**Republic v Nyakundi (Criminal Revision 524 of 2020)**
**[2023] KEHC 1063 (KLR) (Crim) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 1063 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL REVISION 524 OF 2020**

**GL NZIOKA, DO CHEPKWONY & JN NJAGI, JJ**

**JANUARY 19, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**ASSA KIBAGENDI NYAKUNDI ..... RESPONDENT**

**RULING**

1. The ruling herein relates to a revision application filed by the applicant at Kiambu High Court *vide* a letter dated May 29, 2020. It also deals with a constitutional issue as to whether; the provisions of section 82 of the *Criminal Procedure Code* (herein "the Code") is inconsistent with the *Constitution* of Kenya 2010 (herein "the *Constitution*") and therefore should be declared null and void.

2. The revision application arises from the ruling of the learned trial magistrate T.B Nyagena, (SPM) rendered on May 20, 2020, *vide* Chief Magistrate's criminal case No 704 of 2019, in which the court declined to allow the applicant's application to enter a *nolle prosequi* to discontinue proceedings against the respondent.

3. However, before delving into the substance of the matter, brief background facts will suffice for better understanding thereof. On April 20, 2019, the respondent was arraigned before the Chief Magistrate's Court at Kiambu, charged with the offence of; manslaughter contrary to section 202 as read with section 205 of the *Penal Code* (cap 63) laws of Kenya. He pleaded not guilty to the charge and the matter was set for pre-trial directions on May 10, 2019.

4. By a letter dated April 30, 2019, the applicant requested for the matter to be mentioned earlier than the scheduled date for the purpose of making an application for withdrawal of the charge against the respondent. The matter was then mentioned on May 2, 2019. However, the application was not made

as the applicant informed the court that the prosecution file was being reviewed by the Director of Public Prosecutions (herein "DPP"). The pre-trial mention date of May 10, 2019, was retained.

5. On that date the applicant in exercise of the powers conferred to it by article 157 (6) (c) and (9) of the *Constitution* of Kenya, 2010 and legal notice No 134 of 2010, filed in court a *nolle prosequi* document and at the same time orally applied under section 82 of the of the Code (herein "the Code") to discontinue the proceedings against the respondent and have the respondent discharged, on the ground that investigations had revealed that, the evidence available supported a charge of murder and not manslaughter.

6. However, the respondent opposed the application on the ground that he was being ambushed as the *nolle prosequi* document filed in court was not copied to him. He requested for time to respond to the application. At the same time the victim's counsel who had just come on record also requested for time to respond to the application. The request for time was allowed.

7. Subsequently the application was argued and as aforesaid a ruling was delivered wherein the court ruled that the power of the DPP to discontinue criminal proceedings is not absolute. Further, that the application was founded on weak grounds and disallowed the same.

8. Being aggrieved by the ruling the applicant filed the subject application premised on the provisions of; articles 2, 3, 10, 26, 27, 45, 47 48, 50, 157 and 165 of the *Constitution* 2010, and sections 82, 362, 363, 364 and 365 of the Code (cap 75) Laws of Kenya, seeking for the following orders: -

    a. Spent

    b. Stay the ruling of the trial court in Kiambu Chief Magistrate's Court criminal case 704 of 2019 – Republic v Assa Kibagendi Nyakundi dated 20th May 2020 disallowing the DPP' application seeking to terminate the criminal proceedings before the subordinate court.

    c. Call for and examine the record of the proceedings in Kiambu Chief Magistrate Court criminal case number 704 of 2019 – Republic v Assa Kibagendi Nyakundi for the purpose of satisfying itself as to the correctness, legality or propriety of the order issued on May 20, 2020 by Hon T. B Nyangena, SPM.

9. The application was based on the following grounds:

    a. The impugned order amounts to the subordinate court interpreting the *Constitution* to wit the constitutional powers of the DPP contrary to the provisions of section 8 of the *Magistrate's Court Act, 2015* which limits the powers of the trial court to the rights under article 25 (a) and (b) of the *Constitution*.

    b. The impugned order is incorrect as it seems to have been based on the suggestion that the issue of *nolle prosequi* died with the *repealed Constitution*, a position that is legally and factually incorrect.

    c. The impugned order is incorrect as it suggests that the DPP needs to avail evidence before a magistrate in an application for termination of criminal proceedings, and not just reasons as contemplated in law.

    d. The impugned order is improper as it was arrived at without putting weight to the reasons given by the DPP in his application for the withdrawal. The court shut its eyes to the fact that a review of the evidence had disclosed the more serious offence of murder and to which the trial magistrate has no jurisdiction and thus the need to withdraw to allow for murder charges to be instituted at the High Court which is the appropriate forum.

e. The impugned order is improper as the trial magistrate failed to consider the relevant factors in determining the application for withdrawal.

f. The proceedings leading to the impugned order were irregular as the trial magistrate purported to exercise supervisory jurisdiction over the DPP in the discharge of his mandate.

g. The impugned order was illegal as it amounted to the trial court allowing the accused person to elect what charges to be preferred against him and the forum for trial contrary to the available evidence which in the view of the DPP disclosed the more serious offence of murder after review of the evidence.

h. The impugned order is illegal as it amounts to the trail court prescribing the charge to be preferred against the accused person contrary to clear constitutional and statutory provisions which confers state powers of prosecution upon the DPP only.

i. The impugned order is illegal and improper as it makes trash of the doctrine of separation of powers and amounts to judicial overreach.

j. The impugned order was illegal and irregular as trial court reached the finding that the DPP was acting in bad faith in seeking to withdraw the matter without any evidential basis for such a finding of abuse.

10. However, it is noteworthy that after the application was filed, the presiding judge of the High Court, at Kiambu, Hon Lady Justice C. Meoli, *vide* a ruling dated June 4, 2020, recused herself from the matter and the matter was transferred to the High Court at Nairobi.

