



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
CRIMINAL REVISION CASE NO. 9 OF 2017
THOMAS KIMANZI.....APPLICANT
VERSUS
REPUBLIC.....RESPONDENT
ORDER ON REVISION

1. By a letter dated **19th September, 2017**, the Applicant/Accused through the firm of **Mulinga Mbaluka & Co. Advocate** approached this Court seeking Revision of the order of the Subordinate Court presided over by the **Hon. Kibet Sambu**.
2. In a nutshell the Applicant/Accused is charged with the offence of **Defilement** and in the alternative **Committing an Indecent Act with a Child**. The matter proceeded before **Hon. H. M. Nyaberi** who was transferred. Subsequently the **Hon. K. Sambu** took over the matter and gave directions pursuant to the provisions of **Section 200** of the **Criminal Procedure Code**. Per his order the matter was to be heard afresh.
3. Thereafter the Prosecution applied to have the Complainant declared a vulnerable witness within the meaning of the **Sexual Offences Act** so as to testify through an intermediary. In addition, the Court was asked to appoint a Psychologist, Counselor, Guardian, Social Worker, Parent or Relative of the Complainant to act as the intermediary and the evidence of the Complainant be taken in camera. That the application was dismissed. Thereafter on the **4th of April, 2017** a similar application was made and allowed by the Court.
4. It is now argued that the Ruling delivered at the outset was conclusive and the Court was *functus officio*. That the Prosecution is using the Court to violate the Accused's rights.
5. I have carefully considered the averments of the Applicant/Accused and had an indepth perusal of the proceedings.
6. **Section 31(1), (2) and (3)** of the **Sexual Offences Act** provides thus:

“(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—

- (a) the alleged victim in the proceedings pending before the court;**
- (b) a child; or(c) a person with mental disabilities.**

(2) The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of—

- (a) age;**
- (b) intellectual, psychological or physical impairment;**
- (c) trauma;**
- (d) cultural differences;**
- (e) the possibility of intimidation;**

- (f) race;
- (g) religion;
- (h) language;
- (i) the relationship of the witness to any party to the proceedings;
- (j) the nature of the subject matter of the evidence; or
- (k) any other factor the court considers relevant.

(3) The court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness.”

7. On consideration of the initial Notice of Motion the trial Magistrate stated thus:

“It would have been appropriate for the prosecution to have availed the subject complainant before court for her evidence to be tested where upon the court would be able to observe her demeanour and her alleged mental disability and to make an independent and informed observation on whether or not the subject complainant victim qualifies to be declared a vulnerable witness under section 31 of the sexual offences Act No. 3 of 2006 and Article 50(7) of the new constitution.”

The Prosecution was given an opportunity to renew the application. The reason given was that the Court could form the opinion as asked if the subject child had been availed.

8. In a case where the Court is in doubt, as to whether the witness should be declared vulnerable, an intermediary ought to be summoned to advise the Court. The Court deviated from the procedure laid down but it did not close the door to the Prosecution regarding the issue. The Applicant was allowed to renew the application which was done.

9. I do note that the Court did not give directions as to the mode of renewal of the applications. Consequently the Prosecution made a formal application. The Court had the benefit of seeing medical evidence that confirmed the witness’s disability. She had medical retardation and was a victim of epilepsy. In the premises the application was allowed and an intermediary appointed.

10. Orders granted can therefore not be viewed to be parallel decisions of the Court. Therefore I decline to grant the order sought and direct that the file be placed before **Hon. Kibet Sambu on 12th February, 2018** for hearing and determination.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 1st day of February, 2018.

L. N. MUTENDE

JUDGE