



Kilonzo; Director of Public Prosecutions (Respondent) (Criminal Case E035 of 2021) [2022] KEMC 23 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEMC 23 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E035 OF 2021
ZK KAGENYO, RM
MAY 5, 2022**

**IN THE MATTER OF
EMMANUEL KILONZO APPLICANT
AND
DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT**

RULING

Background

1. The accused person is charged before this court with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 22nd day of May 2021 at Kwale Police Station Female Cells Toilets, [Particulars Withheld] within Kwale county, intentionally and unlawfully caused his penis to penetrate the vagina of MMK a child aged 15 years.
2. In the alternative of the main count, he is charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 22nd day of May 2021 at Kwale Police Station Female Cells toilets, [Particulars Withheld] within Kwale county, intentionally and unlawfully caused his penis to touch the vagina of M.M.K a girl aged 15 years.
3. The matter has proceeded for hearing with one witness testifying. When the matter came up for hearing on 21st April 2022, the accused person through his newly appointed advocate Mr. Enoch Ratemo made an application for the recall of PW 1, the complainant in the matter.
4. Mr. Ratemo gave his reasons as that he had realized that the matter proceeded without the involvement of an advocate and that there were a few questions he would like to put to the complainant.



5. In her reply, the DPP opposed the application vehemently. She submitted that the accused person had been given adequate time to cross examine the witness when the matter came up for hearing. She said that the accused person is a trained investigator and hence he knew what was to be asked.
6. It was the submission by the DPP that at the time PW 1 testified, she was under witness protection because she had received threats from the accused person and that after her testimony, the witness protection agency released her back and hence she is not under protection any longer. It was therefore the view by the DPP that recalling PW 1 would be prejudicial to her as a child first and as a witness too.
7. In his rejoinder based on the DPP's submission, Mr. Ratemo said that the law allows recall of a witness and it won't prejudice the complainant as it is the accused who is on trial.

Analysis And Determination

8. Before this Court delves into the analysis of the matter, the court finds it imperative to appreciate its historical background.
9. The accused person was arraigned on 1st July 2021 where he pleaded not guilty to the charges. At that point, the DPP opposed the release of the accused on bail/ bond on among other reasons protection of the victim, as a witness, from interference by the accused person. Upon a hearing of both parties, the learned magistrate ordered for a pre-bail report. This can be found from the proceedings of 1st July 2021.
10. On 15th July 2021, Mr. Chimera, advocate, was on record for the accused person who however was not produced in court.
11. On 15th July 2021, the Probation and Aftercare Services Department filed their report prepared by Eve Ndago. Based on this report, the presiding magistrate then, on the 16th September 2021 granted the accused person a bond of Ksh. 300, 000/= with one surety of similar amount. This was to be revised downwards later on 20th January 2022 to a bond of Ksh. 200, 000/= with one surety or a cash bail of Ksh. 100, 000/=. On this 16th day of September 2021, the matter was certified ready for hearing.
12. Relevant to this application from the stated Bail Information Assessment Report that the court relied on is the contents at pages 3, on the Victim Views and Concerns and page 4 on the sentiments of the Children Officer. From these two, it can be seen that there were allegations of threats on the complainant but at the time the court was granting the bond, the complainant was said to have been placed in secure place even though there were suggestions that, before the release of the accused on bail/ bond, the victim ought to have been allowed to testify first.
13. On 17th January 2022, Mr. Koja, advocate, came on record for the accused person replacing Mr. Chimera advocate who had appeared only once out of the 7 court appearances of this matter, and on 20th January 2022, Mr. Koja was absent and after the bond terms were reviewed downwards and a hearing date slated for 21st February 2022, this matter was allocated to this court. The matter was mentioned before this court on 10th February 2022 and the hearing date was maintained, by consent of the parties and concurrence of the court.
14. On the hearing date, the DPP presented 3 witnesses, one of them being the complainant and at the call-over stage, Mr. Koja Kisiwa who was representing the accused confirmed that he was ready to proceed with the hearing. A time allocation was set and later when the matter was called out for hearing, Mr. Koja had an application to make.