11. Be that as it may, the respondent opposed the application through a notice of preliminary objection dated June 18, 2020, on grounds that: -

a. The jurisdiction of this court is not available to the applicant owing to the fact that the applicant did not appeal the decision of the magistrate. By reason of section 362 (5) of the Code the applicant has no recourse to this court.

b. There was no valid application for discontinuance of the proceedings in criminal case No 704 of 2019 before the Chief Magistrate's Court.

c. "nolle prosequi" is a tool alien to in contradiction to and inconsistent with the *Constitution*. Although there was no reference section 82 of the Code in the document presented to court that section that provides for "nolle prosequi" is inconsistent with the *Constitution* and could not be therefore be contemplated in article 157 (6) of the *Constitution*. It is an affront to the bill of rights.

d. The application in the nature of "*nolle prosequi*"" was in any case presented by a party that was in contumacious contempt of court. As clearly claimed, the permission of the court was necessary for the preference of any new charges against the respondent. Yet the applicant commenced criminal case No 32 of 2019 and No 35 of 2019 before the High Court in Nairobi in the absence of any permission by the trial court to terminate criminal case No 704 of 2019. In addition, the party now seeking revision before this court being guilty of impunity and fragrant abuse of the process of court cannot be entertained by a court of Justice.

e. The jurisdiction of this court relates to the correctness, legality and propriety of any finding of subordinate court. It is not intended to be a substitute for appeals and is certainly not a device through which the High Court would micromanage the exercise of jurisdiction of the

subordinate courts. The respondent in any case failed to make a full and frank disclosure that a previous application for revision made in substantial terms as the current one had been struck out and dismissed in criminal case No 35 of 2019 before this same court.

f. The letter dated May 29, 2019 was not copied to the respondent a device that was intended to defeat 362(2) of the Code. The letter also deliberately ignored counsel for the victims who participated fully in the proceedings before the subordinate court.

g. On the face of it or at all, there's nothing incorrect, illegal or improper in the decision made by the learned trial magistrate. The record will show the latest effort by the applicant is nothing but forum shopping. In this regard, the respondent will make reference to the affidavits filed before the High Court in criminal case No 35 of 2019 and those filed before the subordinate court.

12. The respondent further filed a notice of motion application dated June 18, 2020, seeking for an order that the matter be referred to the Hon The Chief Justice to appoint a judge or judges outside the criminal division of High Court at Nairobi for hearing and determination of the matter and a certificate be issued that a substantial question of law arises touching on the constitutionality of a provision in a statute.

13. The application was supported by the affidavits of even date sworn by the respondent's defence counsel, Dr Khaminwa SC, and the respondent whereas the applicant filed a replying affidavit thereto dated June 22, 2020, sworn by Catherine Mwaniki, senior assistant DPP.

14. Thereafter, the application was heard and determined *vide* a ruling delivered on April 22, 2021, wherein the court certified the matter as raising substantial question of law and referred it to the Hon the Chief Justice for empanelment of a three judge bench which was done.

15. The application was canvassed through filing and highlighting of submissions. The applicant filed submissions dated June 3, 2022 and identified the following issues for determination: -

a. Whether the DPP has powers to withdraw a criminal case in a Magistrate's Court.

b. Whether the DPP breached his powers or acted in an irregular manner by withdrawing under *nolle prosequi* in the Magistrate's Court.

c. Whether the honourable magistrate conducted herself properly in rejecting the withdrawal of the matter in the subordinate court via *nolle prosequi*.

d. Whether a magistrate in exercising jurisdiction under article 157 can deny the DPP leave to withdraw a manslaughter charge with a view to institute a murder charge given that murder trials are held in the High Court?

e. Whether the DPP is required under the law to consult the relatives of a deceased person on the appropriate charge to prefer?

f. Whether the respondent's constitutional rights were breached by the actions of the DPP withdrawing the matter in the Magistrate's Court.

16. The applicant submitted that, the application to withdraw the case against the respondent was made under section 87 (a) of the Code on the basis of new information after further investigations. That there is no bar to the DPP continuing with investigation or even receiving new evidence after a suspect is charged and put on trial. The cases of; *George Taitimu v Chief Magistrate Kibera, &2 others* (2014) e KLR and *Republic v sekento* (2019), e KLR, was relied on.

17. That the term "*nolle prosequi*" is defined in the *Oxford English Dictionary* 2nd Edition 1989 as "unwilling to pursue"; and in the *Black's Law Dictionary*, 8th Edition as "a legal notice that a law suit or prosecution has been abandoned." That the power of the DPP to enter a *nolle prosequi* is derived from article 157 (6), (c) (7) and (8) of the *Constitution*, section 25 of the *ODPP Act*; and section 82 of the Code and it is clear from these provisions that the DPP has discretion to enter a *nolle prosequi* in criminal proceedings and once the court is informed of the same, it ought to ensure there is no abuse of the legal process, mala fides, misuse of power, or oppression that would cloud the exercise of the discretion. The applicant cited the case of; *Seenoi Ene Parsimei Esho Sisina & 8 others v Attorney General* [2013] eKLR, where the court outlined the circumstances under which it can interfere with that exercise of discretion.

18. Similarly, among the conditions to be satisfied under article 157(6) (c), before the charge is withdrawn is for the court to ensure that, there is no abuse of the court process, safeguard public interest and interest of administration of justice. In that regard, the applicant cited the cases of; JR case No 104 of 2015 *Republic v Director of Public Prosecutions & another ex-parte Wilfred Thiong'o Njau* [2015] eKLR

19. Furthermore, there is no hard and fast rule to determine the powers and extent of entering a nolle prosequi by the DPP. The applicant referred the court to the text by *Sir Elwyn Jones* 1969 CLJ at page 49, where it is stated that the decision to initiate a prosecution is a grave one and there are many factors to consider including public policy.

