



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

MISC. CRIMINAL APPLICATION NO. E016 OF 2020

IN THE MATTER OF ARTICLES 159(2), 165(3a) & (D)(II), 259(1) OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 176, 362, 364 OF THE CRIMINAL PROCEDURE CODE, [CHAPTER 75 OF THE LAWS OF KENYA]

AND

IN THE MATTER OF WITHDRAWAL OF THE CASE BY CLAN ELDERS

BETWEEN

JOHN RADING OLOO.....APPLICANT

VERSUS

THE DIRECTOR, PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE PRINCIPAL MAGISTRATE, SIAYA LAW COURTS.....2ND RESPONDENT

THE COMMANDING OFFICER YALA POLICE STATION.....3RD RESPONDENT

ALLOYS RADING OLOO.....4TH RESPONDENT

RULING

1. The Applicant herein is **John Rading Oloo**. He is also the accused person before Siaya Principal Magistrate’s Court Criminal Case No. 149 of 2020 where he is charged with the offence of grievous harm contrary to Section 234 of the Penal Code. Particulars of the Charge are that on the 29th day of January, 2020 at about 11.00 hours at Sihonga B village, Got Regea sub-location, in Gem sub-county within Siaya County, without lawful excuse he did grievous harm to Alloys Oloo Rading.
2. The Complainant is thus one Alloys Oloo Rading who, from the material before the trial court, is the biological father to the accused person. When the accused person/ applicant herein was arraigned on 6/3/2020 he pleaded NOT GUILTY to the charge as amended as he had initially been charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code.
3. The case was then set down for hearing and on 28/7/2020, PW1, the complainant testified. The Prosecution also called PW2 Audrey Apiyo a Clinical Officer from Yala Hospital who produced a P3 form for the complainant and that is when the prosecution stood down PW2 and sought leave to amend the charge sheet and the charge sheet was accordingly amended to read grievous harm as opposed to assault causing actual bodily harm.
4. On 6/8/2020, a fresh charge sheet was filed and the same was read out to the accused person to which he pleaded Not Guilty and on 18/8/2020, the accused was represented by Mr. Agina Advocate.
5. The Prosecution requested that the case be referred to Nyibenda Clan for possible resolution and the court acceded to the request and granted parties 30 days to resolve the issue amicably and report to court.
6. On 16/9/2020 when the parties appeared in the lower court, the complainant was sworn and he stated that they had a meeting on 7/9/2020

and that the accused refused to seek forgiveness and threatened that he would kill the complainant, who was fearing for his life. The Complainant prayed that bond for the accused person be suspended as he (the complainant) had no peace and stated that the accused had a panga and threatens to kill the complainant.

7. The Prosecutor then informed the trial court that the threats against the complainant by the applicant herein were still persistent and prayed for bond terms to be suspended. The Prosecutor stated that the complainant was magnanimous to allow out of court settlement.

8. As at 16/9/2020, a report dated 7/9/2020 on reconciliation had been filed in court on 15/9/2020 and it is titled:

“Reconciliatory letter between Aloice Rading Oloo and John Oloo Rading meeting held at Sihonga village between Rading Oloo Family son and wife.”

9. The trial court therefore after reading the aforesaid letter made the following orders:

1. Accused bond terms are hereby reviewed to bond of Kshs. 300,000 with 2 sureties who will ensure he attends court. When charges were amended, bond terms were not [sic] due to advocate request to peaceful settlement.

2. I agree with Prosecutor that bond terms be suspended forthwith to protect the old man complainant.

3. Hearing 2/11/2020.

4. Mention 30/9/2020.

Remanded in custody.

Hon. J. Ong’ondo

Principal Magistrate”

10. On 30/9/2020, Mr. Okande Advocate holding brief for Mr. Agina Advocate for the accused person requested for copy of ruling which the court granted. This court further observes that vide letter of 11/8/2020 filed in court on 12/8/2020, Mr. Agina Advocate wrote to court requesting for review of bond terms and seeking that the court allows the case to be referred to ADR.

