REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL REVISION NO. 9 OF 2018

PROSECUTOR............................APPLICANT

VERSUS

STEPHEN LESINKO.............RESPONDNET

RULING

(Being a revision from the decision of trial Magistrate Chesang dismissing the charge pursuant to the provisions of section 202 of the CPC)

This is a revision from the order of the Resident Magistrate dismissing the charge of defilement against the respondent/accused under section 202 of the Criminal Procedure Code.

Being aggrieved with the decision and order the Director of Public Prosecution filed this application seeking a review to quash and set aside the impugned order.

The application is brought under Article 165 (3), (6), (7) Articles 159 (1) (2) Article 50 (1) (a), (22), (47) (1) of the constitution 2010, section 362, 364, 100, and 202 of the Criminal Procedure Code, Victims protection Act 2014 section 4, 5, 6, 10 and 11 and section 3, 4, 5, 7 and 9 of the Fair Administration Act 205.

It is supported by the annexed detailed letter by the applicant counsel and mainly sets out the grounds on impropriety, illegality, and incorrectness of the order dated 9th March 2016. The applicant main relief against the respondent is couched in the following terms.

> ***"That the Honourable court be pleased to revise, review and set aside the order of dismissal and substitute it with an order of reinstatement and direct the case to proceed before any other court other than Hon. Chesang".***

The application is opposed by the respondent who filed a replying affidavit dated 13/4/2018. At the trial and in these notice of motion application is being represented by Mr. Itaya Advocate.

In the replying affidavit, the respondent urges this court to find that the complainant was absent and also the prosecution counsel. He further admits that the case was at the defence stage and he was prepared together with his advocate to adduce evidence against the prosecution.

The respondent further deposed that the High court in this matter has no jurisdiction to alter an order of acquitting and therefore not seized of the powers to make any orders under the constitution or statute

Mr. Akula, the learned counsel for the applicant submitted that the trial magistrate invoked wrongly so the provisions of section 202 of the CPC and ordered for an acquittal. He further argued that in the entire CPC there is no situation envisaged when a Criminal court could be properly constituted without a prosecution counsel being present. Mr. Akula further contended that the order by the trial magistrate is defective for failure to make orders of discharge or acquittal. He drew the court's attention to the provisions of the Article 10 of the constitution on National values and principles which bind state officers in discharge of their duties. Learned counsel further urged the court to be guided by Article 159 (2) (D) of the constitution which provides that justice shall be administered without undue regard to procedural technicalities and the purpose and principles of this constitution shall be protected and promoted.

In his response, Mr. Itaya submitted that the raised by the applicant's counsel as in contravention with section 348A of the CPC providing on the right procedure to be followed in the case of an acquittal.

He urged the court to dismiss the application filed under section 362 as read with section 364 of the CPC.

Background and Procedural History

On 6th July 2016 the respondent/accused was charged in Criminal Case No. 22 of 2016 at Kajiado chief Magistrate's court with the offence of defilement contrary to section 8 (1) (3) of the sexual offences Act No. 3 of 2006. The brief particulars of the charge are that on diverse dates between 2014 and 18th June 2016 at Kajiado Township in Kajiado Central Sub-county within Kajiado County, the accused intentionally and unlawfully caused his penis, genital organ (penis) to penetrate genital organ (vagina) of A.W a girl aged 15 years old. The respondent pleaded not guilty and the applicant/application opened its case calling a total of four (4) witnesses. On 15th February 2018 the applicant closed its case and the same day a ruling on a case to answer under section 211 of the CPC was made by the learned trial magistrate.

The defence hearing was scheduled on 9th March 2018 but the prosecutor was not present. In response the learned trial magistrate made the following order:

> ***"matter is dismissed contrary to section 202 of the CPC for absence of the complainant and prosecution counsel. The decision for the courts to start promptly was made at the bar-bench meeting held on 5th March 2018 in which the prosecution was in attendance.***
>
> ***As it is now 10.15 am, the orders made above shall abide".***

It is apparent from this order that non-attendance of the prosecutor led to the dismissal of the charge against the respondent who already had a date to state his defence.

Analysis and resolution

Before I address the real issue in this application, it is worthy I first set out some of the relevant constitutional and legal provisions dealing with issues of this application.

The High Court under Article 165 of the constitution exercises both original jurisdiction and appellate jurisdiction in Civil and Criminal matters.

A special aspect of the original jurisdiction is the court's power on judicial review in determining the constitutionality of legislation and actions taken by the executive and decision of inferior courts, body, public officer or tribunal.