20. The applicant submitted that the Hon trial magistrate did not illustrate in her ruling when and how the DPP acted in a manner that abused its discretion or outside its mandate. Further the Hon, trial magistrate does not have the power to stop the DPP from instituting a murder charge which can only be dealt with in the High Court. That the DPP has the sole mandate to charge an accused person based on evidence and has no duty to consult the relatives of the victim on the charges to prefer.

21. That the order of the trial court in declining the application for withdrawal of the charge was incorrect, illegal, and improper as she failed to take into consideration the reasons for withdrawal, in that at the time of arraigning the respondent in court, the investigations were still under way as the forensic and scene of crime reports had not been received.

22. Further, upon receiving the reports the applicant was of the opinion that new evidence supported the offence of murder thus necessitating the decision to withdrawal the charge. The applicant relied on the cases of *Republic v Leonard Date Sekento* [2019] eKLR where the court stated that the reasons given for an application under section 87 (a) (b) of the Code should be evaluated to establish whether they were in conflict with the *Constitution*. Further reliance was placed on the case of; R*epublic v Arnold Aguvasu* [2019] eKLR and *Republic v Paul Mutuku Magado* [2019] eKLR where it was held that all parties in an application for withdrawal of proceedings should be given an opportunity to present their case.

23. Finally, the applicant argued that, the respondent has not provided any material particulars to demonstrated the alleged violations of his rights under articles 50 (2) and 165 (6) & (7) of the *Constitution*. The case of; *Republic v Attorney General & 4 others ex-parte Diamond Hashim Lalji* (2014) eKLR was relied on.

24. The respondent filed submissions dated June 9, 2022, and identified the following issues for determination; -

    a. What is the status of section 82 of the Code against article 157 (8) and (11) of the *Constitution*?

    b. What is the effect of S.7 of the sixth schedule of the *Constitution* in application of S. 82 of the Code?

c. What is the purview of 362 of the Code?

d. Is the application by the applicant for revision as contained in the letter by Mr Alexander Muteti dated May 29, 2020 sustainable in view of the provisions of section 364(5) of the Code?

e. Is the finding by trial magistrate illegal, incorrect or improper?

f. Was it proper for the applicant to commence High Court criminal case No 32 of 2019, High Court criminal case No 35 of 2019 all against the respondent concurrently with criminal case No 704 of 2019 before the Chief Magistrates Court, Kiambu.

g. Was there a competent application for discontinuance of proceedings against the respondent before the learned Chief Magistrate's Court on May 10, 2019? Was the applicant bound to and did he give reasons for the application, if competent?

h. Whether the constitutional rights of the respondent were violated and if so, can this court exercise jurisdiction to render remedy or should the respondent seek recourse in other judicial proceedings?

i. If the answer to no 7 is in the affirmative as necessary, what remedy is available to the respondent.

j. What is the proper exercise of the power to prosecute in the circumstances of the matter before the court and generally?

k. Once the DPP exercises the power to charge an individual, is such power exhausted or spent?

l. Was the conduct of the applicant such that the learned trial magistrate was justified to decline their "nolle prosequi?

25. The respondent reiterated the averments in the preliminary objection and submitted that, the applicant should have appealed against the impugned ruling rather than file an application for revision. That, the applicant cannot exercise revisionary power at its own instance when they ought to have appealed.

26. That the applicant purposely concealed from this court the fact that, they had filed another revision application dated July 10, 2010, which had been dismissed. Further, the issue of new evidence had already been canvased but more significantly, the applicant has not provided this court with a copy of the ruling sought to be revised.

27. It was argued that the document presented in court dated May 10, 2019, did not have the reasons for withdrawal of the case. Neither was there reference to new evidence nor that a new charge of murder was contemplated. Even then the alleged new evidence has never been disclosed to the court or defence. Furthermore, the applicant has not explained when the alleged reports were obtained, and why they were not available earlier, as the applicant had informed the Chief Magistrate's Court at Makadara and Kiambu that investigations were complete.

28. The respondent further submitted that, the application to withdrawal the charge was based on false utterances by the DCI, Mr Kinoti and the learned state counsel, Ms Mwaniki. That it was actuated by malice and amounted to abuse of the court process. The case of *Githunguri v Republic* (1985) KLR 3090, was cited where it was held that investigations should be conducted in good faith and must "not be unreasonable or made in bad faith or intended to achieve ulterior motive or used as a tool for personal score or settling or vilification".

29. The case of *Republic v the DPP &another ex parte Chamanlal Vraslal Kamani &others* (2015) e KLR, was also referred to where the court held that, "criminal proceedings ought not to be investigated simply to appease the spirit of the public yearning forth blood of the perceived victims. That a prudent and conscious prosecutor must be able to demonstrate that it has a reasonable and probable case for mounting a criminal prosecution otherwise the prosecution will be malicious and actionable."

30. The respondent further submitted that the applicant's claim that the respondent was charged with manslaughter without evidence is not only dishonest but unsustainable. That it is vacuous and contemptable. Furthermore, having made an application for discontinuing of proceeding in Kiambu, it was an act of impudence, impertinence and contempt to the trial magistrate to commence concurrent proceedings in a superior court.

31. It was submitted that under section 26 of *repealed Constitution*, the Attorney General did not have to seek for court's permission when exercising its power under section 82 of the Code to enter the nolle prosequi. However, under article 157(8), of the *Constitution*, the DPP must seek for court's permission to enter a *nolle prosequi*. That in that case, the new constitution did away with the "diabolic creature *nolle prosequi*" and therefore section 82 of the Code, which provides for it, is in latent conflict with the *Constitution* and hence null and void. As such, the application for discontinuance of the proceedings before the Hon Trial Magistrate was invalid.

32. The respondent distinguished the case of; *R v Leonard Dante Sekento* (supra), relied on by the applicant on the ground that the matter under consideration was on the parameters of section 87 (a) of the Code, which is radically different from section 82 of the Code.

