

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.167 OF 2017

G O W.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, G O W was aggrieved by the decision of the trial court in which his application to recall a witness was denied. He is also challenging the decision of the trial court to cancel the bond that was granted to him. From the Ruling delivered by the trial magistrate in **Makadara Chief Magistrate's Court Criminal Case No.4382 of 2014 Republic –vs- G O W**, it is not disputed that the Applicant is facing a charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. It is alleged that the Applicant defiled his daughter who is aged eleven (11) years old. From the Ruling, it was apparent that the trial court formed the impression that the Applicant and his wife (the mother of the victim) were frustrating the hearing of the case by unduly influencing the victim not to cooperate with the investigating officer. The turning point appears to have been the information given to the court by the investigating officer that the Applicant concealed from her the whereabouts of the victim when the case was fixed for trial. The Applicant's wife had been uncooperative. She had in fact become obstructive in the quest for the investigating officer to avail other witnesses before the court. It also emerged that, despite the Applicant facing the charge of defilement of the victim who is his daughter, the Applicant continued to live with the victim. It was only after the court had intervened that the victim was able to testify before court. Her custody was later handed over to the Children's Officer after the court formed the opinion that the victim was a vulnerable person who was in need of care, protection, counselling and guidance which could not be availed to her when she was staying at home with her parents.

On the issue of bail, the trial court had this to say:

“On the issue of bail, I do find that on the 21/3/17 the accused was warned by the Chief Magistrate on the interference of the case failure to which the bond will be canceled. I have considered the circumstances of the case and the submission of the investigating officer and the conduct of the mother of the victim and do believe there is reason to believe there is interference of the case by the accused person.”

The trial court then canceled the bond of the Applicant.

During the hearing of the application, it was the Applicant's case that he was denied the right to fair trial when the trial court rejected his application to recall the complainant for the purpose of cross-examination. The Applicant explained that since he instructed counsel, it had become apparent that the complainant ought to be recalled for the purpose of clarifying certain issues that will impact on the Applicant's trial. It was the Applicant's case that there was no justification for the trial court to cancel his bond since he had attended court without fail. The allegation that he had interfered with the witnesses had not been established and therefore the bond that was earlier granted to him ought to be reinstated.

The prosecution on its part opposed the application. It was the prosecution's case that the trial court took the interest of the victim of the crime into account when it declined the Applicant's application to recall

the witness. As regard bail, the prosecution submitted that the trial court was justified in making the decision that it did after it had established that the Applicant had interfered with witnesses.

This court has considered the facts of this application. Whereas the law allows an accused person the right to recall a prosecution witness who has already testified, that right is not absolute. The trial court will be guided by the reasons given by an accused person in seeking the recall of a witness and the broader interest of justice. In the present application, the Applicant applied to recall the complainant on the grounds since instructing counsel, the said counsel had noted that the complainant was not asked questions which would clarify certain pertinent issues. On the other hand, it is the prosecution's case that the Applicant had not established sufficient reasons for the complainant to be recalled. Upon evaluating the rival arguments in that regard, this court is of the view that taking into consideration the entire context of the case, and the fact that the complainant is the daughter of the Applicant, the trial court properly exercised its discretion in declining to allow the Applicant the right to recall the witness. It was clear to the trial court as it is to this court that the complainant would be subjected to further psychological trauma if she is put on the trial stand again. This is taking into consideration the fact that the complainant is a vulnerable witness and has been declared to be a child in need of care and protection. The Applicant's application in that regard lacks merit and is dismissed.

As regard the Applicant's plea that he should have his bail restored, the Applicant is on a firmer ground. It was clear from the Ruling of the trial court that the person, who was in fact interfering with the witnesses, and particularly the complainant, was the mother of the complainant and not the complainant himself. The prosecution did not place any cogent evidence on record to support its argument that the Applicant indeed interfered with the witnesses. The fact that the Applicant continued to stay with the complainant after the sexual assault incident had been reported to the police is not sufficient ground for the trial court to reach conclusion that he had interfered with witnesses. From the record, it was evident that the Applicant has attended court without fail. He has fulfilled a fundamental requirement when bail is granted. There is no suggestion that he is likely to abscond if the bail that was granted to him is restored.

In the premises therefore, this court finds merit with the Applicant's application for revision of the trial court's decision dated 2nd June 2017 under **Section 362** of the **Criminal Procedure Code**. That decision is brought to this court and is set aside and substituted by a decision of this court restoring the bond that was granted to the Applicant on the same terms. It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF JULY 2017

L. KIMARU

JUDGE