

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

MISC. CRIMINAL APPLICATION NO.E009 OF 2024

MAHAMED IBRAHIM MOHAMED.....ACCUSED/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The file of the lower court in Hola Sexual Offence Case No. E001 of 2022 in Republic v Mahamed Ibrahim Mohamed has been placed before this court vide an application dated 22nd April 2024 wherein the accused/Applicant is seeking for orders:

- 1) That the Honourable Court be pleased review and/or set aside the ruling and or orders of the Honourable B. Kabanga SRM issued on 22nd February 2024 in the Chief Magistrate Court Hola, Criminal Case No. E002 of 2024: Republic Versus Mohamed Ibrahim Mohamed; disallowing production of the affidavit dated 20th November 2023 as sworn by the victim/complainant in the matter.
- 2) This Honourable Court be pleased to order that the affidavit dated 20th November 2023 and sworn by the victim/complainant be admitted for purposes of production by the accused in support of his case.

- 3) That further this Honourable Court be pleased to review or set aside the Ruling and or orders of the Honourable B. Kabanga SRM issued on 22nd February 2024 in the Chief Magistrate Court Hola, Criminal Case No. E002 of 2024: Republic Versus Mohamed Ibrahim Mohamed;
2. The application is based on grounds stated on the face of the application and supported by the affidavit of the Applicant. The gist of the application is that the Applicant is facing a charge of incest at the magistrate`s court at Hola. The complainant in the case is his own daughter. At the close of the prosecution case the trial court found the Applicant to have a case to answer and was placed to his defence.
3. The case came up for defence hearing on the 14th December 2023 when counsel for the Applicant Mr. Cohen Amany, informed the trial court that the defence had been served with an affidavit sworn by the victim in the case dated 20th December 2023 wherein she recanted the evidence she had adduced in court against the accused/Applicant. Counsel stated that they had been served with the affidavit by Mr. Chacha, counsel holding brief for the complainant and the same had been placed in the court file. Mr. Amany made an oral application to be allowed to produce the said affidavit as evidence in their case.
4. The Prosecution objected to the application by the defence and sought to have the affidavit struck out from the court record on the ground that the same was unprocedurally

sneaked into the court file. The trial magistrate agreed with the prosecution and stated in a ruling dated 22nd February 2024 that the move by counsel watching brief for the victim to introduce the affidavit in court without adherence to due process offended section 9(2) of the Victims Protection Act. The court held the affidavit inadmissible and struck it off from the court record. It is that action that prompted the filing of the application that is now before this court.

5. The Applicant argues that the action by the trial court of striking the affidavit off the record had the effect of barring him from relying on it in his defence. That locking out the said affidavit will be prejudicial to the applicant and constitutes a miscarriage of justice. They urged the court to set aside the ruling of the trial court and allow the accused to rely on the said affidavit in his defence.
6. The state opposed the instant application vide the replying affidavit of Mr. Michuki Alfred, the Prosecution Counsel at Hola sub county office. Counsel stated that the Applicant is facing a charge of incest. That the complainant who is his daughter gave sworn evidence in court and narrated what transpired between her and the Applicant. That the Applicant was placed to his defence. That when the case came up for defence hearing, a counsel purporting to hold brief for the complainant produced an affidavit sworn on 20th November 2023 that was purported to have been sworn by the complainant. The complainant purported to recant her

evidence earlier given in court. That the prosecution opposed the application to have the affidavit produced in court as they did not know the state at which the affidavit was purportedly made. That the Victims Protection Act has placed parameters in which an advocate can participate in court. That it appeared that the counsel watching brief was not acting in the best interests of the minor in placing in court an affidavit that was purportedly signed by the minor in order to defeat justice. That the said advocate never appeared in court again thereby raising questions as to what his intentions were. That the complainant is still a minor with no resources to access an advocate. That she was not in court when the application was made. Therefore, that this was a well-choreographed plan to defeat justice. The prosecution urged the court to dismiss the application.

7. The application was canvassed by way of written submissions of counsels for the accused and the prosecution counsel.

Applicant`s submissions

8. Counsel for the Applicant submitted that section 362 of the Criminal Procedure Code empowers the High Court to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

9. Counsel submitted that the application was properly initiated and in that respect relied on the case of **Republic v James Kiarie Mutengei (2017) eKLR** where the court held that:

The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo-moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question.

10. Counsel made reliance on the case of **Prosecutor v Stephen Lesinko (2018) eKLR** where the court elucidated the principles that guide courts in examining issues pertaining to section 362 of the CPC to be:

a. Where the decision is grossly erroneous.

b. Where there is no compliance with the provisions of the law.

c. Where the finding of fact affecting the decision as not based on the evidence or it is result of mis-reading or non-reading of evidence on record.

d. Where the material evidence on the parties is not considered.

e. where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

11. It was submitted that the decision of the trial court was not only legally untenable but also occasioned a miscarriage

of justice thereby necessitating the invocation of this court's supervisory jurisdiction. That failure to revise and rectify the trial court's ruling would allow grave injustice to persist as the Applicant is being subjected to prosecution based on a claim that the complainant herself has disowned.