33. The respondent submitted that the ruling of the trial court is not incorrect, illegal or improper, as the court took into account the actions of the prosecution, for instance; the letter dated April 30, 2019, issued to the Head of Station seeking for an earlier mention date without copying in the defence and the trial magistrate, the demeaning language used against the trial magistrate, the application for her recusal and the propaganda in the media by the learned counsel Ms Mwaniki and the DCI Mr Kinoti, portraying malice, ill faith and abuse of the court process.

34. That, although the Hon, trial magistrate stated that the applicant did not give reasons for the withdrawal of the charge, the same were belatedly given.

35. Further, the claim by the prosecution that the Hon, Trial Magistrate violated section 8 of the *Magistrate's Court Act* 2015, that limits the power of the Magistrate's Court to rights under article 25 (a) and (b) of the *Constitution* is without basis. That, there is no express bar to the Hon Trial magistrates interpreting the *Constitution* and, that the Hon Trial Magistrate was not dealing with any claims as contemplated in that section.

36. The victim's family filed submissions dated June 14, 2022 and identified the following issues for determination: -

    a. Whether the victim's family has a right to participate in criminal proceedings?

    b. Whether section 82 of the Code, cap 75 is inconsistent with the *Constitution*, more particularly article 157 (8).

37. The victim's family submitted that article 50 (7) and (9) of the *Constitution*, section 4(2) (b), and 9 (1) and (2) of the *Victims Protection Act* (herein "VPA") stipulates the role of the victim in the criminal trial. Further section 3 of the VPA recognizes and gives effect to the right of victims, while section 4 (a) obligates the court to ensure that every victim is heard before any decision affecting the victim is made. Furthermore, that the role of a victim in criminal trial is recognized in the *United Nations Declaration*

*of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985*. It was also submitted that the constitutional rights of an accused person as to fair trial should be balanced with statutory rights of the victim of the offence.

38. That section 82 of the Code is inconsistent with the article 157 (8) of the *Constitution* as it implies that where the DPP files a *nolle prosequi* the court has no role and is a mere rubber stamp of the court. Further, that the DPP is guided by the *Constitution* and the fundamental principles of the need to serve the cause of justice, prevent abuse of legal process and public interest. That, the applicant never engaged the victim's family and therefore there was no public interest that they were pursuing. Thus the court ought to consider whether the interests of the victim were considered when DPP decided to enter the *nolle prosequi*. Reliance was placed on the case of *Seenoi Ene Parsimei Esho Sisina & 8 others v Attorney General* [2013] eKLR.

39. It was submitted that even before the new Constitution was promulgated, the High Court had declared that, the court was entitled to know the reason why the Attorney General or his agents applied to enter a *nolle prosequi* and that the discretion to enter *nolle prosequi* was subject to the supervisory jurisdiction of the High Court. In this respect, the victim's family cited the cases *Crispus Karanja Njogu v AG* UR criminal application No 39 of 2000 (HC) *Githunguri v Republic* 1986 KLR 1 and *Naibei Gerishon Kisach v Republic* [2011] eKLR.

40. Further, that where the nolle prosequi was deemed to be oppressive, unreasonable and capricious, it was declared null and void. The cases of *Adan Kayman wehliye v Republic* [2005] eKLR, *Republic v Enock Wekesa & another* [2010] eKLR and *Moses MihesoLipeya v Republic* [2007] eKLR were relied on.

41. Having considered all the materials placed before the court, we find that the following issues have crystallized for determination: -

    a. Whether this court has jurisdiction to deal with the revision application.

    b. Whether the applicant should have filed an appeal or a revision?

    c. What is the procedure of instituting a revision application and/or whether there is a valid revision application before the court?

    d. Whether the impugned ruling is incorrect, improper and illegal?

    e. Whether the provisions of section 8 of the *Magistrate's Court Act* limits the powers of the subordinates courts to the rights under article 25 (a) and (b) of the *Constitution*.

    f. Whether section 82 of the Code is inconsistent with article 157(6) (c) and (8) of the *Constitution*, and if so whether it should be declared null and void.

    g. Whether the prayers sought for in the revision application should be granted.

42. On the issue of jurisdiction, we note that the jurisdiction of the court flows from either the *Constitution* or legislation or both. In the case of; *Samuel Kamau Macharia v KCB & 2 others*, civil application No 2 of 2011, the Supreme Court of Kenya stated that: -

> " A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law"

43. Similarly, in the case of, the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1, the late Nyarangi JA (as he then was) stated as follows:

> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

44. Pursuant to the aforesaid, the power of the court to intervene in the proceeding of the subordinate court is provided for under article 165 (6) of the *Constitution* which states as follows: -

> "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."

45. The High Court may thus entertain revision application in exercise of the supervisory jurisdiction. In that regard, the revisionary jurisdiction of the High Court is provided for under section 362 as read with section 364 of the Code. The section 362 states as follows: -

> "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".

46. While section 364 of the Codes states that: -

(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed".

47. Having considered the aforesaid, we hold that this court is properly clothed with jurisdiction to hear any revision application. Even then, as stated above, any challenge on the jurisdiction of the court should be raised at the earliest. As such the respondent should have raised the issue of jurisdiction before delving into the substance subject matter herein and by participating in the hearing of the revision application, the respondent has submitted to the jurisdiction of the court and is thus estopped from challenging the same.

48. The next issue of whether the applicant should have filed an appeal instead of a revisionary application shall be dealt while dealing with the issue of whether the impugned ruling is irregular, incorrect or improper. At this point we shall deal with the issue raised by the respondent to the effect that, there is no valid revision application before the court as the applicant's letter dated May 29, 2020, does not constitute a valid revision application, raising the procedure of filing a revision application.

49. In that regard, it is noteworthy that the provisions of sections 362 and 364 do not provide for the procedure of filing a revision application. However, section 362 states that; "the court may call for and examine the record of any criminal proceeding before any subordinate court..." Our understanding thereof is that the court can move suo moto and exercise revisionary jurisdiction.

