



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 4 OF 2020**

**VICTOR SAMBU & 5 OTHERS.....APPLICANTS**

**VERSUS**

**JSN.....RESPONDENT/PROSECUTOR**

**RULING**

The Applicants were aggrieved by the decision of the Chief Magistrate's Court Milimani (Hon. E. Andayi Chief Magistrate) delivered on 12<sup>th</sup> February 2019. In the verdict, the Chief Magistrate allowed the Respondent to institute private prosecution of the Applicants. The Chief Magistrate, held, *inter alia*, that the Respondent had satisfied him that the Police had failed to act on his numerous complaints despite the fact that the Respondent had evidence that the Applicants, either jointly or singly, were planning or had the intention to kill him. The Applicants had robustly opposed the application essentially on the grounds that the Respondent lacked the requisite mental capacity to prosecute them. The Applicants argued that it had been established by a consultant Psychiatrist that the Respondent suffers from Paranoid Schizophrenia. He was suffering from hallucinations that made him imagine that his co-workers (the Applicants) intended or were plotting to kill him.

From the ruling of the Chief Magistrate, it was apparent that the trial court did not believe this claim of mental incapacity on the part of the Respondent as asserted by the Applicants, because, in their initial response they had failed to attach any medical documents to support their assertion that it had indeed been established that the Respondent suffers from a mental incapacity. This is what the Chief Magistrate stated in his ruling:

***“The Respondents (the Applicants herein) through their counsel have not produced any documents to prove the allegation that the applicant suffers from positive Schizophrenia (sic) which causes the Applicant to have illusions and abnormal imaginations. If this had been done the court would have had an opportunity to ask the Applicant to proceed to a government medical institution to verify the claims. However, as they are, the claims are bare. The Applicant countered the claim in his affidavit where he says that the company’s doctor has been causing medication to be administered to him and the doctor alleged to be doing so is one of the Respondent.”***

From the above ruling, it became obvious to the Applicants that if they obtained medical reports to support their claim, the trial court would reconsider its decision. That is what they exactly did. They filed an application seeking the Chief Magistrate to reconsider his decision. They annexed three medical reports prepared on various dates within a span of three (3) years which stated that the Respondent suffers from Paranoid Schizophrenia and has been under medication since 2013.

On several occasions, he had been admitted to hospital when his conditions worsened. The consultant Psychiatrist attributed his relapses to lack of appropriate social support and failure by the Respondent to take his medication as prescribed. The Application for reconsideration of the decision, however met a headwind when the trial court (Hon. Martha Mutuku, Chief Magistrate) correctly held that the magistrate's court did not have a jurisdiction to review its own decision in a criminal case. The remedy of the Applicants, if aggrieved, was to either file an application for revision or file an appeal before the High Court. The Applicants followed the advice. They filed the present application for revision seeking the setting aside of the order granting leave to the Respondent to institute private prosecution against them.

The promulgation of the **Constitution, 2010** ushered in a new prosecutorial regime in the criminal justice system. **Article 157** of the **Constitution** creates the office of the Director of Public Prosecution. Under **Article 157(4)**, the Director of Public Prosecution has power to direct the Inspector General of National Police Service to investigate any information or allegation of criminal conduct. **Article 157(6)** sets out the prosecutorial powers vested in the Director of Public Prosecution which includes the power to 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.

In exercise of his powers, under **Article 157(10)** of the **Constitution**:

***“The Director of Public Prosecution shall not require the consent of any person or authority for the commencement of***

*criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”*

In respect of private prosecutions, **Section 28** of the **Office of the Director of Public Prosecution** provides that:

*“(1) Notwithstanding any provision under this Act or any other written law, any person may institute private prosecution.*

*(2) Any person who institutes private prosecution, within thirty days of instituting such proceedings, notify the Director in writing of such prosecution.*

*(3) In accordance with Article 157, of the Constitution and this Act, the Director may undertake, takeovers or discontinue any private prosecution.”*

The jurisprudential landscape is therefore considerably different than was previous before 2010. Authorities in respect of case filed before 2010 when the Constitution was promulgated may not therefore give the true position of the applicable legal terrain. This court cautions against the citation of such cases without taking cognizance of changes that have taken place in the legal regime with respect to prosecution of criminal cases. For instance, whereas the case of **Floriculture International and 4 others vs. The Attorney General Nairobi HC Misc. App. No. 114 of 1997** (unreported), may be good law in respect of certain conditions precedent to be fulfilled before the court may grant leave for a party to institute private prosecution, that decision is no longer good law on account of legal developments that ensued after the coming effect of the **Constitution, 2010**.