15. Mr. Koja for the accused person applied to cease acting for the accused person as after he had gone through the witness statements, he noticed that one Kaingwa Bendigo, the father to the complainant was his client on previous matters and now that he was on the other side, Mr. Koja felt conflicted. He effectively withdrew and left the accused in the waters to swim by himself. The court however is appalled by the “preparedness” of Mr. Koja as this was an issue in which he would have noticed well in advance at his chambers even before the matter came up that day.
16. The court gave the accused audience. When he addressed the court, the accused person made two applications, one for adjournment and two, a one-month period to look for another advocate.
17. The DPP did not object to the application in principle but what appeared uncomfortable to her was the issue of time as she informed the court that the complainant in the matter was under witness protection and that the agency that was holding her was growing impatient and would not hold her for too long.
18. The court was called upon to balance on the two conflicting positions and the accused was ultimately granted a one-month period to put his house in order whereafter the matter would proceed for hearing on the 22nd March 2022. On this date, the accused person was ready to proceed through self-representation and in fact he applied to start with the complainant as PW 1. On this date, only the complainant testified, she was cross examined by the accused person to his satisfaction and after her evidence, the matter was adjourned to 21st April 2022.
19. It is on 21st April 2022 that Mr. Enock Ratemo, advocate, came on record for the accused and on this date, he had 2 applications to make. First, he made an application for adjournment as his client was too inebriated on that date that he could not be able to logically participate in the proceedings of the day and the 2nd application is the subject of this ruling. The court, considering the position of mental capacity in a trial, granted the former application and remanded the latter for 5th May 2022.
20. An application for recalling of a witness, on the application of a party, is founded under section 146 (4) of the *Evidence Act* where it states;

The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.

This is to be contrasted with recall or a summoning, suo motu by the court under section 150 of the Criminal Procedure Code.

21. From the wording of the section, by the use of the word may, it is a discretionally power granted upon the Court, which on its part, the court must exercise it judiciously depending on the circumstances and merits of a case-by-case basis, noting that no two cases are the same. This Court takes lessons from the finding of Lesiit J in Republic v Fredrick Ole Leliman & 4 others [2017] eKLR where the judge held that,

Under section 146(4) of the *Evidence Act*, the court has ample power to permit the re-calling of any witness either for further exam-in-chief or for further cross-exam. The rider is that such power must be dictated by exigency of the situation, and fair play and good sense as a safe guard guided by the requirements of justice. This obviously depends with the unique facts and circumstances of the case. See Rajeswar Prosad Musra vs. State of West Bengal & Another 1966 SCR (1) 178. The power to re-call a witness must be exercised judiciously and not capriciously or arbitrarily and must only be exercised in order to meet the ends of justice and must be for strong and valid reasons. (Underline mine).



22. In order to exercise this discretion, the court acts on the reasons advanced by the applicant. These were the sentiments of Nagillah J in *Charles Moraba Pius v Republic* [2017] eKLR where the Judge held that,

To recall a witness for cross-examination or otherwise is permissible both under the law of evidence and under Criminal Procedure Code. However, the party applying must lay sufficient ground for the recall, a desire to clarify a point, must point out the point he needs to clarify in the evidence so far adduced. A mere statement that “I recall PW8 & PW9” for cross-examination is not sufficient. (Emphasis mine)

This was the similar finding by Meoli J in *Philemon Kiogora Munjuri v Republic* [2018] eKLR, where she held that,

The reasons given for the recall are not firmed up by substance; it is not enough to allege likely prejudice or vague evidential matters that require ‘clarification’ as the Applicant has stated in the supporting affidavit. (Emphasis mine)

23. The applicant in this matter made a general remark that “the matter proceeded without the involvement of an advocate and that there are a few questions I would like to put to the complainant.” This Court verily respects the involvement of an advocate in a trial. In fact, not as a matter of feelings, empathy or sympathy but as a matter of it being a constitutional right under Article 50 (2) (g) thus,

Every accused person has the right to a fair trial, which includes the right to choose, and be represented by, an advocate, and to be informed of this right promptly.

A trial may be vitiated if it is shown that the accused was denied of this right by the Court. This right gives both the Court and the accused respective obligations. The court is mandated to give the accused the avenue, information and opportunity to choose an advocate while on his part, the accused has a mandate of making that choice. Generally, the court cannot make the choice for the accused, and the choice that the accused makes binds him.

24. After changing the advocates twice, the accused opted to fight the battle by himself. He confirmed to the court that after one month of rethinking about his legal representation after the withdrawal of Mr. Koja, he was ready to proceed and indeed craved to start with the complainant. He proceeded without counsel on that date. This court granted him an opportunity to cross examine the complainant at length. It is this Court’s finding that the applicant has not demonstrated what specifically is remaining from the PW 1 to warrant her recalling.

25. On the other hand, the DPP contends that this application is being made after PW 1 was released from custody of the witness protection agency. One of the worries of the DPP since inception of the case was that the accused was likely to interfere with the complainant once released on bail. This was equally captured in the pre-bail report. Even though there has not been demonstrated through evidence that there has been such interference, this court cannot dismiss the DPP’s fears as just a palaver considering that the accused had been out on bail and the complainant was equally out there on her own. The DPP is worried of the integrity of the evidence by the minor which she believes that a recall would defeat the purpose of the protection that the complainant had been accorded. A breach of the integrity on the part of the DPP’s evidence, and particularly if occasioned by the accused person is likely to cause serious prejudice on the case of the DPP.