50. In the same vein, section 364 (1) expands the circumstances to recognize that the court can exercise revisionary jurisdiction where the lower court record has been called for or reported for orders, or which otherwise comes to its knowledge. In our considered view, the revisionary jurisdiction of the court can thus be initiated by the court suo moto or by a third party making an application (aggrieved party moves the court for revision) or through a subordinate court's order, (for example where a subordinate court refers to the matter to the High Court for revision of any order).

51. However, the question remains as to whether a third party seeking for revision of an order of the court, should file a formal application while applying for a revision. As already stated there is no prescribed procedure for filing a revision application. However, it suffices to note that, by a gazette notice No 189, the Hon The Chief Justice issued practice directions, pursuant to the provisions of articles 159 (2) and 161 (2) (a) of the *Constitution* of Kenya, section 10 of the *Judicature Act* (cap 8), section 81 (3) of the *Civil Procedure Act* (cap 21) and section 39 of the *High Court (Organization and Administration) Act*, 2015, to standardize practice and procedures in the High Court.

52. In that regard, practice direction No 20 states that: -

"(a) An application for revision may be made by way of a notice of motion application accompanied by an affidavit or a letter to the Judge setting out the grounds for the order sought.

(b) The application may be placed before a Judge for directions on the same day (emphasis added).

53. Pursuant to the aforesaid, we hold that a revision application does not necessarily have to be initiated in a formal manner. It can be made either orally or formally, and can take any form including a letter or filing of notice of motion application. In the given circumstances herein, we find and hold that, the letter dated May 29, 2020, constitutes a valid application for revision.

54. As regards the issue as to whether the applicant should have filed an appeal for reason of section 362 (5) of Code or a revision, we note that indeed, the two processes are different in that, whereas an appeal is

a legal right to a party, a revision in law depends on the discretion of the court, and cannot be claimed as a matter of right.

55. In addition, through an appeal the case is heard again by a different and superior court and may lead to a new decision, whereas in a revision, the High Court checks whether legal actions were followed and whether the court exercised regular jurisdiction. Therefore, an appeal iscontinuation of proceedings and involves examination of law and facts, while a revision checks jurisdiction and procedure followed to arrive at the impugned decision.

56. Further, there is only one procedure involved in an appeal that is the hearing of the case, while in a revision, two methods are involved, preliminary and final. Furthermore, in an appeal, the court has the power to interfere with the decision in any way, whereas interference is limited in a revision.

57. Furthermore, a court can act suo moto in a revision but in an appeal an aggrieved party must move the court. Moreover, the statutory provisions that govern both processes under the Code are distinct and the powers of the court upon hearing an appeal and revision are not the exactly the same, in that whereas a court can convert a conviction on appeal to acquittal, it cannot in a revision.

58. Finally, revisionary jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. The question of the extent of appellant or revisionary jurisdiction has to be considered in each case with reference to the language employed by the statute.

59. In the instant matter, the applicant applied for discontinuance of proceedings before a final decision therein was rendered. The application was therefore made at an interlocutory or preliminary stage. The applicant is thus inviting the court to examine, *inter alia*, the manner in which the subordinate court exercised its jurisdiction in declining to allow the discontinuance of the subject proceedings. It is our considered opinion on that ground and extent per se, this matter falls within the purview of revision and is properly before the court.

60. We shall now turn to the issue as to whether the impugned decision is incorrect, improper and illegal. In that respect, the applicant argues that, the impugned ruling was arrived at without putting weight to the reasons given for discontinuance of proceedings and by the court erroneously demanding that, the alleged new evidence alluded to by applicant should have been tendered before the trial court.

61. That by the trial court declining to allow the application for withdrawal of the charge, it usurped the power of the applicant to draft and prefer charges against the respondent and the trial court was exercising supervisory jurisdiction over the applicant.

62. However, the respondent submitted that, the document presented to court on May 10, 2019, for withdrawal of the charge did not bear any reasons and neither did it make reference to any new evidence, nor disclosed the new evidence to the court or the defence, therefore in finding that the applicant did not advance reasons for discontinuance of the proceedings the trial court acted properly, legally and correctly.

63. Furthermore, there was no indication that a murder charge was contemplated, and neither was the evidence of scene of crime report new as the applicant had earlier indicated at the Chief Magistrate's Court at Makadara and Kiambu that investigations were over.

64. That in addition, the trial court took into consideration the conduct of the learned state counsel Catherine Mwaniki and George Kinoti, DCI, which had hallmarks of malice and abuse of process of the court. That, the malice was evidenced by the applicant preferring a murder charge against the respondent *vide* HCCRC No. 32 and 35 of 2019, when the manslaughter charge had not been

withdrawn. Thus, having applied to discontinue the proceeding in Kiambu Chief Magistrate's Court, it was an act of impudence, impertinence and contempt to commence concurrent proceedings in the superior court. Further the applicant obtained a conservatory order stopping proceeding in the subordinate court without the knowledge of the respondent. Therefore, the applicant was acting in bad faith and was not entitled to the orders sought.

65. On the other part, the victim's family submitted that, pursuant to the provisions of article 50(9) and the *Victim Protection Act*, they were not engaged by the applicant before the application for withdrawal of the charges was made. Therefore, the applicant cannot have been pursuing public interest, as pertains to the victim's family.

66. Having considered the arguments of the parties on the issue of illegality, incorrectness and impropriety of the impugned ruling we find that, first and foremost, although this is main issue in the revision application, the parties did not substantially address the same in this arguments and submissions in court.

67. Be that as it were, the provisions of section 362 of the Code referred to herein sets the parameters of exercise of revisionary powers. However, before we delve therein, we note that the objective of revisionary power is, inter alia, to set right a patent defect or error of jurisdiction or law, correct manifest irregularities or illegalities.

