

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.207 OF 2015

REPUBLIC.....APPLICANT

VERSUS

P M M.....RESPONDENT

RULING

The Director of Public Prosecutions was aggrieved by the Ruling made by the trial magistrate in **Nairobi CMC Criminal Case No.197 of 2015**. The Ruling was made on 6th August 2015. In the Ruling, the trial court declined the Director of Public Prosecutions' application seeking to have the complainant in the case testify with the assistance of an intermediary. The prosecution contends that the trial court erred because it failed to recognize that the complainant was a vulnerable witness who needed to testify with the assistance of an intermediary. The prosecution was of the view that the Respondent would not be prejudiced if the complainant testifies with the assistance of an intermediary because he will have the opportunity to cross-examine the complainant. The application is supported by the annexed affidavit of Cynthia Akoth Opiyo, the prosecuting counsel in the case.

The application is opposed. A.K. Machuki, counsel for the Respondent swore a replying affidavit in opposition to the application. She deponed that the complainant was not a vulnerable person within the meaning of **Section 2, 3(6) & (7) of the Sexual Offences Act** to entitle her to be assisted by an intermediary when she testifies before court. She deponed that the complainant did not have capacity to give evidence before court on account of her mental status. A Consultant Psychiatrist had written a report which confirmed the complainant's incapacity to testify before court. She was of the view that the trial court properly appreciated the provisions of **Section 125(2) of the Evidence Act** in declining to allow an intermediary to assist the complainant when she testifies before court. She swore that the Respondent would be prejudiced if an intermediary is allowed to assist the complainant to testify in the case because the proposed intermediary had lived with the complainant for more than a year and therefore the likelihood that she may have coached the witness cannot be ruled out. She stated that the Applicant had not placed sufficient grounds to enable this court firstly, declare the complainant to be a vulnerable witness, and secondly, for the complainant to be assisted by an intermediary during the hearing of the case. The competence of the complainant to testify had also been put in doubt by the medical report. She urged the court to dismiss the application.

This court has carefully considered the rival arguments made by counsel for parties to this application. **Section 125** of the **Evidence Act** provides as follows:

“(1). All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to the questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

(2). A mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.”

In the present application, the prosecution applied before the trial court under **Section 31** of the **Sexual**

Offences Act for the complainant, who is a child, and also a person with mental disability, to, firstly, be declared a vulnerable witness and secondly, to be allowed to give her testimony with the assistance of an intermediary. **Section 31(4)(b)** of the **Sexual Offences Act** allows the trial court to give directions to the effect that a vulnerable witness may give evidence through an intermediary. The application was objected to by the defence. In its objection, the defence argued that since a psychiatrist had already made a report to the effect that the complainant lacked the requisite competence to give evidence in court, if the application sought by the prosecution was allowed, it would imply that a person with no competence is being allowed to testify by another means. The defence was apprehensive that the intermediary may coach the complainant to adduce evidence that will implicate the Respondent. The prosecution submitted that its only concern was for justice to be done in the case.

On evaluation of the facts of this case, this court holds that the trial court erred when it declined to allow the prosecution's application. From the court record, it was apparent that the complainant is both the child of the Respondent and a person with mental disability. It was not clear from the medical report whether the complainant's inability to testify in court was permanent or temporary. This is because the Psychiatrist who wrote the report on 7th November 2014 was of the opinion that although the complainant was mentally unstable at the time of examination, the doctor required further information from the mother of the complainant and the records in regard to her (the complainant's) performance at Jacaranda Special School. It is clear that that report was not conclusive as to the complainant's competence or otherwise to testify in court.

In regard to the question whether the complainant is a vulnerable witness pursuant to **Section 31(1)(b) & (c)** of the **Sexual Offences Act**, this court holds that indeed the complainant is a vulnerable witness by virtue of being both a child to the Respondent and a person with mental disability. The Respondent has been charged with committing incest with the complainant. The Respondent is the father of the complainant. The vulnerability of the complainant cannot therefore be in doubt. The complainant no longer lives with the Respondent. She is being taken care of by a Child Welfare Organization. The question that remains for determination is whether the complainant should be allowed to testify through an intermediary as provided under **Section 31(4)(b)** of the **Sexual Offences Act**. From the submission made by the prosecution, it was evident that taking into account that the complainant is a vulnerable witness, she cannot testify without the assistance of an intermediary. This court however directs that another medical report be prepared by the Psychiatrist taking into account the concerns raised by the Psychiatrist. This will enable the trial court determine the nature of assistance that the intermediary will accord the complainant during the time that she will testify before the court. The concerns raised by the defence regarding the competence, and or whether or not the complainant has been influenced by the intermediary will be addressed by the defence when they will be given an opportunity to cross-examine the complainant.

The upshot of the above reasons is that the order of the trial court made on 26th August 2015 is hereby revised and set aside. It is substituted by an order of this court declaring the complainant a vulnerable witness under **Section 31(1)**, who shall be accorded the right to testify with the assistance of an intermediary as provided under **Section 31(4)(b)** of the **Sexual Offences Act**. Before the complainant testifies, a medical report must be filed by the Psychiatrist who earlier examined her. The Psychiatrist must be provided with information that will assist the doctor prepare a comprehensive report. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2015

L. KIMARU

JUDGE