In that regard, it will not do for the Applicant to only establish that he has been frustrated by the Police from pursuing a criminal complaint. Such Applicant must establish that, apart from pursuing investigation of the complaint by the Police, he has also sought the intervention of the Office of the Director of Public Prosecution and failed to obtain satisfactory resolution of his complaint. This is because, since the promulgation of the **Constitution**, it is only the Director of Public Prosecution who can give consent for charges to be laid in court against the accused. The Applicant will not have meet the threshold if he only attempts to establish inertia or frustration to the resolution of his complaint by the Police alone. He must also establish that he sought the intervention of the Director of Public Prosecutions and got an unsatisfactory response.

Further, an application seeking leave to institute private prosecutions can only be competent if the Director of Public Prosecutions is one of the Respondents. This is due to the fact that, in all criminal proceedings, it is the Director of Public Prosecution who represents the Police in court. As was held by **Okwany J** in **Frandik Nyamwaro Ogora vs. Elkana Obwaya Nyandika & 2 other [2018] eKLR**:

*“The law with regard to the procedure to be adopted by a private citizen who desires to initiate private prosecution against another citizen, as is the case in the instant application, is contained in Section 88 of the Criminal Procedure Code which requires that the party should approach the Magistrate’s Court to permit him to carry out the prosecution. I however do not believe that the intention of the said section was to give parties a blank cheque to unilaterally decide that an offence has been committed and to initiate private prosecution against another citizen without reference to the Police or the office of Director of Public Prosecution.”*

In the present application, having read the pleadings filed by the parties and considered the submission made before court, it was clear to the court that the Respondent’s application to be granted leave to institute private prosecution did not meet the legal threshold. In the first place, neither the police nor the Director of Public Prosecution were enjoined as parties to the proceedings. How did the trial court verify the allegation of inaction by the Police or the Director of Public Prosecution if they were not given a chance to respond to the allegations made against them? A cardinal principle of the law is that no one can be condemned without being give a right to be heard. The allegations made by the Respondent against the Police accusing the police of inaction is just that; allegations. Without the Police being given a chance to respond, this court cannot reach a definitive finding that the Police are guilty of inaction or dereliction of their statutory duty without having been given the chance to respond.

Further, when the allegation was made that the Respondent lacked legal capacity to prosecute the case on account of an alleged mental incapacity, it was incumbent upon the trial court to at least call for a medical report to determine and satisfy itself that indeed the party had the requisite mental capacity. It is not every day, indeed it is rare in court proceedings, both civil and criminal, for an allegation to be made by one of the parties that a party lacks mental capacity. It was the duty of the trial court to investigate if the allegations made about the Respondent’s mental capacity were indeed true. When medical reports where brought to the attention of the court that the Respondent had indeed in the past suffered mental illness, the trial court had the duty to investigate the veracity of the medical reports by referring the Applicant to be examined by a Government Psychiatrist. That was not done in this case. The law is clear in regard to who may institute proceedings in court. That person does not include a person suffering from mental incapacity.

In the premises therefore, this court holds that the Applicants made a case for this court to revise the order that emanated from the ruling by the trial court delivered on 12<sup>th</sup> February 2019, under the powers vested to this court by **Section 362** and **Section 364** of the **Criminal Procedure Code**. The orders granting the Respondent leave to institute private prosecution against the Applicants is hereby set aside. It is substituted by an order of this court dismissing the Respondent’s Application dated 28<sup>th</sup> September 2018 and filed in court on 4<sup>th</sup> October 2018. The Respondent is at liberty to retrace his steps and follow the directions given by this Court in this Ruling if he is still interested to pursue the prosecution of the Applicants. It is so ordered.

**DATED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2020.**

**HON. L. KIMARU**

JUDGE