



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

HIGH COURT CRIMINAL REVISION NO. 416 OF 2012

MOSES MUCHIRI NJUNOAPPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

1. The applicant who is facing imminent private prosecution has brought an application for revision contained in a letter dated 24th September 2012 and filed in court on 25th September 2012. The application is brought under the provisions of **Section 362 to 367** of the **Criminal Procedure Code**.
2. The backdrop of the application is that the applicant had been charged at Thika court for causing grievous harm contrary to **Section 234** of the **Penal Code**. Subsequently, the state entered a nolle prosequi, which was allowed by the learned magistrate, for reasons that this would allow the police to carry out further investigations. The respondent has now applied for and been granted leave to institute private prosecution against the applicant, and this application is therefore, against that decision of the learned magistrate to allow those proceedings to be brought against the appellant.
3. It was argued by Mr. Makori, learned counsel for the applicant, that the private prosecution was instituted with the intention of coercing the applicant into a settlement, in a civil suit that the respondent has filed against him. It was also contended that the respondent's private prosecution amounts to a challenge to the nolle prosequi, yet there is no report on the prosecution's further investigations, for which the nolle prosequi was granted.
4. Mr. Makori urged the court to be guided by the case of **Republic v Jared Wakhule Tubei and Mary Florence Wander H.C. Rev Case no. 26/2012** in which a court of concurrent jurisdiction held that the powers of the court in supervision are wide. He further urged that the applicant stands to suffer loss of liberty and infringement of his rights if the proceedings are allowed to stand.
5. On behalf of the Respondent the application was opposed by learned counsel Mr. Ingutya. Mr. Ingutya submitted that under **section 362 of the Criminal Procedure Code** as read with **Section 364 Criminal procedure Code**, this court must be satisfied that there are proceedings to which its powers of review apply. He submitted that there were no such proceedings in the lower court, since there was no accused person and no charges framed or admitted as yet. The respondent filed a list of authorities on which he relied, but in particular he referred to the case of **Brian Yongo v**

Republic 147 of 2007.

6. The jurisdiction of this court on review is limited by the wording of **Section 362** of the **Criminal Procedure Code** itself, as follows:

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

It therefore applies to proceedings that have been concluded and a final order made.

7. It is not disputed that there was an application in the lower court, which was brought by the respondent, seeking leave to commence private prosecution against the applicant. That application was allowed and the leave sought by the respondent to commence private prosecution was granted. In my view, these were proceedings before a subordinate court for purposes of **Section 362** of the **Criminal Procedure Code**, which are therefore capable of being placed before the High Court for revision.
8. The powers of revision which are statutory in nature, do not allow the court to invoke general discretion to supervise proceedings except in the terms of **Section 362** of the **Criminal Procedure Code** as set out above. The applicant has not demonstrated what the irregularity, illegality, impropriety or the incorrectness is, in the lower court proceedings to warrant this court invoking its powers under **Section 362** of the **Criminal Procedure Code**.
9. There is no multiplicity of cases in the matter before me if the only reason for stating so is that there is a civil case on the same matter. Criminal proceedings can be instituted concurrently with those of a civil nature. The law on the determination of concurrent civil and criminal proceedings on substantially similar issues is to be found in **Section 193 A** of the **Criminal Procedure Act**, which provides that:

“Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

The reasoning that there is a pending civil case and the only to coerce the applicant into a settlement does not, by itself, warrant the granting of stay of concurrent criminal proceedings.

10. The respondent went before the lower court under the provisions of **Section 88(1)** of the **Criminal procedure Code** to seek leave to commence the said private prosecution. There is no requirement that he should have awaited a report from the police if he could satisfy the court that he should be granted the leave sought.
11. For the foregoing reasons, I decline to revise or interfere with the orders of the learned trial magistrate in the lower court.

The application is dismissed.

SIGNED DATED and DELIVERED in open court this **13th** day of **August** 2013.

L. A. ACHODE

JUDGE