



**Prosecution v Ochieng (Criminal Revision E115 of 2023)  
[2025] KEHC 1273 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1273 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL REVISION E115 OF 2023  
DK KEMEL, J  
FEBRUARY 28, 2025**

**BETWEEN**

**PROSECUTION ..... APPLICANT**

**AND**

**BRIAN PAUL OCHIENG ..... RESPONDENT**

**RULING**

1. The Applicant herein vide a letter dated 25/10/2023 has sought for revision of orders made by the trial court on 11/8/2023 in Bondo Sexual Offence Case No. E038 of 2022 wherein the trial court declined the prosecution’s request to have documents namely treatment notes/books be marked for identification and ordered it to proceed with the case.
2. The Applicant’s gravamen further is inter alia; that the prosecution’s key witness is a six (6) year old minor who had been attended to in hospital following defilement and which was crucial for her to identify those documents; that Article 50(2) of the *Constitution* provides that every party in a case should be given adequate time and facilities to prepare for their case and that the prosecution was to comply with that provision by supplying the documents to the defence after the same had been marked for identification; that the defence did not suffer any prejudice if those documents were marked for identification as they were to be supplied with them thereafter and that they would have an opportunity to prepare their case; that the trial court order in declining to have these documents marked for identification has locked out the prosecution and denied it an opportunity to present the case and which has now caused a miscarriage of justice; it is in the best interest of justice for both parties that the two documents be marked for identification as they are the crucial documents relied upon by the prosecution.
3. The Applicant now urges this court to intervene and call for the record of the lower court and proceed to revise, vary and set aside the orders of the learned trial magistrate dated 11/8/2023 so as to accord fair administration of justice in the matter.



4. The revision was canvassed by way of oral submissions.
5. Miss Mumu for the prosecution reiterated the contents of her letter dated 23/10/2023. She submitted that the treatment notes in question were due to be marked for identification when the defence objected the same on the grounds that they had not been served in time. The prosecution sought to have the witness stood down so that the service of those documents to be effected upon the defence. However, the trial magistrate dismissed the application. She submitted that there is need for the orders to be reviewed so that the case can proceed in the best interest of the parties.
6. The Respondent (Brian Paul Ochieng) who is the accused in the matter opposed the application. He argued that the Respondent is battling lies.
7. I have considered the application by the prosecution as well as the oral submissions. I have also perused the record of the lower court and more particularly the ruling dated 11/8/2023. In the said ruling, the learned trial magistrate held as follows:

“All in all, my considered option is that the state has not met the requirement to be allowed to present additional documentation at this juncture. They have not shown the court any predicament that they may have had in serving the same since it has been established that the same were indeed in their possession. The Counsel for the State stated that she did not know why the same were not served and the proper response is that they ought to have known to form the basis of their application. Without this, the application remained baseless and without grounds in support. The same is hereby dismissed.”

8. It is the foregoing decision that has generated this revision. The revisionary power of the High Court in Article 165 (6) & (7) of the Constitution. The same provides as follows:
  - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  - (7) For purposes of clause (6), 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 or give any direction it considers appropriate to ensure the fair administration of justice.

Being guided by the above provision, this court has the advantage going through the record of the lower court. It is not in dispute that the case involved a minor who is a victim aged six (6) years and a child offender. That being the position, both the prosecution and the defence were to conduct the trial with utmost diligence and care so as to ensure that both the prosecution and defence given adequate time and facilities in order to ensure that each party has their day in court. Even though the prosecution sought to mark the disputed document for identification, it is noted that those documents had not been supplied to the defence. It is also noted that the exercise of marking documents for identification is not the same as producing them. Documents can be marked for identification and produced afterwards. Therefore, no prejudice could have been suffered by the defence if those documents were marked for identification as they would be supplied with those documents to enable them prepare their case and that the witness could still be stood down and be recalled at a later date to proceed with his or her testimony and that the defence would be in a position now to tackle the witness in cross examination. It was therefore erroneous for the learned trial magistrate to deny the prosecution an opportunity to mark the documents for identification. The order by the learned trial magistrate had the effect of shutting out the prosecution from presenting crucial evidence to the court. It seems the learned trial magistrate leaned so much in favour of the defence on the ground that the subject was a



minor. The learned trial magistrate ought to have also considered the fact that the victim of defilement was also a minor aged six years and who was entitled to justice as well from the court.

9. I find the decision arrived at by the learned trial magistrate dated 11/8/2023 was arrived at in error. The same was irregular, and contrary to the prosecution's right to fair trial and due process under Article 50(2) of the Constitution. There is therefore merit in the prosecution's request for revision of those orders so as to ensure that justice is not only done but is seen to be done.
10. In view of the foregoing observations, the revision has merit. The same is allowed. The following orders are hereby issued:
  - a. The ruling by the learned trial magistrate dated 11/8/2023 is hereby set aside and substituted with an order allowing the prosecution's application to mark the treatment notes/books for identification.
  - b. PW3 be and is hereby recalled to continue with her evidence in chief.
  - c. The prosecution is ordered to ensure the said documents are supplied to defence forthwith to enable them prepare for their case.

**DATED AND DELIVERED AT SIAYA THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of:

Brian Paul Ochieng...Subject

N/A.....for the Subject

Soita.....for Prosecution

Ogendo.....Court Assistant