26. In Vincent Otieno Otieno v Republic [2019] eKLR, Mwango J advised that,

Unless serious prejudice would be occasioned to the state, or it can be shown that the request to have the witnesses recalled is based on ulterior motive, a court should generally be inclined to allow recall as serious administration of justice failure could be the consequence.

The accused person having been afforded adequate time to put his house in order, considering that he chose on to proceed unrepresented and that in the previous court appearances he never complained of the fluctuating attendance of his advocates at different dates and considering that out of the many court appearances he had never appeared in court drunk but, on this date, he opted to appear in court heavily drunk, and further considering the concerns registered by the DPP on the likely interference of witness, this court finds that this application was made based on ulterior motives. The court verily questions the modus operandi of the accused person and finds the fears of the DPP as not real and not just fears.

27. I find that Counsel did not advance any specific reason to recall this witness and whereas the accused has a constitutional right to legal representation the court should not allow the same to be abused by the accused and turn a blind eye on the constitutional rights of the complainant under Article 50 (9) and at the attendant legislation being the *Victim Protection Act*, 2014. The court has a duty to protect both the accused and the complainant.

28. A similar finding of a 2 High Court bench on revision which had held that,

In our considered view, however, there was no such miscarriage of justice. The trial court was right to dismiss the application to recall the said witnesses. Firstly, the appellant did not lay any ground for the said application. No reasons were given why the application was necessary or why the previous cross-examination was inadequate. We are satisfied, that the appellant was given ample time to cross-examine the said witnesses which he did for PW1 and PW2. For PW3 the appellant stated he had no questions for the witness. The dismissal of his application to recall these witnesses was not a miscarriage of justice. The application was not grounded on any reasons or justifiable facts, or on a desire to clarify any previous issues. It was an application which any prudent court could not grant.”(emphasis mine) was upheld by the Court of Appeal on appeal in *Elijah Kaigwa Nyambura v Republic* [2016] eKLR, by the Court stating that,

The High Court reviewed the exercise of discretion by the trial court and made a finding that the appellant’s application was not grounded on any reasons or justifiable facts or on any desire to clarify any issues and that there was no miscarriage of justice. In the circumstances of this case, we are satisfied that the High Court reached the correct decision.

29. Similarly, I find that the application by the accused person is not grounded on any reasons or justifiable facts or on a desire to clarify any issue from the evidence of the complainant.

30. However, this court will disagree with the invitation by the DPP to find that the accused person was a trained investigator. The court appreciates that the DPP makes this inference from the fact that the accused is a police officer and hence must have been trained on investigations. I differ with that opinion as it is not a proven fact before court that all police officers are trained investigators neither is there evidence from the accused that he is one. However, I will appreciate the background of the inference by the DPP that the accused cannot be treated as a totally ignorant accused person as he has the advantage of exposure into the world having gone through the high school education, being a researcher at KEMRI and ultimately serving as a police officer in South Kinangop in Nyandarua county, Border



Patrol-Quick Response Team Unit and Kwale Police Station, after a rigorous training. He cannot be said to be of wanting intelligence. Lord Denning in *Pett vs Greyhound Racing Association* whose wisdom was relied on by Mativo J in *Joseph Ndungu Kagiri v Republic* [2016] eKLR, while addressing the question of legal representation stated that,

It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task

This court had the advantage of observing the accused when he was cross-examining PW 1. He was exemplarily composed and strategic in his mode of examination. He cannot be said to have been prejudiced by the lack of the legal representation based on the reasoning of the learned Lord Denning. In fact, having consulted a plethora of authorities in the above cited case, Mativo J ended up with a finding that,

Considering the above authorities and the facts of this case and the judicial interpretation of substantial injustice, I am not persuaded that the appellant herein has satisfied any of the tests stated above to demonstrate that substantial injustice was occasioned to him due to fact that he and his co-accused were unrepresented.

31. I will make a similar finding in this matter.

Determination

32. The upshot of the foregoing is that the instant application is hereby disallowed.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 5TH DAY OF MAY, 2022.

KIONGO KAGENYO

RESIDENT MAGISTRATE

In the presence of;

Mr. Felix- Court Assistant

Ms. Faith Luseno, for the DPP

Emmanuel Kilonzo-Accused

Mr. Enock Ratemo- Advocate for the Accused.

