Director of Public Prosecutions v Tawa (Criminal Case 010 of 2023) [2023] KEMC 264 (KLR) (8 May 2023) (Ruling)

Neutral citation: [2023] KEMC 264 (KLR)

REPUBLIC OF KENYA

IN THE KWALE LAW COURTS

CRIMINAL CASE 010 OF 2023

ZK KAGENYO, RM

MAY 8, 2023

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS ..... REPUBLIC

AND

JAPHETH CHIDIMA TAWA ..... ACCUSED

RULING

Introduction

1. The Accused person is facing an indictment of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. (sic)

2. The particulars are that on September 2022 at [Particulars Withheld] of Kwale county within coast region unlawfully and intentionally caused his penis to penetrate the anus of M.A a girl child 15 years. (sic)

3. Charges were read over to the accused person on the 19th day of January 2023 where he denied the accusations.

4. Pretrial conference was conducted on the 20th day of February 2023 and after the documents were supplied by the prosecution to the defense counsel for the defense, Mr. Rono rose and made an oral application that is subject of this ruling. Mr. Rono acknowledging the receipt of the documentary evidence as supplied by the State, made the application for the court to compel the medical officer to write a witness statement stating that the defense had not been supplied with such a statement from the medical practitioner despite him being indicated as the 3rd witness on the face of the charge sheet.

5. Mr. Rono based his application on the fact that ordinarily, medical practitioners while testifying do give technical terms and hence the defence needed to interrogate the evidence beforehand as counsel could not ask questions on things that he did not know.

6. Mr. Rono anchored his application on articles 25 and 50 (2) (j) of *the Constitution* of Kenya and expressed his belief that it was reasonable to ask the doctor to write the evidence he had in advancement of the right to fair trial.

7. Further, Mr. Rono urged the Court to consider that the charges that the accused person is facing are serious and have wider ramifications to the accused if found against him.

8. The applicant said to rely on the case Ahmed Abdullahi Maalim -v- Republic [2022] where the Court was said to have relied on the case of Thomas Chomodley -v- Republic in finding that the prosecution should supply all the material evidence such as copies of statements and such other evidence.

9. Mr. Rono invited this court to change the norm where medical practitioners do not record statements as witnesses, noting that nothing shall be prejudicial if the medical officer writes the statement.

10. In response the prosecution counsel Mr. Khamis observed that the clamour by the defence is that he wanted to know what the clinical officer was to say in evidence and to quench his thirst for such knowledge, counsel for the state pointed out that the clinical officer has already recorded the observations he made at the forms P3 and PRC and on the Medical Treatment Notes.

11. Mr. Khamis urged this court to consider that a clinical officer is not a regular or any other witness but an expert witness and by nature of him being an expert witness that is the very reason that the court and the prosecution equally sail in the same boat with the defence in struggling to follow up on the medical terms used by the expert.

12. It was Mr. Khamis's further submission that the expert will only be testifying to what he has written in the documents and warned that allowing such an application will be opening a Pandora's box.

13. While responding to the authority relied on by the defense, he said that the authority talks of supplying the evidence and qualified that as the prosecution they have already supplied the evidence to the defense. It was his opinion that they discharged their constitutional mandate by supplying in advance the evidence they have to rely on.

14. In his rejoinder Mr. Rono wondered how a Pandora's box was to be opened with mere statement being recorded by the medical practitioner. He impressed that the accused has the right to challenge the evidence to be adduced and observed that experts do add terminologies which are not in the documents supplied. It was his contention that those terminologies cause difficulties during cross-examination and that is why the doctor should write a statement and indicate what he observed as it is difficult to ask questions on things that one does not have information. At this instance, he buttressed his argument by relying on what he said was the observation of the court in the case of Robert Muli Matoro -v- Republic [2005], said to have been determined by justice Nyanje.

15. In his closing remarks Mr. Rono told the court to consider that trials in Kenyan courts are on adversarial basis and the court plays the role of an umpire.

16. After these submissions by the parties the parties invited the court to make its ruling this was despite Mr. Rono depriving the Court the benefit of looking at the authorities he was relying on as none was supplied to the court.

Analysis And Determination

17. My understanding of the quest by the defence is that he needs a more synthesized set of facts that the medical practitioner is to testify on in court.

18. As this court is making this ruling, I was wary and cautious not to overstep on the mandate of this court. I say this because the nature of the application by the defence counsel was grant of a sweeping order that medical practitioners be compelled to record statements which is a shoe size bigger than this court as that is the preserve of the High Court to make such declarations.

19. Informed by the limitations on the jurisdiction and the powers therefrom, this court thus confines its findings within this case singularly as it has been invited by the defence.

20. It is common ground and an undisputed fact that medical practitioners are rightly regarded as expert witnesses falling under section 48 of the *Evidence Act*.