The court also under Article 165 (6) and (7) of the same constitution exercises supervisory and revisionary jurisdiction over subordinate courts. Under this jurisdiction the courts either on its own motion or by an application made by an aggrieved party to call for the record of proceeding in a subordinate court at any stage to look at the propriety, legality or correctness of the decision of the subordinate court.

This power of the High Court to call for the record is also provided for under Section 362 of the CPC which provides that the High court may call for and examine the record of any proceedings before any subordinate court situated within its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, reviewed or passed of such subordinate court.

The right to be heard under this jurisdiction is not mandatory but render Section 364(5) of the CPC the High Court when exercising its powers of revision has discretion to hear or not to hear the parties either personally or through their advocates. However, the court may hear any party either personally or by an advocate. This is more applicable under the provisions in Section 364(2) of the Code which states that:

> "***No order under this Section shall be made to the prejudice of an accused person unless he has had an opportunity of being head either personally or by an advocates in his own defence. My minding on revisionary jurisdiction under Section 362, 364 alongside Section 354, 357 and 358 of the court in exercising revision to care any irregularity or impropriety the court has wide powers to interfere in an order which has resulted in flagrance miscarriage of justice. What should be noted is the legal provision that render revision the court cannot convert an acquittal into one of conviction."***

According to Prof. Tan in his article on appellate, Supervisory and Revisionary jurisdiction, **Longman Publishers 1989 (Walter Woon Edition at page 233** he set out the following differences:

> **(a) Supervision extends to all administration interests but revision to subordinate courts**
>
> **(b) Supervision depends upon party initiative in seeking relief but revision may occur on a judge's initiative *on the other hand.***
>
> **(c) Supervision of entirety is unlawful to questions not touching the merits of the case but the revision will lie on the errors of law and fact.**
>
> **(d) Supervision is effected by way of prerogative writs but revision is marked by complete flexibility of remedies**.

The essence of this jurisdiction under section 362 as read with section 364 of the Criminal Procedure Code has been considered in several cases. In the case of ***Kiwala v Uganda 1967 EA 758*** the court held that:

“Once a case has been revised by the High court becomes *functus officio* and that the revision is final unless there is an appeal to the court of appeal”

In addition, the case of ***Uganda v Polasi*** the court held:

“The case has come to this court’s notice in the exercise of its functions. The accused, it would seem, was unaware of the illegality of the sentence….. Once this state of affairs has come to the notice of the High Court, what must it do when it is enjoined to exercise general powers of supervision and control over the magistrates’ courts, coupled with the specific powers of revision , under ….the Criminal procedure Code? The court is clothed with authority to correct errors …. Here the accused is sentence to undergo imprisonment for seven years, a sentence which exceeds the legal limits by five years and, accordingly, there’s a gross illegality. In these circumstances, the clear duty of this court, notwithstanding the fact that the accused has abandoned his appeal, is to invoke …the Criminal Procedure Code and cure the illegality. I would hold that in the circumstances of this case, even if this court is functus officio, it has jurisdiction under its revisional powers to correct the formidable error of the trial magistrate which has already occasioned an injustice”

Further support for this view is to be found in the **English Court of Appeal decision REX Versus Compensation Appeal tribunal 1952 IKB 338 – 347** where it was stated:

“The court of Kings Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity but in a supervisory capacity. This control tends not only to seeking that the inferior tribunals keep within their jurisdiction, but also to seeking that they observe the law.”

The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it offends against the law, when the kings Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it.

It is only exercising a jurisdiction which it has always had.”

It is plain from the above passage that the High Court is vested into wide revisionary powers to look into the orders, decisions, proceedings, sentences where any of the following circumstances manifest themselves.

a. Where the decision is grossly erroneous

b. Where there is no compliance with the provisions of the law.

c. Where the finding of fact affecting the decision as not based on the evidence or it is result of mis-reading or non-reading of evidence on record

d. Where the material evidence on the parties is not considered.

e. where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence, (See Article on Revision in civil and criminal cases by *Rabia Tus – Sarela and Marya* *http/www:academia.Edn/24795/revision is in Civil and Criminal Cases)*

These are the principles which will guide this court when we examine the issues of the present application.

It will be therefore my task to see whether the order of dismissal under section 202 of the Criminal Procedure Code was irregular, illegal or incorrect.

The applicant’s letter before this court raised a number of issues which are extremely important and can be reformulated into the following:

a. Whether this court has the jurisdiction

b. Whether equality of arms was violated in the judicial proceedings before the trial court

c. Whether the victim’s rights are subordinate to the accused rights

d. Whether section 202 of the CPC was an appropriate section to dismiss the charge.

