Nyabuto v Republic (Criminal Revision E024 of 2025)
[2025] KEHC 4106 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4106 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKADARA

CRIMINAL REVISION E024 OF 2025

J WAKIAGA, J

APRIL 2, 2025

BETWEEN

PHILEMON NYABUTO ..... APPLICANT

AND

THE REPUBLIC ..... RESPONDENT

(Being a revision from the ruling of the trial court in Makadara Criminal Case No 3147 of 2024 dated 13th November 2024 by Hon M. W. Njagi SPM)

RULING

1. The applicant was charged with the offence of causing grievous harm contrary to section 234 of the *Penal Code* the particulars of which were that on the 26th day of May 2024 at Pipeline Estate in Embakasi sub County of Nairobi County unlawfully did grievous harm to PI a minor aged 15 years.

2. On the 9th day of October 2024 the father of the complainant appeared before the court and informed the court on oath that he had talked with the parents of the accused person and that they had agreed to settle the matter out of court. He was duly cross examined by the prosecutor and confirmed that the minor had been taken for counselling.

3. This application was opposed by the prosecution on the ground that the minor did not have the capacity to consent to the withdrawal and that it had a duty to protect the interest and right of the children. It therefore intended to prosecute the applicant to the logical conclusion of the cause.

4. By a ruling thereon dated 13th November 2024 and the subject of this ruling the court upheld the objection by the prosecution and stated that the if the child was to withdraw the case, court would have been expected to test the intelligence of the child through voire dire examination and that it was only the state which could decide whether or not to withdraw the cause.

5. By an application dated 20th November 2024 filed under certificate of urgency ant the High Court Criminal Registry at Nairobi the applicant moved the court for an order that the court revise the said order preventing the minor through the guardian from withdrawing the case against the applicant herein.

6. The application was supported by affidavit of Joseph Ongoro who described himself as an Elder in Holy Christian Ministries Tasia who deposed that the applicant, the complainant and their parents worship thereat. He stated that he was approached by the father of the applicant for the purposes of mediating and settling the issue between the parties herein, which was as a result of a fight between the complainant and the applicant.

7. He deposed further that he summoned the parents of the complainant plus the complainant and that after discussion the parties agreed to settle the matter with the parents of the applicants paying kshs 25,000 to cater for any medical expenses that may arise upon which the parents of the complaint would with draw the case at the next court hearing.

8. The application was further supported by the affidavit of Joel Nyabuto the father of the complaint who confirmed having paid to the parents of the complainant a sum of kshs 25,000 and that pursuant to the court order that the complainant be taken for counselling, on three different occasions together with the parents of the complainant, they took the same to Mukuru Health Centre, the evidence of which they presented to court.

9. He deposed that he had been informed by their Advocate on record that the courts promote reconciliation and encourages amicable settlement in matters of this nature.

Submissions

10. This mater was transferred from Milimani to this court and on behalf of the applicant Mr Wangalwa submitted that the *Constitution* recognizes reconciliation and that the court ought to put social face to the matter so as to foster good neighbourliness between the parties. He stated that the applicant had been in custody for eight months and that the complainant was in form three who took oath and stated that he wished to withdraw the matter so as to move on with his life.

11. On behalf of the State, MS Kariuki submitted that a minor could not withdraw a matter and that the case was of grievous harm. She contended that the Magistrate did not act irregularly and therefore the application should have been dismissed.

Determination

12. Having looked at the lower court proceedings and the decision of the court herein together with the application placed before me, I am of the considered opinion that in rejecting the application for withdrawal, the lower court acted in error, having found out the reason for the withdraw was not set out , the best course of action was to seek those particulars more so when the father of the complaint was before the court and had been sworn on oath further there was no reason why the court should not have summoned the complaint so as to establish his intellect.

13. As submitted by the application the *Constitution* of Kenya at Article 159(2) (c) stipulates that in exercising judicial authority courts should be guided by alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional mechanism.

14. The only limitation in the exercise of this jurisdiction is provided for in sub clause (3) which states that traditional dispute resolution mechanism shall not be used in any way that ;

a. Contravenes the bill of rights

b. Is repugnant to justice and morality or result in outcomes that are repugnant to justice or morality

c. Is inconsistent with this constitution or any written law.

15. Long before the *Constitution* 2020 was promulgated section175 of the *Criminal Procedure Code* provides that " in all case the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offences of personal or private nature not amounting to felony and not aggravated in degree on terms of payment of compensation or other terms approved by the court and may thereupon order the proceedings to b e stayed or terminated "

16. Justice Korir in the case of *Republic v Pricilla Cherono Chebet & 2 others* Nairobi High Court Criminal case no 65 of 2011 expressed herself on the need to promote reconciliation thus:

> " it is my considered view that reconciliation ought to be given visible and viable space in the criminal justice system as envisaged by Article 159 of the *Constitution*. For both the offender and victims, genuine reconciliation brings closure to the loss however heinous the crime committed may have been. Reconciliation is even more critical where both the offenders and the victims are family, relatives, neighbours or friends. It therefore behoves the courts where the circumstances of the case permit to promote reconciliation alongside penal sanctions. In my view reconciliation speaks to the humanity of the offender and the victim while sanction speaks to society's condemnation of the offender and the offence and the two ought to work in tandem"

17. It was upon the trial court to promote reconciliation and in failing to do so the decision herein was in error. Having looked at the affidavits on record I am satisfied that the reconciliation herein was valid and did not prejudice the rights of the minor in any way. I am alive to the circumstance of the offence and therefore allow the application herein by substituting the decision of the trial court dismissing an application for withdrawal with an order allowing the father of the minor to withdraw the charges against the applicant who is hereby discharged .

18. The applicant shall be set free forthwith unless otherwise lawfully held.

SIGNED DATED AND DELIVERED AT MAKADARA THIS 2Nd DAY OF APRIL 2025

J. WAKIAGA

JUDGE

In the presence of