This Application

11. Vide an application by way of Notice of Motion dated 18/11/2020 and filed in this court on 18/1/2021 exactly two months apart, the applicant herein John Rading Oloo who is also the accused person in the trial court, through Mr. Agina Advocate seeks the following orders:

1. Spent

2. That pending the hearing and determination hereof Principal Magistrate’s court - Siaya Law Courts Cr. Case No. 149/2020 be and is hereby stayed;

3. That the Hon. Court be (sic) to declare the charges against the applicant in Siaya Principal Magistrate’s Courts Cr. Case No. 149/2020 as withdrawn;

4. That in granting the above prayers the Honourable court do adopt the decision of the clan elders meeting held on 7/9/2020 and acquit the applicant;

5. That the Hon. Court do issue any further orders/reliefs as it deems just to grant in the circumstances of the case.

12. In the grounds in support of the application, the applicant laments that despite the court acceding to referring the case (assault) facing the applicant to arbitration before clan elders who deliberated on the matter and filed their arbitral report in court on 18/8/2020 as stated in the narrative above, the trial court had abdicated its judicial role under Section 176 of the Criminal Procedure Code, Chapter 75 of the Laws of Kenya and did not consider the decision of the clan elders and that instead, he ordered that the case do proceed to hearing by fixing a mutually convenient hearing date which was slated for 3/11/2020.

13. The supporting affidavit sworn by John Rading Oloo the applicant reiterates the grounds in support deposing that according to the Elders’ Report, the only way of bringing enduring peace in the family was for the trial of the applicant to be terminated and that he be acquitted. He urged this court to exercise its supervisory role and allow the application.

14. The Respondents did not file any replying affidavit but Mr. Kakoi Principal Prosecution Counsel submitted orally, when the application came up for oral hearing on 1/2/2021.

15. In support of the application, Mr. Agina Advocate for the applicant submitted that the trial court’s refusal to adopt the Elders’ Report on reconciliation was erroneous and offends Section 176 of Criminal Procedure Code. He urged this court to stay the lower court proceedings and to call for the trial court file for perusal. He faulted the trial court for failure to adhere to Article 159 of the Constitution that calls upon

courts to encourage ADR mechanisms.

16. Opposing the application on behalf of the Respondent, Mr. Kakoi Principal Prosecution Counsel submitted urging this court not to grant the orders sought. He submitted that despite Article 159 of the Constitution allowing courts to embrace ADR, the court cannot impose a decision on a party. He conceded that albeit parties were encouraged to negotiate for a settlement, they disagreed hence the court had to fix the case for hearing since the complainant did not accede to reconciliation of the matter as it became more acrimonious and that the complainant was unwilling to reconcile.

17. In a rejoinder, Mr. Agina counsel for the applicant submitted that the lower court file has the Elders' decision which the complainant did not object to.

18. Upon hearing the submissions by the respective parties' counsel, I directed that the trial court file in Siaya PM Cr. Case No. 149/2020 be availed to this court for perusal and consideration in exercise of this court's supervisory jurisdiction under Article 165(6) and (7) of the Constitution, to enable this court make any order or give any direction it considers appropriate to ensure the fair administration of justice.

DETERMINATION

19. I have carefully considered the application by the applicant herein and the rival submissions by both parties' counsel.

20. In my humble view, the main issue for determination is whether the prayers sought are merited. Article 159(2) (c) of the Constitution provides for alternative forms of Dispute Resolution and calls on courts to embrace it in the administration of justice. The Article provides:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles:

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to Clause 3.”

21. Under the Clause three cited above:

“Traditional dispute resolution mechanisms shall not be used in a way that:

(a) contravenes the Bill of Rights,

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this constitution or any written law.”

22. Section 176 of the Criminal Procedure Code provides that:

“In all cases, the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or any terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.”

23. From the reading of the above provisions, it is clear that the application of alternative Dispute Resolution mechanisms in criminal proceedings is very limited to common assault, misdemeanors and not aggravated offences and not in felonies.

24. A misdemeanor is defined under Section 4 of the Penal Code as any offence which is not a felony, and the general punishment which is provided for, upon conviction for misdemeanors where no specific punishment is stipulated in the offence Section is as provided for in Section 36 of the Penal Code which provides:

“36. Where in this Code no punishment is specifically provided for any misdemeanor, it shall be punishable with imprisonment for a term not exceeding two years or with a fine or to both.”

25. On the other hand, Section (4) of the Penal Code defines a felony as:

“an offence which is declared by the law to be a felony or if not declared to be a misdemeanor, or punishable without proof of previous conviction, with death, or with imprisonment for three years or more.”

26. It is the same Penal Code at Section 4 that defines grievous harm to mean:

“any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely to injure health, or which extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, membrane or sense.”

27. The offence of grievous harm is established under Section 234 of the Penal Code which provides:

“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”

28. The Applicant herein was and is facing the offence of grievous harm contrary to Section 234 of the Penal Code which offence has been classified and defined under section 4 of the Penal Code as a felony and therefore the offence is among the crimes that Section 176 of the Criminal Procedure Code prohibits the courts from adopting reconciliation as a form of alternative justice.