68. In considering the exercise of revisionary powers by the court in the case of: *Public Prosecutor v Muhari bin Mohd Jani and another* [1996] 4 LRC 728 at 734, 735, it was observed that: -

> " 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 untrammeled and free, so as to be fairly exercised according to the exigencies of each case" (emphasis added).

69. In the case of; *Sriraja Lakshmi Dyeing Works v Pangaswamy Chettair* [1980] 4SCC 259 the court stated as follows: -

> " The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice".

70. 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 v Brig F.J Dillon* 1964 AIR 497, 1964 SCR (4) 409)."

71. To revert back to the subject issue herein, we note from the impugned ruling that, the trial court declined to allow the application for discontinuance of proceedings on the grounds that the applicant had failed to furnish reasons in support thereof and asserted that it was not under obligations to give reasons. That, the applicant only gave reasons simply because the matter was of great public interest and stated that new evidence had emerged which pointed at the offence of murder and to which the court had no jurisdiction to handle. But even then, the applicant did not tender the alleged new evidence to the court and defence.

72. However, we note from the trial court proceedings of May 2, 2019, that the applicant informed the court, they had written a letter to the court dated April 30, 2019, requesting for the matter to be mentioned earlier than the scheduled date so as to enable them "withdraw the case". However, on that date the matter was not withdrawn as the file was being "reviewed by the DPP".

73. Subsequently on May 10, 2019, the applicant filed a nolle prosequi document in court and applied orally to enter the same against the respondent and have the proceedings against him discontinued. The record indicates that although the document filed in court did not give any reason for the application, the learned state counsel orally told the trial court that, the reason for the application was that, the "investigation had revealed the evidence available did not disclose the offence of manslaughter" but murder.

74. Moreover, when the application for withdrawal was canvassed before the trial court, the applicant informed the court as follows: -

> " The forensic expert report was not in the hands of the DPP. The scene of crime report was not ready. The charge of manslaughter was presented (sic)on the basis that there was death that pointed the accused as the culpable person. The DPP at the time was persuaded that the accused shot the deceased.
>
> However, upon further investigation matters took a different turn and revealed that the DPP considered and was satisfied that the matter of manslaughter was not supported by the evidence. The DPP reviewed his decision to put the correct charge of murder which is triable by the high court".

75. In addition, by letters dated; April 26, 2019, April 30, 2019 and submissions dated; May 17, 2019, the applicant informed the court of on-going investigations. Further, the applicant informed the court that, the subject matter having arisen in Nairobi and the Chief Magistrate`s Court at Makadara having assumed jurisdiction, a fact the trial court was aware of, the matter should have been referred to Makadara Chief Magistrate's Court, hence the necessity to allow the application.

76. Having considered the trial court's record, it is clear that the applicant gave reasons for discontinuance of the proceedings contrary to the finding of the trial court that reasons were not given the applicant having argued that it was under no obligations to give reasons. However, to the contrary in the same ruling the trial court states that, the applicant gave reasons in the public interest. The respondent supported that position by submitting that, although the trial court held no reasons were given, the same were given albeit late.

77. In fact, the issue does not seem to have been failure to give reasons but to tender the new evidence to the court or to the defence. The question that arises is whether the applicant was legally bound to tender the evidence before the trial court.

78. In our considered opinion the evidence in question was going to be used in the High Court to hear the murder case. Further, taking into account that the charge of murder is triable in the High Court then the subordinate court did not have the jurisdiction to evaluate the evidence even if it was for the purposes of allowing the application or not. In fact, if the evidence was evaluated in the subordinate court, it may end up embarrassing the High Court that would hear the matter or prejudice the proceedings in the murder case. The requirement that the new evidence alluded to should have been provided was incorrect and improper.

79. In the same vein, our considered opinion is that the trial court also took into account extraneous matters through the finding that the applicant had portrayed malice, ill faith and abuse of court process by prosecuting the case in the media. In that regard, the trial court thus stated as follows: -

> " Failure to disclose the evidence and always acting as though he is prosecuting the case in the media, portrays malice, ill faith and abuse of the court of the court process. He does not appear keen in upholding the rule of law, accused`s rights, public interest and strengthening of the criminal justice system.
>
> In as much I would have wished to grant the application by the DPP to discontinue the current proceedings, in view of all the circus that has dominated the entire process since inception I am of the view that the spirit of the law generally, and the *constitution* in particular must be upheld not only for the sanctity of the judicial system but also for the interest of the public and posterity".

80. We hold that, in considering whether to grant the application for discontinuance of the proceedings, the trial court needed to consider primary the threshold set under article 157(11) of the *Constitution* as to whether the applicant was acting in public interest, the interests of the administration of justice and to prevent and avoid abuse of legal process.

81. In that case to determine whether the applicant complied with the aforesaid threshold the court will consider inter alia: -

a) Whether the application is brought in good faith.

b) Whether matter in issue is a matter in which the society has a stake.

c) Whether the party against whom the proceedings are to be discontinued will suffer any prejudice if the application is allowed or denied.

d) Whether the reasons advanced for the application are reasonable, sufficient and/or adequate.

e) Whether the matter to be withdrawn has commenced hearing or is fresh matter.

f) Whether there has been inordinate delay in making the application for withdrawal.

g) The sentiments of the respondent to the application.

82. It is therefore our finding that the impugned ruling is improper in that it did not take into account the reasons advanced by the applicant and was based on extraneous considerations, in particular the alleged malice on the part of the Director of Criminal Investigations Mr Kinoi and the learned state counsel Ms Mwaniki.

83. The next issue to consider is, whether the provisions of; section 8 of the *Magistrate's Act* limits the jurisdiction of the subordinate courts to the rights under article 25 (a) (b) of the *Constitution*. First

and foremost, this issue did not arise in the revision application herein neither is it an issue that was dealt with by the trial court.

84. Be that as it were, the provisions of section 8 of the *Magistrate's Court Act*, states that:

> "(1) Subject to article 165 (3) (b) of the *Constitution* and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the bill of rights.
>
> (2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in article 25 (a) and (b) of the *Constitution*.
>
> (3) Nothing in this Act may be construed as conferring jurisdiction on a Magistrate's Court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the bill of rights.
>
> (4) The Chief Justice shall make rules for the better exercise of jurisdiction of the magistrate's courts under this section.

85. Pursuant to the aforesaid, it is clear that the Magistrates' Court jurisdiction to hear any application under the constitutional provisions is limited to matters under article 25(a) and (b), and does not extend to section 157 of the *Constitution*. However, as already stated and at the expense of repeating ourselves, there is nowhere in the impugned ruling the learned trial magistrate purported to interpret the applicant's power under article 157 (6) (c, (7), (8) and (11) of the *Constitution*. Therefore, the submissions by the applicant to that effect are not tenable. We shall leave the issue at that.

86. The next issue relates to the constitutionality of section 82 of the Code. The issue was first raised by the respondent in the notice of motion application dated June 18, 2020, wherein the respondent sought for an order that, the Hon The Chief Justice appoints a judge or judges to hear and determine the subject issue. It was argued that, the issue has never been dealt with before and therefore this is the first time the court is called upon to determine it.

87. That under the old constitution, the Attorney General did not need to seek permission of the court when exercising the power of the *nolle prosequi* under section 82 of the Code. However, the 2010 *Constitution* avoided nolle prosequi and therefore section 82 of the Code, which provides for it, is in latent conflict with the *Constitution* and hence null and void.

88. However, the applicant submitted that, nolle prosequi is not an illegal instrument, and that section 82 of the code does not in any way contradict article 157 (6) (c) and (8) of the *Constitution*. That, by Miscellaneous Law Amendment section 82 of the Code was amended by replacing the word "AG" with "DPP" and in fact, the reading of both section 82 Code and article 157(6), the DPP, clearly reveal that the applicant has power to terminate criminal proceeding. Finally, that no phraseology in section 82 of *Criminal Prosecutor Code* suggests the Director of Prosecutions cannot exercise nolle prosequi under the new constitution.

89. The victim's family on their part supported the respondent and submitted that section 82 of the Code, should be declared unconstitutional in that the new constitution, does not mention the latin word "*nolle prosequi*" and therefore section 82 of the Code is inconsistent with article 157 (8) of the *Constitution*.

90. Having considered the arguments by parties, we shall start by setting out the provisions of both section 82 of the Code and article 157(8) of the *Constitution*. In that regard, section 82 of provides that:

> "(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the DPP may enter a *nolle prosequi*, either by stating in court or by informing the court in writing that the Republic intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts".

91. On the other part, article 157(6) (c), (7) and (8) of the *Constitution* states that:

(6) The DPP shall exercise state powers of prosecution and may—

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) subject to clauses (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the DPP or taken over by the DPP under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The DPP may not discontinue a prosecution without the permission of the court.

92. A plain reading of the two subject provisions reveal that, they are in tandem with each other, save that section 82 of the Code speaks to the discontinuance of proceeding by way of a "*nolle prosequi*" and does not expressly state that the Director of Public Prosecution, shall require permission of the court before seeking for discontinuance of proceedings, whereas article 157 (6) (c), and (8) gives the Director of Public Prosecution the power to "discontinue the proceeding" albeit without stating that it shall be by entering "*nolle prosequi*" but expressly provide that the permission of the court must be sought.

93. In our considered opinion, the provisions of article 157 (6)(c) and (8) is wider in scope as the applicant's power to discontinue proceedings can be invoked under sections 82 (1) of the Code only and section 87 (a) of the Code, stated

94. Pursuant to article 157 (8) of the *Constitution* under section 25 (1) of the *Office of the Director of Public Prosecution Act*, the applicant is obligated to seek for permission of the court before applying for discontinue of any criminal proceedings. section 25 (1) states:

> " The director may, with the permission of the court, discontinue a prosecution commenced by the director, any person or authority at any stage before delivery of judgement."

95. Be that as it were, the question that arises is whether by section 82 not expressly providing that the court's permission is required before discontinuance of proceedings, it is inconsistent with article 157

(8) of the *Constitution*. To address this question, recourse is had to the provisions of section 7 of the sixth schedule of the *Constitution* of Kenya, 2010, which provides that: -

> "(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this *Constitution*.
>
> (1) If, with respect to any particular matter—
>
> (a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and
>
> (b) a provision of this *Constitution* that is in effect assigns responsibility for that matter to a different state organ or public officer, the provisions of this *Constitution* prevail to the extent of the conflict". (emphasis added)

96. Pursuant to the afore provisions it follows that, in construing the provisions of section 82 of Code, regard must be had to the subject to the provisions of article 157 (8) of the *constitution*. Therefore, whenever the applicant applies to withdrawal any criminal proceeding either under section 82 (1) or 87(a) of the Code or any other law, the applicant must seek for the permission of the court.

97. The Supreme Court of Kenya in the case of; *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR dealt with the provisions of, section 7 of the sixth schedule of the *Constitution* of Kenya, 2010 and stated as follow: -

> "(127) As to the standing of the existing law before the expiry of the time-frame for legislating on the relevant laws, and as to whether courts should continue applying the existing law until the period specified under the fifth schedule expired, Maraga JA held as follows [ paragraphs 85-86]:
>
> "In my view, if that were the case, section 7(1) of the sixth schedule to the Constitution would be otiose. In its place, there would have been a provision suspending conformity [to] the Constitution until after the expiry of the period of 3 years in the fifth schedule. But as I have said, that is not the case. The operation of the entire Constitution, including section 7(1) of the sixth schedule, commenced on the effective date, that is August 27, 2010. Article 262 of the Constitution makes that very clear. It directs that 'the transitional and consequential provisions set out in the sixth schedule shall take effect on the effective date.'
>
> "It therefore follows that from the word go, as required by article 10 of the Constitution, all state organs, state officers, public officers and all persons are to interpret, apply, enact and implement all laws as well as public policy in accordance with the values and principles of good governance which include national unity, the rule of law, democracy and public participation, human dignity, equity, social justice, equality, human rights, non-discrimination,

> good governance transparency, accountability and sustainable development."

98. The Supreme Court of Kenya was quoting from the decision of Maraga JA (as he then was) in the case of; *Royal Media Services Limited & 2 others v Attorney General & 8 others* [2014] eKLR. The court considered jurisprudence on the subject from other jurisdictions and observed as follows:

> (188) The Court of Appeal of Belize, in the case of *San José Farmers' Co-operative Society Ltd v Attorney-General* (1991) 43 WIR 63, hadthe task of ascertaining the meaning of the foregoing provisions; and Henry P J.A held as follows:
>
> > "In my view, the object of section 21 was to ensure that during the five years following Independence no attacks were to be launched against the constitutionality of existing laws. In others, such existing laws become instantly unconstitutional when the Constitution of the territory came into force because they were afforded no such protection. Both provisions created problems and section 21 of the Belize Constitution was designed to overcome both problems by providing a breathing space during which the Governor-General and Parliament could effect the necessary legislative changes. The section does not, however, in my view, detract in any way from the power of a court either during the five-year period or afterwards to construe an existing law 'with such modifications, adaptations, qualifications, and exceptions as may be necessary' to bring it into conformity with the Constitution. At the same time the modifications, etc must be such only as are necessary and a court must be wary of usurping the functions of Parliament by introducing new and possibly controversial legislation in the guise of a modification necessary to bring a particular law into conformity with the Constitution" [emphasis supplied].
>
> The court held that section 32 would have to be deleted in its entirety, as it would not be possible to effect the necessary modification without usurping the powers of Parliament. Henry P. J Athus stated this position:
>
> > "In my view a distinction must be drawn between on the one hand, construing existing provisions in an Act with such modifications, adaptations, qualifications, and exceptions, as may be necessary to bring them into conformity with the Constitution, and on the other hand, introducing entirely new and unrelated or contradictory provisions into the Act. The former is the function of the court, the latter the function of Parliament which the court ought not to usurp."

99. In conclusion the Supreme Court stated as follows; -

> (197) We do, thus, have a reliable jurisprudential basis for proposing the principles to serve as a guide, in interpreting constitutional provisions in the transitional framework, especially as regards the fifth schedule, and section 7 of the sixth schedule to the Constitution of Kenya. Our perception is set out in specific terms as follows:
>
> i. The Constitution of 2010 came into operation being cognizant of existing legislation. Flowing from the Constitution's supremacy clause, it was imperative to provide a formula by which old legislation would transit into the new constitutional dispensation, without creating a vacuum. section 7(1) of the sixth schedule, therefore, is vital as a medium for ensuring harmonious transition.

ii. The fifth schedule gives a time-frame within which Parliament ought to act by amending or repealing old legislation, or enacting new law, so as to give effect to particular articles of the Constitution.

iii. All laws in force immediately before the promulgation of the Constitution remain in force, but subject to section 7(1) of the sixth schedule.

iv. In construing any pre-constitution legislation, a court of law must do so taking into account necessary alterations, adaptations, qualifications and exceptions, to bring it into conformity with the Constitution.

v. Where it is not possible to construe an existing law in accordance with (iv) above, so as to bring it into conformity with the Constitution, that is to say, where a law cannot be conditioned through judicial intervention without usurping the role of Parliament, such a law is invalid for all purposes"

100. In conclusion, our considered view is that the fact section 82 of the Code does not state that permission of the court is required when the applies to enter a *nolle prosequi* does not render it null and void or inconsistent with the *Constitution*, in light of the provisions of section 7 of the sixth schedule to the *Constitution*,

101. However, to avoid unnecessary litigation and we recommend that Parliament amend section 82 of the Code to bring it in conformity with the article 157(8).

102. The last issue to consider is whether the prayers sought in the revision application should be granted. We have already held that the impugned ruling is improper and incorrect which falls under section 362 of the Code. Indeed, section 364 empowers the court to revise such an order and consequently we set aside the order of the trial court dated May 20, 2020, declining to allow the application to enter a *nolle prosequi* in the criminal case No 704 of 2019, at the Chief Magistrate's court at Kiambu and allow the application accordingly.

103. In that regard the criminal proceedings in the High Court criminal case No, 32 & 35 of 2019, which were instituted while the manslaughter charge was still in existence is null and void. Indeed, the conduct of the applicant to prefer two charges against the respondent over the same subject matter was not done in good faith and must be discouraged and frowned upon.

104. However, should the applicant consider preferring any charge against the respondent, it shall do so within seven (7) days of the date of this order. The respondent shall remain on the subsisting bond terms.

105. Finally before we pen off, we find that the issue of the rights of the victim that was canvassed herein was not an issue before the court and therefore will not delve in it, save to observe that the participation of a victim in a trial is limited as they are not secondary prosecutors, as held in the case of the Supreme Court of Kenya decision in *Joseph Lendrix Waswa v Republic* [2020] eKLR. Thus the applicant is not duty bound to seek the victim's opinion on what charges to prefer against a suspect.

106. Those then are the orders of the court.

**DATED, DELIVERED AND SIGNED ON THIS 19TH DAY OF JANUARY, 2023**

**GRACE L. NZIOKA**

**PRESIDING JUDGE**

**DORAH CHEPKWONY**

**JUDGE**

**JESSE N. NJAGI**

**JUDGE**

In the presence of:

Ms Gichuhi HB for Mr Muteti for the Applicant

Dr Khaminwa SC for the Respondent

Cliff Oduk for the Victim's Family