I will deal with each salient features of the application.

Jurisdiction:

One of the earliest decision recognizing the doctrine of jurisdiction in the court of appeal decision in Lillian Motor vessel v Caltex where the court concluded *inter-alia* that where the court has no jurisdiction of the subject matter or authority to act its judgments and orders are void and regarded as a nullity. The importance of this decisions stems from the submission made by Mr. Itaya for the respondent challenging this

court's jurisdiction to entertain the present application. Mr. Itaya contended that the applicants issue can only be determined on appeal and not revision.

It is not in dispute that Article 165 6 & 7 of the constitution confers of supervisory jurisdiction to the High Court over subordinate courts. This operationalized by section 362 of the Criminal Procedure Code which empowers the High Court to call for records of the proceedings in any Criminal Court case subordinate to its jurisdiction to exercise powers of revisions it gives wide scope to the court to examine the correctness, legality or propriety of any finding/sentence or order can exercise all the powers of an appellate court.

As regards the orders on acquittal references made to section 348A and section 364 of the Criminal Procedure Code. The general legal principle under our code is that the court in exercising powers under revision cannot convert an acquittal to that of conviction.

It is also provided under the same code in section 380 that the court can interfere with any orders of a subordinate court including acquittal where is gross error of law and is necessary to alter review, vary or set aside in the interest of justice.

I have reviewed various aspects of the applicant's application. By the nature of the order dismissing the proceedings midstream the applicant's invocation of supervisory and or revisionary jurisdiction to me is an appropriate avenue to seek redress over the trial magistrates order.

The notion by the defence counsel that in the matter of criminal motion No. 9 of 2018 be commenced by way of an appeal under section 348A of the Criminal Procedure Code lacks merit. The present application precisely lies to be brought by way of a criminal revision.

(b) Whether equality of arms was violated in the judicial proceedings before the trial court

The functions of the Director of Public Prosecutions are provided under Articles 157 6, 9(a), (b), (c), (7), (8), (9), 10 and 11 of the constitution.

The director of public prosecutions exercises the state functions of prosecution including the institution, undertaking, taking overs, continuance and or termination of criminal proceedings amongst other functions and duties.

In discharging his duties the director of public prosecutions is required among other things to have regard to public interest, the interest of administration of justice and the need to prevent and avoid the abuse of legal process. This is the role the prosecution counsel was expected to perform before the trial court on the 9th of March 2018.

The basic Instrument that guarantees the right to a fair hearing is found in article 50 of the constitution. The provisions on Article 50 on various rights in my view serve not only the accused persons but also the prosecution and the victims.

When fulfilling the principle of equality of arms, notably the Criminal Procedure Code provisions cannot be elevated to a higher hierarchy to allow requirements of a fair trial to be sub servient as to their legality and fairness.

I found Article 10 (1), (2) of the constitution of significance in that it embodies observance on values and principles of governance that bide all the state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law or makes or implements public policy decisions.

In tangible terms on the notion of fairness, in an adversarial system Article 50 of the constitution substantially is derived at procedural equality between the defence and the prosecution. The equality right and due process required the accused to be given an opportunities to state his defence in answer to the prosecution case which had been closed pursuant to section 211 of the CPC. That opportunity to rebut the legal arguments and evidence against the prosecution was lost because of the dismissal order. In the case of **Neumeister Versus Anzima 1980 /HRR91** the court held:

> ***"In an adversarial system or inquisitional system in criminal trials both parties must be represented throughout the proceedings from pretrial, trial and final judgement."***

In the event the prosecution counsel or authority and or the defence is excluded. The principle of equality of arms is violated. The trial court was under a duty to take positive measures to summon the applicant and hear evidence for non-attendance before passing judgment.

(c) Whether the victim rights were violated

Since the promulgation of the constitution 2010 crime victims' status in the criminal justice system has changed. They are no longer just witnesses for the state but their rights secured under the constitution in Article 50 …… and the Victim Protection Act 2014. The victims of crime under the Act are entitled to certain basic rights. Under the Act the victim has broad rights to due process, fairness, right to notice, right to be present, right to be heard, etc.

In the present case the right to notice was important to entitle her to be heard before an order of dismissal was made by the trial court. At the stage of the criminal proceedings the victims' presence to physically attend the trial was important for the following reasons: First, she had testified against the accused person, secondly, she was involved in proceedings related to investigations and arrest of the accused, thirdly, the incarceration and subsequent prosecution was as a result of her statement to the police.

In my conceded view a trial court cannot ignore the issues of the victim's right to reasonable protection and safety from the accused. It is

necessary for her to know that the criminal process started under her instigation has come to an abrupt end due to some technicality of procedure or non-participation by the state to prosecute the case.

