



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

HCCRA NO. 134 OF 2017

ABDUL NUUR.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal Magistrate's Court at Kabarnet Cr. Case no. 387 of 2015 delivered on the 13th day of March, 2015 by Hon. S.O. Temu, PM/

RULING

1. The DPP has urged the Court to allow for reconciliation in the matter of this appeal from a conviction and sentence for the offence of rape contrary to section 3 (3) of the Sexual Offences Act and submitted as follows:

“DPP

The complainant informed me that they wanted to reconcile. The complainant had sought to withdraw in the trial Court and was not given a chance. When the complainant had testified she still indicated that she wanted to forgive the appellant. I feel that the parties were not given a chance to withdraw.

Due to the insistence by the complainant to withdraw the charge, I felt the appellant may have been convicted on a shaky and unreliable evidence. The appellant should be given the benefit of doubt. The complainant is a grown up person and she is entitled to withdraw the charge. She wanted to withdraw the charge from the beginning during the trial Court.”

2. The Court reserved the matter for ruling/directions after considering the legality and propriety of the proposed course of action.

3. Of course, section 204 of the Criminal Procedure Code allows the withdrawal of a complaint in the trial Court in terms as follows:

204. If a complainant, at any time before a final order is passed in a case under this Part, satisfies the Court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused

Part VI of the Criminal Procedure Code under which section 204 falls is on “*Procedure in Trials before Subordinate Courts.*”

4. Any contest as to who is a “*complainant*” which has engaged judges, magistrates and legal practitioners is put paid in cases of Sexual Offences by the provision of section 40 of the Sexual Offences Act which provides that:

“40. The decision as to whether **the prosecution** or investigation by any police officer of a complaint that a sexual offences has been committed should be discontinued shall rest with the Attorney General”.

5. Article 157 of the Constitution vesting the state prosecutorial powers with the DPP, the authority to discontinue a prosecution or investigation into alleged commission of a sexual offence under section 40 of the Sexual Offences Act must be exercisable by the DPP.

6. The application for reconciliation herein having been made by the DPP or with the apparent authority of the DPP as disclosed by the submissions made in court and set out above, the court must take it that the authority to discontinue the prosecution has been given pursuant to Section 40 of the Sexual Offences Act.

7. The Court agrees with the DPP that the insistence of the complainant from the very first day of trial to withdraw the complaint may be a pointer to credibility of the prosecution's case and the complainant who was at trial aged 60 years and of sound mind, is a person capable of

consenting to the withdrawal of the charges at the trial stage, and reconciling with her alleged assailant on appeal, as well as to the very act of sexual act subject of the charge of rape for which the appellant was convicted and sentenced provoking this appeal. See section 42 of the Sexual Offences Act.

8. What remains, therefore, is for the complainant to signify her reconciliation with the appellant upon which court, even as an appellate court, may act pursuant to Article 159 of the Constitution to promote alternative method of dispute resolution, the matter now being outside the ambit of Section 204 of the Criminal Procedure Code which is for withdrawal of complaint by the complainant at trial stage before a final order in the case.

9. Accordingly, the court shall at this stage upon oath take any representation of the complainant regarding her alleged reconciliation with the appellant pursuant to court's power to take additional evidence on appeal under section 358 of the Criminal Procedure Code.

Order accordingly.

DATED AND DELIVERED THIS 21ST DAY OF FEBRUARY 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent