



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL REVISION NO. 24 OF 2018

REPUBLIC.....PROSECUTOR/RESPONDENT

VERSUS

JACOB BUNDI.....ACCUSED

S K K (Suing on behalf of minor)

S N.....APPLICANT

RULING ON REVISION

1. Before court is a Motion on Notice dated 20th February, 2018 wherein the applicant has moved the Court under **Sections 362, 364, 365, 366 and 367 of the Criminal Procedure Code Cap 75 Laws of Kenya (“the Code”)**. In the Motion, the applicant has sought the setting set aside of the orders issued on the 5th February, 2018 in Tigania SOA NO. 3 of 2018 **Republic vs. Jacob Bundi** withdrawing the said case under **Section 87(a)** of the **Criminal Procedure Code**.

2. The grounds upon which the Motion is grounded are set out in the body of the Motion and in the affidavit sworn by the applicant on 20th February, 2018.

3. The applicant is the mother of the minor who was the victim of an alleged defilement in the case. She alleged that the trial Court misdirected itself by accepting the withdrawal of the case; that since the withdrawal of the case, the accused has been bragging, harassing, abusing and intimidating the minor/victim and that the withdrawal of the case will cause grave injustice to the victim.

4. The application was opposed vide a replying affidavit of the Jacob Bundi (hereinafter “the respondent”) who was the accused before the trial court, sworn on 6th June, 2018. He deponed that; the matter came up before the trial Court for mention three times and the prosecution all along advised that there was no sufficient evidence to sustain the offence of defilement; that after his discharge, he never met the applicant or her daughter, nor has he uttered any threats to them. He maintained that the allegations against him are made in bad faith as the applicant had demanded for Kshs. 500,000/= from him which he had declined to give. He concluded that if he had been harassing the applicant as alleged, the applicant ought to have made a report to the police.

5. I have carefully considered the application, the affidavits and the law. When the matter came up for hearing, Learned Counsel appearing for the respective parties, Mr. Muthomi, Mr. Muriuki and Mr. Kiarie, for the applicant, the respondent and the prosecution respectively, requested that the Court do decide the matter on the basis of the material on record.

6. This court has been invited to exercise its jurisdiction under **section 362 of the Criminal Procedure Code Cap 75 of the Laws of Kenya** which provides:-

“The High Court may call for and examine the record of any criminal proceeding 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”.

7. Under the said section, the jurisdiction of this court is limited to calling for the trial court’s record to satisfy itself as to the **legality, or propriety of any finding, sentence or order recorded or passed, and as to the legality of the proceedings**.

8. This court has called for and carefully considered the record of the trial court. The accused was arraigned before in court on 8th January, 2018 with the offence of defilement contrary to **section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 23rd November, 2017, at Kamachia Location in Tigania West sub-county of Meru County, the accused defiled SN a girl aged 15 years. There was also an alternative charge of indecent act with a child. The accused pleaded not guilty to both counts.

9. On the very date of plea, the prosecutor is recorded as stating; **“everything is normal as per the P3 Form and I request for a mention date to review the investigation file”**. The accused was then released on a bond of KShs.50,000/-. The matter was fixed for mention on 15th January, 2018 and then 5th February, 2018. On the latter date, the following was recorded:-

Prosecutor

“I wish to withdraw the case under Section 87 (a) CPC for want of evidence. The P3 Form shows that the genitalia was normal.

Signed

Accused

No objection.

Signed

Court

Case withdrawn under section 87(a) CPC. Accused is discharged. Title deed to be released.

Signed”

10. From the foregoing, there is no evidence that the complainant, a minor or her guardian were consulted or advised of the matter. It should be noted that there were two counts facing the accused, one for defilement and another for indecent act with a child. From the record, it would seem that the prosecutor looked at the P3 Form, saw the opinion of the doctor therein that the genitalia was normal and concluded that there was no evidence. Does the charge for indecent act with a minor depend on the information in the P3 Form? It is not clear from the record.

11. **Article 27 (1) of the Constitution** provides:-

“Every person is equal before the law and has the right to equal protection and equal benefit of the law”.

12. **Article 50** on the other hand provides:-

“1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body;

.....

7) In the interests of justice, a court may allow an intermediary to assist a complainant or an accused person communicate with the court.

8) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offence”.

13. In consonance with the foregoing, Parliament enacted the **Victim Protection Act 2014** wherein **sections 4 and 9** provide as follows:-

“4 (2) b) Every victim is, as far as possible given an opportunity to be heard and to respond before any decision affecting him or her is taken.

9 (2) Where the personal interest of the victim has been affected, the Court shall;

a) permit the victim’s views and concerns be presented and considered at stages of the proceedings determined to be appropriate by the court; and

b) ensure that the victim’s views and concerns are presented in a manner which is not;

i) prejudicial to the rights of the accused; or

ii) inconsistent with a fair and impartial hearing”

14. In the cases of **R vs. Joseph Lentrix Waswa (2016) eKLR** and **R vs. Veronica Gitahi and Others (2016) eKLR**, the courts allowed restricted participation of the victims in those proceedings.

15. In the present case, the victim is a minor. She lodged a complaint with the police as a result of which investigations were carried out and the office of the Director of Public Prosecutions, being satisfied that there was evidence to lodge a criminal case, charged the accused in the above noted case. It is not clear why the prosecutor would sound a warning from the first day the matter came up in court for plea that he needed to review the file. He is expected to have reviewed it before arraigning the accused in court. There is no evidence whatsoever on record to show that the victim was either notified, consulted or advised before the prosecutor took the decision he took.

16. I am alive to the fact that the role of the prosecution should never be undermined. It has power to institute and terminate criminal proceedings. However, that power is not absolute. **Section 87 (a) of the Code** gives the trial court discretion, to either permit or decline a withdrawal of charges against an accused.

17. In this regard, it was imperative in this case that the court should have first satisfied itself that the provisions of the **Constitution of Kenya and the Victim Protection Act, 2014** cited above were complied with before permitting the withdrawal of the charges.

18. The victim has now come to this court complaining about the orders made by the trial court which affected her without her being heard. That is not trivial. The prosecution participated in these proceedings. There was no indication that it intended to re-arrest and re-charge the accused as contended by the accused.

19. In this regard, I am satisfied that the impugned order was made without considering the provisions of the Constitution and the law which I have referred to above. That order therefore cannot stand.

20. It is clear that I have not dealt with the allegations of harassment and bragging raised by the applicant. To my mind those are matters to be dealt with by the police if and when an appropriate report or complainant is made.

21. Accordingly, I allow the application. The order made on 5th February, 2018, in **Tigania SRM Court Cr. Case SOA No. 3 of 2018 R v. Jacob Bundi** terminating the proceedings is hereby set aside. The matter is remitted back to that court to be dealt with in accordance with the law.

DATED and DELIVERED at Meru this 27th day of September, 2018.

A. MABEYA

JUDGE