REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION 184 OF 2016

OFFICE OF THE DIRECTOR OF

PUBLIC PROSECUTIONS……APPLICANT

VERSUS

MARTIN MBITHI……...…...……..RESPONDENT

RULING

The Applicant, vide a letter drafted by Annette Wangia, Senior Prosecution Counsel dated 12th October, 2016 made an application to this court invoking its powers under Section 362 and 364(1)(b) of the Criminal Procedure Code. The Application was for the revision of a ruling made by **Hon. Ojoo in Criminal Case 1482 of 2013**. They laid out the background of the criminal case as one in which the Respondent faced a charge of sexual assault contrary to Section 5(1)(a)(ii) as read with Section 5(2) of the Sexual Offences Act. The offence was alleged to have occurred on 6th May, 2013 at Ongata Rongai.

The contentious ruling involves the acquittal of the Respondent under Section 204 of the Criminal Procedure Code on 28th September, 2016. This ruling was made at the behest of an application made on 23rd September, 2016 by the Respondent's advocate, Nzavi, predicated by an affidavit sworn by the complainant seeking to have the matter withdrawn.

The Applicant set out the following grounds why it sought to have the order revised:

1. That the learned magistrate misdirected herself when acquitting the Respondent under Section 204 when such an application was never made by the complainant.

2. That the learned magistrate misdirected herself in relying on an affidavit allegedly sworn by the complainant which was availed to the court by the respondent without examining the alleged affiant to determine whether it was made under threat, coercion or duress and whether she understood the implications of the withdrawal.

3. That the learned magistrate misdirected herself in failing to take into consideration the provisions of section 40 of the Sexual Offences Act which bestows the power to discontinue prosecution in the Attorney General which power now rests with the Office of the Director of Public Prosecution.

4. That the decision to acquit the Respondent was improper.

The Respondent replied to the application *via* affidavits sworn by Martin Mbithi, herein Martin, and Miriam Mwikali Mutuku, herein Miriam.

In his affidavit, Martin, deponed that a disagreement occurred between the parties leading to the filing of the criminal case but that he had consequently met and reconciled with the complainant agreeing to unconditionally withdraw the charges he faced. He deponed that on 23rd September, 2016 the complainant was in court and tendered her affidavit expressing her desire to withdraw the charges and that the prosecution therefore should have requested the examination of the complainant *vis a vis* the affidavit. He deponed that he had never coerced, intimidated and/or promised the complainant any reward or gain in order to withdraw the charges. He swore that the trial court acted within the law as envisaged under Sections 176 and 204 of the Criminal Procedure Code when it evaluated the evidence before it and acquitted him. He deponed that it was against the rules of natural justice and the Constitution for the Applicant to pursue criminal charges when the complainant had withdrawn the complaint. Further that it was in the interest of justice and fairness that this court should uphold the acquittal by the trial court particularly given that the complainant was willing to attend court and state her position with regards to the matter.

Miriam's affidavit was annexed to the reply. In it she deponed that she swore an affidavit to withdraw the case against the Respondent which she submitted to the trial court on 23rd August, 2016. She rejected the allegations made by the Applicant in their letter dated 12th October, 2016 and submitted that she swore the affidavit without any coercion, threats and/or intimidation or promise of any reward or gain. She submitted that she had a right to withdraw the case under Section 204 before a final order is made and that she was aware that Section 176 of the Criminal Procedure Code allowed courts to promote reconciliation, encourage and facilitate settlements in an amiable way. She submitted that it would be in the interest of justice and all fairness for the court to uphold the acquittal by the trial court and let the matter rest.

The parties made oral submissions on 9th November 2016 that mirrored on the depositions to the supporting affidavit and the application itself.