21. My interactions with the practice in criminal law in our courts of law gives me an unfair advantage in discerning the background from which Mr. Rono is coming from with his application.

22. Many are times when medical practitioners become excessively economical with recorded information on the standard forms and the medical treatment notes as it would be expected but tends to be overly verbose and generous with the oral testimony while at the witness box.

23. It is not a surprise to see a medical practitioner who, while testifying, is holding a Medical Examination Report (Form P3) bearing less than 10 words, save as for the obvious name and address of the patient and the general appearance of the patient as he attended the facility, but from such form P3 takes the court to an extensive piece of evidence from his head some of it being medical lessons to the court and the parties present.

24. The generally agreed practice in the adduction of evidence by experts in court is that they are bound to establish their expertise to the satisfaction of the court, their knowledge in the field, the method relied on in coming up with the findings and now the findings thereof. In practice in our courts, there is a clear consistency in consonance with the practice aforestated when experts to wit among others, handwriting experts, ballistic experts, government analysts, forensics experts such as cybercrime analysis experts, officers from the CBK on currency notes analysis among others, preparing written and comprehensive reports detailing the method used and the observations to greater details, but this is a feature conspicuously missing in our medical reports.

25. This could understandably be said to be probably influenced by the hierarchy of purposes by the doctors while attending patients where saving the life of the patient ranks higher and other ancillary issues such as legal processes and claims come secondary. Documents such as medical treatment notes are documents which human intuitions, while faced with a medical case, one would record an observation rather than the method used or scientific or medical apparatus used in observing and later the observation therefrom.

26. However, it is such reflexive findings by the medical practitioners that find their way in our courts of law and are now to determine the enjoyment of the rights by another as where we are presently and may determine the denial or continued assurance of the liberty and other freedoms of the other. Should the court treat the right to fair trial of the accused as subservient to these said practices by medical practitioners? In reasoning, whether for example deductive or inductive, it is to be seen that there is a premise behind an inference. Posting the inference without giving the premise fails to provide the foundation by which one would cross-examine the other. To that extent, I agree with Mr. Rono that any further information by the medical practitioner while at the witness box, if not cautiously weighed would amount to the much frowned upon trial by ambush, considering that approximately close to above 80% of the litigants are unrepresented and hence may lack the skills or knowhow to challenge such on-the-spot information.

27. It is my finding that right to fair trial is paramount and should remain as sanct as Article 25 (c) of *the Constitution* of Kenya declares it to be. What purpose does unfathomable documented piece of evidence serve even if served well in advance? I find no value in scribbling mystiques only to demystify while at the witness box as an ambush to the other.

28. Be that as it may, it is worth noting that a trial is not a relay sprint race where a baton has to be passed and taken over immediately from one sprinter to the other and the one receiving the baton has to mandatorily and immediately take off to pass the baton to the other or touch the finish line. A trial is a process which can accommodate pauses to prepare. A defence counsel or the accused person may move the court to have a witness stood down in order to prepare for cross-examination or even recall such a witness who he feels that there is need for further cross-examination, save as to say, within certain set parameters. It is such privilege accorded to the accused person who is said to be the most favoured child in the criminal justice system that would provide a panacea to the instant troubles and worries by the defence counsel if he feels the inadequacy of the evidence they have been supplied with early in advance. At that instance, the recorded evidence by the Medical Practitioner would be on the court record and as guaranteed by Article 50 (5) (a) of *the Constitution* of Kenya, the accused would apply and be supplied with the same and make the necessary further preparations.

29. It would be proceeding per incuriam if this court would make a finding that the evidence by medical practitioners as documented in the supplied medical documents is by default insufficient until that medical practitioner testifies orally and the court gets to see the additional material. Nothing should be construed from this ruling to be the import of such by this court and I dare say that each case depends on its own merits.

30. As I conclude, I wish to restate that preparedness in a trial is on a personal level and one's limitations in preparations should not be construed to mean to result to an unfair trial. It would therefore be a misnomer to infer that Article 50 (2) (j) of *the Constitution* of Kenya is breached just because the prosecution has not supplied what the defence would have desired to be supplied with. The essence of being supplied in advance is to prepare which includes research, comparing and interrogating the processes involved in a field and in that regard, hence the coinage of the term, learned friend for the presumed capability of discerning and reading all aspects of human endeavour with notable expertise although one is not an expert in such a field.

31. While considering the authorities relied on by the defence counsel, I find that none of them directly related to the present case as they were talking of the right to be supplied with evidence well in advance which no authority can more authoritatively give it than the supreme law under Article 50 (2)(j) has explained it.

32. In the end, I lack merit in the instance case and disallow the same.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 8TH DAY MAY, 2023.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of;

Mr. Archbald Kimbada - Court Assistant.

Ms. Rosemary Nandi, ADPP, for the State

Mr. Rono for the Accused Person

Japheth Chidima Tawa-The Accused Person