There is no victim who possess a yearning to see justice done more profoundly and more justly than a sexual assault or defilement victim. In the instant case, the accused was arrested and charges with aggravated sexual abuse of a child. Thereafter the prosecution summoned four witnesses to discharge the burden of proof beyond reasonable doubt. In pertinent part the trial magistrate made a finding of a prima facie case to warrant the accused to be placed on his defence under section 211 of the CPC.

As the record bears me witness, the accused never gave his defence but was to be rewarded with a technical order of an acquittal under section 202 of the CPC.

In my judgement it's the court's duty to preserve and protect victim's rights to justice and due process. The trial court unfortunately did not uphold the victim's right to be heard at an acute stage of the criminal proceedings hearing on 9th March 2018. This was not one such instance where judicial discretion was properly excised. It is generally accepted that the administration of justice is a matter of evidence before a court of law. The provisions under the Evidence under Cap 80 of the laws of Kenya is the means sanctioned by the constitution and the rules in which courts ascertain in a judicial proceeding the truth respecting a matter of fact and proving the parameters of the case under the various standard of prove. In criminal cases the legal burden of proving every element of the offence against an accused person lies from the beginning to the end on the prosecution. **(see Woolmington v DPP) 1935 1 ALL ER 1).**

What the learned trial magistrate did was to discard the evidence of the four witnesses summoned by the state and dismissed the case as if there was no evidence at all. Whether there was no sufficient evidence to sustain a conviction is a matter of law. The standing feature of the case was that no mention is made as how the criminal court was constituted without the presence of a prosecutor. If on the other hand the accused had stated his defence and subsequently a final order of acquittal is made that will be a different matter altogether.

It is salient from the order that the magistrate invoked Section 202 of the Criminal Procedure Code to punish the prosecutor for non-attendance in court on that particular day. She however forgot one cardinal principle that the object of the court is to adjudicate the rights of the parties and deliver them in accordance with the constitution and statutory provisions.

I do not think that section 202 of the Criminal Procedure Code was enacted to render prejudice or injustice to either party in the administration of criminal justice. What counts in adjudication of disputes is evidence in law. It plays such a pivot role in serving the interest of justice between two disputants. Although there is force that sometimes cases are dismissed on a technicality for one reason or another, decisions of individual Judges and courts should interrogate certain processes and procedures that negate enforcement of rights to a fair hearing under Article 50 of the Constitution. The sentiments envisaged on the nature and sufficiency of evidence it is logic and relevance in the decision by courts was re-visited by Prof. Wade in his book which is illustrated in the following passage:

> ***"Just as the courts look jealously on decisions by other bodies, on matters of law, so they look indulgently on their decisions of fact. But the time of this indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore the court is disposed to intervene. No evidence does not mean only a total dearth of evidence. It extends to any case where the evidence taken as a whole, is not reasonably capable of supporting the finding or where in other words, no tribunal could reasonably reach that conclusion on that evidence".***

Further **De Smith, Woolf & Jowell, Judicial Review of Administration Action 5th Edition** observed as follows:

> ***"A tribunal which has made a finding of primary fact wholly and unsupported by evidence or which has drawn an inference wholly unsupported by any of the primary facts found by it, will be held to have erred in point of law. Again, such a finding could be held to be irrational or unreasonable and as we discuss later, the courts presume that as a matter of law, parliament did not intend any decision maker so to act"***

In order to secure justice in the instant case, the combination of all the circumstances ought to have been taken into account including the position of the evidence on record adduced by the prosecution. As demonstrated by the legal Scholar Prof. Wade and De Smith the dismissal order by the learned trial magistrate ignored the concept of evidence rules and unreservedly went for a decision which occasioned a failure of justice to the parties in the criminal case.

Having ascertained the peculiar circumstances of this case the question I ask is whether in dismissing the charges there was real danger to substantial injustice.

What happened in this case is serious procedural, irregularity for the trial court not to take into account the gravity of the offence and that the prosecution had rendered evidence in support of the charge and even closed its case.

The prosecution never had a reasonable opportunity of making submissions or subjecting evidence of the defendant to cross- examination during the defence hearing for reason that the charge was dismissed before the due date. It is also clear that the prosecution counsel was not in court to address the legal issues on dismissal of the charges on a part heard case section 211 of the CPC was complied with and accused placed on his defence.

In this case the learned trial magistrate misapprehended the law under Section 202. This resulted in a verdict which was unjust to both sides because the prosecution had a legitimate expectation to hear the defence of the offence. The opportunity given to the accused to state his defence as perpetrator of the crime was lost.