DETERMINATION

This court has considered the submissions by the respective parties and finds that the application turns on whether a complainant has the power to withdraw a criminal case under Section 204 of the Criminal Procedure Code when the offence in question emanates from the Sexual offences Act, no. 3 of 2006. The Respondent has submitted that the Criminal Procedure Code provides the procedural law in criminal case while the Applicant states that when it comes to offences under the Sexual Offences Act the procedure *vis a vis* withdrawal of prosecution vests in the Office of the Director of Public Prosecutions pursuant to Section 40 of that Act. The Section in question states:

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

It is trite that the responsibility of instituting and undertaking criminal trials lies with the office of the Director of Public Prosecutions as per Article 157. It is clear that the office of the Director of Public Prosecutions has the mandate to decide whether to prosecute or investigate complaints relating to sexual offences. It is this court's finding that the section in question applies to complaints and not trials. In making this observation this court is clear that the provision deals with pre-trial matters pertaining to complaints made. Therefore, the Applicant's submission that only the office of the DPP has the mandate to withdraw criminal cases where the offences relate to Act No. 3 of 2006 is not backed by law. Section 204 of the Criminal Procedure Code would be invoked even in cases of this nature.

With the above in mind, I now address the question of whether the magistrate erred in allowing the withdrawal. This court has considered the Applicant's submission that the complainant was never examined by the court to establish whether she was making the withdrawal of her own volition. The

respondent in response to this submission deponed that she was in court when the submission was made and the prosecution could have asked for the examination. The Respondent submitted that it was the complainant who tendered her affidavit in court on the date in question.

It is clear that 23rd September, 2016 was meant for submissions *on* a ruling on whether the prosecution had made a case to answer. The Respondent's advocate had on 2nd September, 2016 sought three weeks to file the submissions. When the weeks were done and the matter came up on 23rd he started out by submitting, inter alia, that the matter was coming up for submissions but that he was not fully acquainted with the file. It seems proper to reproduce his submission leading up to the application. He submitted thus:

> ***"I have now had a chance to peruse the record and I have noted that the complainant has made several attempts to withdraw the case, for instance 2.11.2015 and on 23.8.2016. The complainant even went ahead and filed an affidavit in court on 23.8.216 expressing a desire to have the case withdrawn. She maintains her wishes."***

The advocate then went ahead and made an application to withdraw the case to which the Applicant responded and which led to the ruling of 28th September 2016. An affidavit had been presented to the court on 23rd August, 2016 and the court made a ruling that the hearing proceeds and bizarrely the complainant was then recalled for cross examination by the Respondent. That being said it is clear that the ruling that forms the basis of this application is a revision of the magistrate's earlier order of 23rd August 2016. It therefore appears that the manner in which the application was made was proper and that the complainant was in court and even took part in a hearing. Therefore if the Applicant sought to query the application they had an opportunity to do so but did not.

That said though, it is the view of this court that this is not a good case that the court to have allowed the withdrawal. This court is cognizant that the Sexual Offences Act attaches a lot of weight to the offences therein. This is demonstrated by the heavy penalties prescribed. The offences elicit certain emotions and are therefore of public interest. They cannot just be withdrawn at the will of a party who claims reconciliation with the offended party. Moreover, the court must take into account the stage at which the withdrawal is sought. It is after the complainant testified. Had there been genuine reconciliation, the withdrawal would have been proposed much earlier. The trial magistrate in her ruling indicated that the complainant was an adult of sound mind and could therefore withdraw the complaint if she did so wish. However, given the public nature of the offence in question, and further that the complainant had opted to testify against the Applicant gives an impression that some inducement may have been used to secure the withdrawal. It is in the public interest that the matter should be heard to conclusion.

In the end, I set aside the order of the learned trial magistrate withdrawing the case and acquitting the Applicant under Section 204 of the Criminal Procedure Code. I substitute it with an order that the prosecution case is reopened and shall proceed to conclusion. It shall be mentioned before the trial magistrate on 8th December to take a hearing date. It is so ordered.

DATED AND DELIVERED THIS 29TH DAY OF NOVEMBER 2016

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Nzavi for the Applicant.

2. M/s Akuja for the Respondent.