



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CRIMINAL REVISION CASE NO. 27 OF 2014**

*(From the original conviction and sentence in criminal case No. S.O 22 of 2011 of the Chief Magistrate's court at Malindi)*

**CHIEF MAGISTRATE .....APPLICANT**

**VERSUS**

**JAPHET KALUME**

**SHUJAA GABRIEL.....RESPONDENTS**

**ORDERS ON REVISION**

*(Before Hon. Mr. Justice Said J. Chitembwe on 5th March, 2015)*

This matter was placed before me under Section 363 (2) of the Criminal Procedure Code. The two accused persons were charged with gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The charge sheet did not prefer a different charge for each accused but simply combined both accused. This anomaly was detected after the prosecution had closed its case.

The proceedings show that the prosecution was forced to close its case without calling other witnesses. Under Section 364 of Cap. 75, this court has powers to alter or reverse orders made by the subordinate court. The accused have not been convicted or acquitted. I will exercise my powers under Section 362 and 364 of Cap 75 which allows this court to satisfy itself as to the regularity of any proceedings of a subordinate court and order that the order putting the accused persons on their defence is hereby set aside. Similarly the proceedings relating to the closure of the prosecution case is also set aside. In essence therefore, I do hereby direct that the prosecution case be re-opened. The prosecution shall be at liberty to amend the charge sheet and bring separate charge sheet for each accused. The accused shall be at liberty to recall the witnesses.

In the case of **MURUNGA V REPUBLIC (2008)1 KLR G&F 1223**, the Court of Appeal held that two or more men cannot jointly and at the same time commit the offence of gang rape against one woman as each of the men commits the act of rape individually. It is a requirement that each offender must be charged separately.

The issue is purely technical and there shall be no prejudice on the accused who have had two years to tender their defences but have not done so. The magistrate hearing this matter is hereby directed to have the prosecution case re-opened and the order putting the accused on their defence is set aside. Should the prosecution fail to amend the charge sheet, then the trial court shall be at liberty to proceed in the manner it deems fit.

Dated and revised at Malindi this **5th** day of **March, 2015**.

**Said J. Chitembwe**

**JUDGE**