



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. CRIMINAL APPLICATION NO.1 OF 2017

BETWEEN

JAMES NDEGE NYANGICHA APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. **JAMES NDEGE NYANGICHA** (the applicant) has sought for orders that the case pending before the magistrate's court at **OYUGIS CRIMINAL CASE NO.12 OF 2016** be started afresh on grounds that due to frustration and the unbelievable prison conditions, he was under great stress during the proceedings, so he would like the witnesses to be recalled to testify afresh because now he is in a stable frame of mind; and he is physically and spiritually fit.

2. The background to this matter is that the applicant was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8 (3)** of the **Sexual Offences Act No.3 of 2006** – the complainant being a 14 year old girl named **VAO**.

3. The trial begun on 28/06/2016 and 4 witnesses testified on that day and the prosecutor then sought an adjournment to call the remaining witnesses. The record shows applicant's response to the application was – **"I have no objection."**

4. Hearing was then set for 13/07/2016 but on that day he did not proceed and a production order was issued for the next day. On 14/07/2016 when the applicant appeared in court, he applied that the case starts afresh saying he now had an advocate.

5. The prosecution opposed the application that the complainant was a student and the delay in concluding the matter was not in her best interest. Since the applicant said he had an advocate, the trial magistrate directed that his counsel appears in court to make any appropriate application.

6. On 26/09/2016, the applicant again requested for recall of the witnesses saying that at the initial hearing he was unwell.

7. The prosecution opposed this saying the issue of the applicant's health had not been raised during the hearing of the witnesses who had so far testified.

8. The court rejected his request on grounds that he had not given any satisfactory explanation to warrant recalling of witnesses; and he had been given an opportunity to cross examine all the witnesses who appeared in court.

9. Again on 04/10/2016 the applicant asked for the recall of the witnesses to which the court pointed out that a determination on the matter had been made. The applicant then stated:-

"I have no confidence in the way this matter is proceeding; the court does not listen to me."

10. At the hearing the applicant argued that part of his reason for seeking a recall was that the complainant had been coached by the prosecutor on the kind of evidence to give because there was a day he saw her secretly talking to the prosecutor. He also argued that what the witnesses stated in court was different from what was in her statement recorded by police.

11. In opposing the application **MR. OLUOCH** on behalf of the State submitted that the only reason the applicant is pressing for a **De Novo** hearing is because he was put on his defence.

12. Whereas every accused person has the right to apply for recall of witnesses in the course of trial, that right is not absolute – the person

applying must state why it is necessary to recall witnesses – infact his application amounts to a **De Novo** process. At the initial stage he claimed to have engaged an advocate – however no advocate ever appeared thereafter and the claims were simply hot air.

There was not even a name disclosed to attach to any such advocate.

13. Thereafter the applicant claimed that when the witnesses initially testified he was unwell – yet at the time when they were testifying in court he never alluded to his purported ill health and on his own admission he did not have any document to support that he had been unwell.

14. Indeed even his claims that the witnesses stated in court was a departure from the contents in her statement demonstrates a desire to patch up his case.

15. Of course being in prison custody is not easy for any ordinary human being, and just having one’s liberty restricted, and activities controlled is stressful enough. If each case was to await individual adjournment with prison realities before it is heard then I doubt that criminal matters would make any significant progress.

16. I am satisfied that the trial magistrate duly considered the application made by the applicant. I have also considered the same and find no satisfactory reason to warrant the matter being heard **De Novo**.

17. Consequently the application is dismissed.

Delivered and dated this 4th day of April, 2017 at Homa Bay

H.A. OMONDI

JUDGE