REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CRIMINAL CASE NO. 10 OF 2017

BENSON GITAHI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **DAVID GITAHI WARUHIU** (*the applicant*) has by a Notice of Motion dated **11th January 2017** sought that orders issue for De Novo hearing of Criminal Case No.2624 of 2012 which has been heard in the Magistrate's court.

The basis for his application is that he was not hearing well when the matter proceeded and if an order is granted then he will answer questions properly. At the hearing of the application he submitted that it was his first time in court and he did not know how to cross examine, so he requests for recall of 2 witnesses.

2. He explained that although he had the witness's statement in his possession, it was only after the witnesses had testified and left that he realised he had left out some issues, he should have cross examined them on, among them being that the complainant had a grudge against him yet he did not bring this court on cross examination.

3. In opposing the prayer M/S Oduor on behalf of the State submitted that the application is not merited as there are no weighty reasons to warrant De Novo hearing. She points out that at no point during the trial did the applicant indicate that he had hearing problem.

4. It is argued that the applicant (who is out on bond) is simply enjoying tactics to ensure the case which begun in the year 2012 is delayed, and 6 years later, it will be unfair to recall a witness to testify a 3rd time. It is drawn to this court's attention that the applicant made an application to recall some witnesses –which prayer was granted by the trial court and went through cross examination.

5. Counsel also urges this court to take note that the complainant who was then aged 15 years at the time of the offence is now 21 years and has moved on with her life, and for the psychologically tormenting ordeal to be reopened after 6 years is unfair and traumatizing, and defeats the ends of justice.

6. The applicant was charged for the offence of defilement of a girl then aged 15 years the incident allegedly took place on 12th June 2012.

The complainant testified as PW1 on 31.12.12 before Obina (SRM). Eventually the trial magistrate was transferred from this station, and when the matter next came up for hearing on 6.03.2015 before Mbulikah (RM), the applicant requested that the matter begins afresh and when prosecution protested then, he then requested to recall PW1 (the complainant) and PW2 – this was after total of 4 witnesses (including the Dr.) had testified.

The trial court allowed recall of PW1 and PW2 for purposes of cross examination and indeed PW2 returned to court on 23.05.2014 for cross examination while PW1 the complainant returned to court on 21.05.2015 for cross examination.

7. Thereafter PW5 testified, prosecution closed its case and the court made a ruling on 07.07.2015 that the applicant had a case to answer. He was to make his defence on 06.08.2015 but on the given date Mbulikah (RM) had been transferred from the station and Wambani (CM) took over the hearing. The applicant then asked for De Novo hearing saying he had not put questions to witnesses. The request was rejected by the Hon. Magistrate.

8. I think the applicant is out to vex and expose the complainant to further trauma (which is really not fair). He has had two bites at the cherry it cannot be that each time there is a change of guard the applicant undergoes some sort of brain wave and develops an entire new manner of conducting his case. He has been allowed a 2nd bite at the hearing and that is enough. I get the impression that:

a) the applicant deliberately wants to delay this matter

b) he is on a patch works spree, trying to seal any loophole he perceives to be poked at by prosecution.

I take into account that with time, memories fade and events become hazy 6 years down the line – it is unfair and unreasonable to recall witnesses to come back (especially PW1 + PW2, a 3rd time) to repeat what they have told this court in two last separate occasions – there must be an end to this dance that is what justice demands and which I find prudent to hold to it is unjust that each time the applicant gets a brain wave concerning questions he thinks he ought to have asked, the case is reopened – each time a new magistrate takes over, the dance starts afresh – I say enough.

There is no persuasive Reason to warrant De Novo hearing or even recall of the witnesses. His application lacks merit and is dismissed.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 2nd day of **October** 2018.

H. A. OMONDI

JUDGE