of complainant (2) penetration (3) identification of the accused as the person who committed the offence. Even if I was to accept that the accused in his defence raised the issue of an alibi; would it be an issue the prosecution would not have with due diligence foreseen? Placing the accused at the scene of the offence by evidence that he was at the scene and therefore properly identified is one of the facts that prosecution seeks to prove in an offence of defilement. This can be led by evidence placing him at the scene and therefore displacing any alibi defence. This is not an issue which the prosecution would not with due diligence foresee.

It is often been stated that;

An application under Section 212 C.P.C. should not be used to allow the prosecution to fill gaps in their case which will be an act prejudicial to the accused. In this case I do find that the defence did not raise any new issues which the prosecution would not have foreseen. Indeed the prosecution had led evidence on that issue particularly by Pw1 the complainant and that the applicant to re-open is intended to fill in gaps if any in the prosecution case.

This application however raises an important issue about the conduct of fair trial. Article 50 of the Constitution provides provision for fair hearing which includes the need for prosecution to provide evidence intended to be used against the accused to the accused. Since the tenets of a fair trial includes the right of the accused and the interest of society on whose behalf prosecution is done, it may be necessary to develop legal mechanism to provide that where the accused defence will be an alibi; such defence be intimated to prosecution in advance to avoid ambush on the prosecution.

Upon considering the application, I find that there was no new issue raised by the defence which the prosecution with due diligence would not have foreseen to warrant a re-opening of the case. I therefore set aside the trial magistrate’s order to re-open the case, and direct that parties having closed their respective case the prosecution and defence do proceed to make final submissions.

Dated at Bungoma this 5th day of November, 2019.

S.N. RIECHI

JUDGE.