29. In **Juma Faraji Serenge alias Juma Hamisi Vs Republic [2007] eKLR**, Maraga J (as he then was) stated:

“To the best of my knowledge, other than in cases of minor assault in which a court can promote reconciliation under Section 176 of the Criminal Procedure Code and such minor cases as the complainant is not allowed to withdraw a criminal case for whatsoever reason, in any case the real complainant in all criminal cases and especially so felonies, is the State. The victims of such crimes are nominal complainants. And the State, as the complainants, cannot be allowed to withdraw any such case because the victim has forgiven the accused as happened in this case or any such other reason. The State can only be allowed to withdraw a criminal case under Section 87A of the Criminal Procedure Code or enter a Nolle prosequi when it has no evidence against the accused or on some ground of public interest. And even then, when it has convinced the court that the case should be so withdrawn.

To allow withdrawals of criminal cases like this is tantamount to saying that relatives of murdered persons can be allowed to withdraw murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system.”

30. This court does appreciate that the Constitution recognizes the use of alternative justice systems as one of the principles to guide the courts in the exercise of judicial authority, and criminal cases are not excluded. However, this court must be alive to the policy guidelines behind the application of alternative justice systems and also observe that the Constitution does not make it mandatory for the courts to refer every case for Alternative Dispute Resolution.

31. In this case, the accused person did request the prosecution to allow for ADR and the Prosecution informed the court of the request. The trial court then acceded to and referred the case for reconciliation involving elders. However, from the letter or proceedings filed in court from the elders, it is clear that there is no consensus between the accused and complainant on reconciliation. It is the elders who concluded on their own accord that for peace to prevail between father and son, the case pending in court must be withdrawn meaning, that the accused has given conditions for peace- that the grievous harm (felony) charge must be withdrawn from court for peace to prevail.

32. On the part of the complainant, he participated in the reconciliation meeting but from the proceedings filed in court, there is no evidence of any party or participant signing the so- called reconciliation proceedings or verdict to have the case withdrawn or be terminated.

33. Moreover, when the matter came up for mention before the trial court, the Hon. J. Ong’ondo recorded what the complainant indicated to court that they had not agreed as the accused did not apologize to him and was continuously threatening to kill the complainant, hence the order by the trial magistrate that the hearing do proceed.

34. Furthermore, as the charge is a felony, what the accused person should have done is to plea bargain with the prosecution and to sign a Plea Bargaining Agreement for consideration by the court and not to demand that simply because the trial court allowed time for ADR then whatever the elders decided without a signed consent of the complainant, accused and prosecution, was to be adopted as the order of the court terminating the criminal proceedings.

35. The power and jurisdiction of this court under Article 165(6) & (7) of the Constitution is not to prefect, control or police the subordinate courts or tribunals in their discharge of their judicial or quasi-judicial mandate. What this court is being asked by the applicant to do, is to compel the trial court to terminate criminal proceedings in favour of the accused person for reasons that parties have reconciled, contrary to the evidence on record that shows clearly, that there is no reconciliation between the accused/applicant and the complainant who is his father.

36. As earlier stated, only the Prosecution can apply to terminate criminal proceedings under Section 87A of the Criminal Procedure Code or Article 157 of the Office of Director of Public Prosecutions Act and may also enter ***Nolle prosequi***, with permission of the trial court.

37. In the alternative, the accused person who believes that he committed the offence and does not want to go through the motions of a full trial may approach the prosecution and complainant, in the case of a felony as is in the instant case, for Plea Bargaining Agreement to be signed and filed into court for consideration.

38. In the absence of any of the above and as the offence is a felony, with the complainant unwilling to reconcile due to alleged threats to kill being advanced at him by the accused, this court cannot and has no jurisdiction to interfere, intervene and compel or order the withdrawal or termination of criminal proceedings in favour of an accused person.

39. For the above reasons I find and hold that this application is misplaced, misconceived and is devoid of merit. It is declined and dismissed.

40. The lower court file which was availed to this court for perusal and consideration is hereby returned forthwith for the trial court to continue with the hearing of the Criminal Case No. 149 of 2020 as scheduled.

41. This file is closed.

42. Orders accordingly.

Dated, signed and Delivered at Siaya this 22nd Day of February 2021

R.E. ABURILI

JUDGE

In the Presence of:

Applicant and his Counsel Mr. Ochanyo Advocate h/b for Mr. Agina

Ms. Nambisia, Prosecution Counsel

Court Assistant: Modestar and Mr. Mboya