



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL REVISION NO.100 OF 2019

(Originating from Nyahururu CM’s Court SOA.62 of 2015 by: Hon. J. Wanjala - CM)

SAMUEL MUKUNDI KANGIGI.....APPLICANT

- V E R S U S -

REPUBLIC.....RESPONDENTS

REVISION ORDER

This matter has been placed before me by Ms. Wanjiru Advocate for the accused, seeking revision of the court’s ruling dated 29/10/2018.

The background of the matter is that Samuel Mukundi Kangigi was charged with the offence of defilement contrary to Section 8(1)(4) of the Sexual Offences Act.

The particulars of the charge are that on 14/4/2015 at around 11.00 a.m., at [Particulars withheld] Village within Nyandarua County, unlawfully and intentionally caused his penis to penetrate the vagina of ZM.; a child aged 16 years.

In the alternative, he faced a charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act.

The accused was released on bond on 30/12/2018 and the case came up for hearing 15 times and 17 mentions but the complainant never attended court on all the said occasions till the father testified on 12/7/2018; that the matter came up for further hearing on 22/10/2018. The accused and his advocate attended but an adjournment was sought by the prosecution on the ground that there were no witnesses present, though bonded. The court declined to grant the prosecution an adjournment as a result of which the prosecution closed its case. The prosecution case was marked as closed. Ms. Wanjiru, the accused’s counsel made oral submissions on ‘no case to answer’ on behalf of the accused and the court fixed the case for ruling on 29/10/2018.

On 29/10/2018, Hon. Wanjala read her ruling in which the court re-opened the prosecution case stating that for a just conclusion of the case she required further evidence.

It is contended by the defence that the said ruling was made irregularly and un-procedurally. The counsel submitted that there were no grounds for ordering a retrial and the prosecution should not be allowed to fill in the gaps in the prosecution case and that is why the counsel prays that the court do call for and inspect Nyahururu SOA.62/2015 for purposes of revision and the court do revise the orders in the ruling delivered on 29/10/2018 and make orders necessary for the ends of justice.

I have duly considered the application by the defence counsel in this matter. I wish to indicate at this stage that what the magistrate was asking for is not a retrial as put by Ms. Wanjiru but a recalling of witnesses under Section 150 Criminal Procedure Code.

The magistrate invoked Section 150 of the Criminal Procedure Code. It provides as follows:

“A court may, at any stage of a trial or other proceeding under this Code, 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 or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such 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 that person as a witness.”

Although Section 150 Criminal Procedure Code seems to suggest that only the court has the right to recall a witness, it seems that the court can allow an application by either the prosecution or the defence to recall a witness, but good reasons must be given for such application. The said section is intended to ensure that the ends of justice are met so that the court gets to whole truth.

When considering a similar provision, in the Indian Case of State of *Jharkhand v Sanjay Mondal and others Cr.App.(DB)No.20 of 2013*, the court stated:

“In light of the aforesaid provisions, the trial court has power to summon any person to give evidence, if his/her evidence is essential for just decision of the case and this court has also power to take further evidence or to direct it to be taken if the evidence is necessary to the ends of justice.”

Section 150 of the Criminal Procedure Code gives a wide discretion to a trial magistrate to assist in ensuring that the trial is fair. Where the prosecution has closed its case, I believe the court has to tread very carefully in exercising the said discretion under this section so that the defence is not prejudiced. The courts have delivered themselves on the meaning of Section 150 Criminal Procedure Code.

In *Fitalis Ogure s/o Ollan v Republic (1950) 24 KLR* de hestang said:

“Although at first sight this section appears not only to give a wide discretion to a magistrate in calling any witness but also to make it mandatory on him to call or recall any person whose evidence appears to be essential to the just decision of the case, the Supreme Court has repeatedly held that a judge should not call a witness in a criminal trial after the case of the defence is closed. The present case goes, however much furtherthe witness was called after the case had been adjourned for judgment. At the close of the case for prosecution, the learned magistrate was in doubt and instead of resolving this doubt, there and then in favour of the accused, he decided on this course of calling fresh witness. In my view, in doing so, the learned magistrate unwillingly committed an irregularity which is fatal to the conviction because if the evidence of that witness is rejected, then it is clear that the appellant should be given the benefit of the doubt and acquitted.”

The court quashed the conviction and set aside the sentence.

Further in the case of *Wambuga s/o Nyaggi & another v Republic (1962) EA62* The court held:

“The powers of the court to call a witness after the case of the defence has been closed should be limited to those cases where something has ex improviso on the part of the accused, which human ingenuity could not foresee last injustice be done. The calling of the witness was not justified by these considerations.”

I note that the two cases cited above deal with instances where Article 150 was invoked when the defence case has been closed. In this case, only the prosecution case had been closed but it still behoved the magistrate to exercise her discretion judiciously. In her ruling, the magistrate said as follows:

“This case was closed after only one witness had testified. Having gone through the entire court record, it is my view that for a just conclusion of this case, I need further evidence. I hereby have to reopen the prosecution case at this stage.”

The prosecution had closed its case after calling only one witness. From the record, the case had been adjourned many many times and the complainant had never attended court. Only the evidence of the complainant's father had been taken. In her ruling, it is evident that the trial magistrate found that the prosecution evidence was inadequate. The magistrate did not state which witness she wanted called. For recalling it could only have been PW1. The order for reopening the case was ambiguous.

The court did not state which witnesses were to be called the matter had been pending since 2015 and only one witness had testified. In my considered view, the magistrate found the prosecution evidence adduced by one witness wanting and inadequate and therefore wanted to develop and improve on the case which was to my mind worthless, being evidence of only one witness who was not even the complainant. In effect, the magistrate was granting an adjournment in the case which she had earlier declined to grant forcing the prosecution to close their case.

The order was absolutely prejudicial to the accused. It meant that the accused had to continue waiting indefinitely for the prosecution case which had failed to take off since 2015. Article 159(2)(b) of the Constitution enjoins this court to hear matters without unnecessary delay. For the above reason, I find that the order of the magistrate dated 29/10/2018 is irregular and prejudicial to the accused and is hereby set aside.

The court directs that the magistrate do proceed to rule on whether or not the accused has a case to answer Under Section 210 Criminal Procedure Code. It is so ordered.

Signed, Dated and Delivered at NYAHURURU this 12th day of November, 2019

R.P.V. Wendoh

JUDGE