The final ground to deal with is on the provisions of Section 202 of the Criminal Procedure Code. For purposes of this application I reproduce the provision of Section 202 herein under

> ***"If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then , if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit."***

I have perused the Criminal Procedure Code and the phrase complainant is not specifically defined. It may be such that the legislature did not want to provide for a definition which is too restrictive or too wide to cause a confusion in this application in the administration of criminal justice.

However, the superior courts have delved into the interpretation in order to give effect as to who is a complaint in a criminal charge in the case of: ***ARVI Ratilal Ganji v Uganda UL. R 237***, the court was dealing with the provisions 202 of the Uganda criminal code which has similar provisions with Section 202 of Kenya Criminal Procedure Code. The court had this to say interalia:

> ***"We are aware that the criminal procedure code does not precisely cover the present facts. But we think the positon is analogous to that envisaged by Section 197 of the Criminal Procedure Code i.e. the position which arises when the complaint is absent. That section by the word complainant probably means a private person who has made a complaint to the court. In the absence of this person clearly there can be no trial and no trial joinder of issue.***
>
> ***The court under those circumstances either adjourns or dismisses the charge it seems to us that the position is substantially the same where the Magistrate has before him merely a public prosecutor whose function is simply to conduct the case and to examine the persons who are the true informants. If the latter are absent and yet it is known they are in existence, and that their advocate can be secured it seems to us hectic short of …….. to embark on a trial of the court and to acquit the accused, the complaint against him being wholly unheard"***

(B) Applying the above definition a complainant in a criminal case is the one who files a complaint at the police station alleging an offence has been committed in reference to provisions of the statute asking the police to investigate and take further action. This is also similar to a plaintiff in a civil case who on seeking a civil remedy files a claim against the defendant. Arising from these principles and provisions of Section 202 of the Criminal Procedure Code the persons who initiated a complaint under the Penal Code or any other statute deals with commission of a crime is the complainant. An indictment against a suspect of crime cannot be investigated without a report first being made to the police or other enforcement agency.

Regarding the present application, a complaint was made to the police on the offence of defilement. The police investigated and recorded statements from the relevant witnesses. The complainant was subsequently seen by the Clinical Officer Lengete. The four witnesses lined up for the prosecution to prove the case against the accused had testified. Furthermore the prosecution had closed its case. The contention that the accused person may be released according to the letter and spirit of Section 202 of the CPC is absolutely misapprehension of the law.

It is important to point out that the role and function of prosecution in criminal justice under Article 157 6, 9, 10, 11 of the constitution is a delegated authority by the state. In a criminal prosecution the function of a prosecutor is to lay before court credible evidence to an alleged criminal against a suspect. It is agreed in both sides on admission of justice that in the strict sense that the prosecutor is not a complainant in a criminal indictment.

Am therefore satisfied that this is an order made with clear potential for substantial injustice which cannot be left to prosper save for the court to exercise its power of revision to interfere with it by setting it aside.

On my part, Article 159 (2d) on the provision that ***(justice shall be administered without undue regard to procedural technicalities)*** is applicable in this case.

It is noteworthy that the next order am about to make is not one which infringes the principle on double jeopardy.

There is an important aspect of this case. The acquittal was not on the merits of the trial. As stated elsewhere the victim and the public have a compelling interest to know the out-come of the criminal charge against the accused. It is improbable to answer this concern with the answer that prosecution authority did not attend the proceedings.

The prerequisite whether a retrial is justified or not was addressed in the case of **Faxchali Manji Versus Republic 1966 EA 343** where the court held as follows:

> ***"In general, a retrial will be ordered when the original trial was illegal or defective. It was further observed that each case must depend on its own facts and circumstances and an order for the retrial should only be made where the interest of justice require it"***

In the present case, I am satisfied that there is compelling evidence and it would be in the interest of justice to order for a retrial for the case to proceed to the next stage for the defence hearing. The only variation is to order that the **Criminal Case No. 22 of 2017** be transferred from the trial court to any other court as the Chief Magistrate may allocate.

Accordingly, the application by the Director of Public Prosecution succeeds in so far as quashing the dismissal order of 9/03/2018 is concerned rendering the proceedings inoperative. The primary file be forwarded to the Chief Magistrate's Court to comply with the order.

Dated, delivered in the open court this 4th June 2018.

……………………………..

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Akula - for the Applicant

Mr. Itaya – Counsel for the Respondent.

Respondent – present

Court: the accused to submit himself before the Chief Magistrate's Court on 6th June, 2018 for further orders.