12. Counsel submitted that the revisionary powers of the High Court are meant to correct procedural injustice. In this respect the Applicant cited the case of **Joseph Nduvi Mbuvi v Republic (2019) eKLR** where the Court stated that:

The object of the revisional jurisdiction of the High Court is to enable the High Court, in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that

it is also exercisable to determine *the regularity of any proceedings of any such subordinate court as well.*

13. Also cited is the case of **Republic v James Kiarie Mutengei (2017)** where it was held that:

It can be deduced from this evaluation that the jurisdiction on revision will be invoked where there is a decision by a subordinate court, the decision is not subject of appeal, the grounds of revision must exist against the decision being challenged from the subordinate court. The interference under section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous, to justness appropriateness and suitability to trial. The trial magistrate has not complied with the provisions of the law, the findings made and the decision reached failed to take into account the evidence that there was a misdirection of facts on the face of the record, the parties in the case were not heard or given an opportunity to present the case before the decision or the decision being contested by the aggrieved party was arbitrary amounting to abuse of the court process.

14. As was stated by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:**

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

15. The respondent did not make any submissions in the case.

Analysis and determination

16. I have considered the grounds in support of the application, the record of the trial court and the submissions by counsel for the applicant.

17. The application is made pursuant to section 362 of the Criminal Procedure Code (CPC) that provides that:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

18. The section is rooted in Article 165 (7) of the Constitution that provides that:

“The High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order and give any direction it considers appropriate to ensure the fair administration of justice.”

19. It is manifest that the supervisory powers of the High Court under section 362 of the CPC has the sole purpose of correcting errors, irregularities or illegalities that may be committed by the trial court in course of the trial which may

occasion an injustice on an accused person. In **Wangondu v Republic Criminal Revision E145 of 2022, KEHC 15873 (KLR)** the court observed that:

“The objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. This jurisdiction will only be invoked where the decision under challenge is; grossly erroneous, there is no compliance with the provisions of the law, or the finding re-ordered are based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

It therefore follows that, in exercise of revision powers, it is not the responsibility of the High Court to take into account the benefit of the evidence, it merely has to see if the provisions of the law have been properly adhered to by the court whose order is the subject of the revision, as held in;_Major S.S Khanna vs Brig F.J Dillon 1964 AIR 497, 1964 SCR (4) 409).”

20. The trial court in the case against the Applicant refused to admit the impugned affidavit on the ground that section 9 (2) of the Victim`s Protection Act requires the court to evaluate a request by the victim to participate in the case and allow the request where appropriate. That the act of the

complainant`s counsel of sneaking the affidavit into the court file without making an application to participate in the case was in violation of section 9(2) of the Victim Protection Act which provides that:

Where the personal interests of a victim have been affected, the court shall -

(a) permit the victim`s views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court.

21. The court further stated that the views of the victim were not binding on the court.

22. I have perused the lower court`s file and noted that even before the issue of the impugned affidavit was brought up on the 14th December 2023, the defence counsel had on the 15/5/2023 informed the trial court that the complainant had recanted her evidence which she had given before the trial court while testifying in a related case, Sexual Offence Case No.E002 of 2022 where the Applicant was charged with a similar offence of defiling the complainant`s sister. Counsel informed the court that the complainant had stated in the latter case that the evidence she had given against the applicant was a fabrication. The defence counsel had thereupon made an application for the complainant to be recalled for purposes of further cross-examination on the issue. Counsel further made an application for the proceedings in

Sexual Offence Case No. E002 of 2022 to be produced as evidence during the case.

23. The said application was opposed by the prosecution counsel on the ground that the defence had already been given an opportunity to cross-examine the complainant and more so that there was no provision for the defence to produce the proceedings in Sexual Offence Case E002 of 2022 before the court made a ruling on a case to answer. The trial court in a brief ruling stated that it was not procedural for the defence to produce the proceedings in Sexual Offence Case No.E002 of 2022 before the court ruled on whether the applicant had a case to answer. That it was only after the applicant was placed to his defence that he could produce the proceedings and the application was in the view of the magistrate pre-mature. On the issue to recall the complainant, the trial magistrate stated that the Applicant was represented by two defence counsels during the hearing. That what had transpired in another court was not for consideration before the court. The court accordingly dismissed the application by the defence and proceeded with the case.

24. At the close of the prosecution case, the trial court found the Applicant to have a case to answer and placed him to his defence. It is after the Applicant was placed to his defence that he sought to be allowed to use the impugned affidavit as evidence in his case was raised.

25. The issues for determination are, in my view:

(1) Whether the trial court erred in refusing to admit the affidavit of the complainant to be used as defence evidence in the case.

(2) Whether the complainant ought to be recalled as a witness in the case.

26. On the first issue it is to be noted that the Applicant was placed to his defence and has offered his defence in the case. He is now seeking for an order from this court that the affidavit of the complainant recanting the evidence she had given against the applicant be admitted as defence evidence in the case.

27. The law is that evidence in a criminal trial has to be adduced by way of oral evidence. It is only in special circumstances as provided under section 33 of the Evidence Act that the law allows for statements of persons who are dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

28. In this case the complainant is alive. She thereby does not come within the ambit of exempted persons as provided by section 33 of the Evidence Act. Our judicial system is built on the foundation that an adult witness in a criminal trial has to give evidence on oath (or under affirmation) where upon he/she will be subjected to cross-examination. To admit the statement of the complainant in this matter which will deny the other party the

right to cross-examine the complainant will be a violation of our criminal justice procedures. Counsel for the Applicant has not stated any section in the Evidence Act or the Criminal Procedure Code that allows the admission of affidavit evidence such as in the circumstances of this case. For those reasons, I decline to admit the affidavit of the complainant as sought by the Applicant.

29. On the second issue, the trial court refused to have the complainant re-called for further cross-examination after it was brought to the attention of the court that she had recanted her evidence in a related case where the Applicant was charged with defiling the complainant`s sister. Though the Applicant has not raised the issue in his application, it is the view of this court this was a pertinent issue to the case that needs to be addressed by this court. The court has power under the provisions of section 362 of the Criminal procedure Code to raise the issue suo moto.

30. The trial court in dismissing the application by the defence to recall the complainant for further cross-examination stated as follows:

The issues that are said to have arisen in another case in No.E002 of 2022 before Court 1 were not brought before this court and will therefore not be used against the accused herein. The application to recall the victim over what transpired in another case that is not for consideration herein is therefore unmerited. The accused will be at liberty to produce

those other proceedings in the event that the court will find him with a case to answer. The application is therefore dismissed.

31. Section 150 of the Evidence Act which deals with re-call and examination of witnesses provides as follows:

Power to summon witnesses, or examine person present

A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case (emphasis mine).

32. The purpose of cross-examination is to test the veracity and credibility of a witness. Once it was brought to the attention of the trial court that the complainant had recanted her evidence in another court, it was incumbent upon the trial court to summon and re-call her for further examination-in-chief or cross-examination. The whole issue went to the credibility of the complainant as a witness for the prosecution. Her credibility had to be tested during the prosecution case and not during the defence case.

33. In **Republic vs. Hillary Mugo Mwendu & 2 others [2019] eKLR**, it was said, with regard to cross-examination and previous statements of a witness that:

“7. Cross-examination of a witness whether for the defence or for the prosecution is meant to test the credibility of the witness. That is why cross-examination is wide and a witness can be asked leading questions and questions need not only be confined to the testimony even in the evidence in chief or in previously recorded statements. Cross-examination is a useful tool for use in trials and in administration of justice whereby it is used by prosecution against its witnesses who become hostile in order to expose what was previously recorded by them and shake their credibility. This must apply to both the prosecution and defence. Section 153 of the Evidence Act answers the question why cross-examination on previous statements. That is, to contradict a witness on what he states and what he had previously recorded. It goes to test his credibility, discover who he is and shake his credit.”

34. It was therefore a misdirection on the part of the trial magistrate to hold that the issue of the credibility of the complainant could be dealt with during the defence case in the event that the Applicant was found to have a case to answer. The

complainant appeared as a witness for the prosecution and therefore she had to be cross-examined as a prosecution witness. The trial magistrate erred in denying the defence the opportunity to test the credibility of the complainant through cross-examination in view of new turn of events that she had recanted the evidence she had given against the applicant.

35. It is to be observed that section 150 of the Evidence Act allows the court to recall a witness for cross-examination at any stage of the trial if his/her evidence appears to the court to be essential to the just determination of the case. In my view the evidence of the complainant was essential for just determination of the case.

36. In view of the foregoing, it is my finding that the trial court did not use its discretion properly in refusing to allow the cross-examination of the complainant on being informed that she had recanted her evidence in another court. The refusal occasioned manifest injustice to the applicant. In the circumstances, the intervention of this court is required to correct the injustice by revising the decision of the trial court.

37. I therefore order as follows:

That the case for the prosecution be reopened and the complainant be recalled for further cross-examination by the defence (and possible re-examination by the prosecution) on her evidence in

relation to Hola Sexual Offence Case No.E002 of 2022.

It is so ordered.

Delivered, dated and signed at GARSEN this 13th day of November 2025.

J. N. NJAGI

JUDGE

In the presence or

Ms Khadija holding brief for Miss Muthoni for Applicant

Mr. Oluoch for Respondent

Court Assistant - Jumaa