



REPUBLIC OF KENYA



KENYA LAW
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**Karanja v Mburu (Criminal Revision E009 of 2025)
[2025] KEHC 5664 (KLR) (7 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5664 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKADARA
CRIMINAL REVISION E009 OF 2025**

J WAKIAGA, J

MAY 7, 2025

BETWEEN

ERICK NDUNGU KARANJA APPLICANT

AND

PHARES MWANGI MBURU RESPONDENT

*(Revision of the decision of the trial court in Criminal case no 956
of 2022 dated 20 th December 2023 by Hon. M W Njagi SPM)*

RULING

1. The applicant was the complainant in case where one Phares Mwangi Mburu was charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code.
2. The accused (Respondent) was convicted but discharged under the provisions of section 35 (I) of the Penal Code on condition that he does not commit any other offence within nine(9) months from the date of the sentence and in passing the said sentenced the trial court noted that the genesis of the assault was a complaint was a reaction to an incidence where the applicant had flogged the accused wife and some other women and the accused acted in revenge(sic) for his wife and therefore deserved a second chance(sic)
3. Being aggrieved by the said determination, the applicant who was the complainant filed this application grounded on sections 4(2) (b),9,12 and 15 of the Victim's Protection Act for declaration that the sentence issued herein was discharging the accused was illegal, incorrect. Procedurally and substantially erroneous, flawed and in disregard of the law and facts
4. It was contended that the order discharging the accused under section 35 of Penal Code be reversed and substituted with a custodial sentence on the ground that the court did not take into account the judiciary sentencing policy guidelines and the victim's sentiments.



5. The application was supported by the affidavit sworn by the applicant in which it was deposed that the trial court without resorting to any pre-sentencing report or victim impact statement sentenced the accused to a discharged under section 35 without any reason and without taking into account the victims' sentiments .
6. It was deposed that the sentence was lenient compared to the offence ,injuries and harm sustained by the applicant as provided for under the [Victim Protection Act](#).
7. This application was initially filed at the Criminal Registry at Milimani High court where it was not certified urgent by Mutende J and on 12th November 2024 the same appeared before Mwamuye J where the Advocate for the applicant informed the court that they had filed submissions on the application to which Mr. Omondi for the DPP responded that it was the DPP who would have filed the application.
8. The court directed the DPP and the applicant to discuss the matter and on 16th December 2024 the DPP informed the court that it wished to formally come on record for the applicant and the court directed the applicant to serve the accused whom it allegedly called the respondent within 14 days for the date thereof.
9. On 29th January 2025 following the establishment of this High Court Registry the cause was transferred to the court and on 18th February 2025 when the matter first appeared before the court Miss Kariuki for the DPP informed the court that they were not involved in the matter and for the purposes of this ruling and for an abundance of caution, the court directed the applicant to serve the convict herein for hearing on 18th march 2025

Submissions

10. On behalf of the applicant it was submitted that the application was allegedly made by the prosecution to the court in exercise of its jurisdiction under sections 362 and 364 of [CPC](#) on the ground that the offense the accused was charged with was a felony with a custodial sentence of up to five (5) years and the trial court should have had a justifiable basis for departing from the prescribed sentence to an alternative sentence. Reference was made to the case of [Alister Anthony Pereira v State of Maharashtra](#) [2012] 2 S C C 648 to the effect that the prime objective of sentence was to imposed an appropriate adequate just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime was done.
11. It was submitted that whereas sentencing was an act of judicial discretion, the higher courts would interfere with the sentencing where such discretion where such discretion was based on wrong principles or procedure or exercised capriciously without due regard to the relevant factors.
12. It was submitted that as per the Supreme Court guidelines in [Francis Karioko Muruatetu](#) , the court must take into account the prosecution and applicant submissions as well as those of the victims before deciding on a suitable sentence. Reliance was placed on the case of [Elisha Kiptang v Republic](#) Criminal Revision No E 002 of 2021 where the court stated that to pass just sentence the court should as a matter of course request for pre-sentencing report where a person is convicted of a felony as well as where the court is considering a non-custodial sentence and the court should give reasons for departing from the none binding recommendations made in the pre-bail report.
13. It was submitted that the sentencing policy guidelines advises that absolute or conditional discharge must be used sparingly and only in the rarest of occasions with sufficient basis taking into account the interest of both parties including the victims.



14. Miss Kariuki for the state submitted that though the applicant had approached the court directly, the discharge under section 35 should be set aside .

Analysis and Determination.

15. From the application herein, it is clear that the same has been filed by the complainant at the trial court and that in filing the same, the convict(respondent) though joined as a party was neither served with the application neither as required under the provisions of section 362 of the CPC and there no affidavit of service to that effect though there is an affidavit of an alleged service of the mention notice through WhatsApp.
16. In this matter the first issue for determination is the role of the victim in criminal prosecution and whether the same can file application for revision to this court directly if he/she is aggrieved by a decision of the trial court.
17. The Constitution of Kenya 2010 bestows all the prosecutorial powers to the Office of the Director of Public Prosecutions under Article 157 and that in undertaking this role the same shall not be under direction or control of any person or authority. This is further covered under section 6 of the office of the Director of Public Prosecutions.
18. From the Constitution and the statute, it is clear to me that the role of the victim is only limited to those set out under the victim protection Act and as set out by the supreme court in the case of Joseph Lendrix Waswa v R [2020] eKLR where the court at paragraph 76. stated that the victim has no active role in the decision to prosecute and that the DPP had at all times retained the control of sand supervision over the trial and that while the victim of the crime can participate at any stage of the proceedings as deemed appropriate by the trial judge , a victim or his legal representative does not have the mandate to prosecute crime on behalf of the DPP.
19. The court proceeded further to state at 77. That the victim cannot and does not wear the hat of a secondary prosecutor, and that courts judgement will not follow the wishes of the victim and that the court must take into account the law the fact all different interests and concerns including the right of the defence and the interest of a fair trial to arrive at a sagacious decision.
20. In this matter the applicant did not make an application before the trial court to participate in the trial and therefore the same can not be said to have had a right over and above that exercised by the prosecution. There is no right available to the applicant to at this stage approach this court directly .
21. If the same was aggrieved by the decision, then the DPP should have filed the application and prosecuted the same, otherwise the court will be enlarging the scope and the role of the victim over and above what the Supreme Court has allowed.
22. I therefore find that the same has no legal standing to file this application.
23. On the merit of the application, I have looked at the proceedings before the trial court and find that the decision herein was based on the facts as presented before the court and in particular the evidence on record on the genesis of the compliant herein and would therefore not interfere with the same.
24. The application has no merit and is therefore dismissed .

DATED SIGNED AND DELIVERED AT MAKADARA THIS 7TH DAY OF MAY 2025

J. WAKIAGA

JUDGE



In the presence of:

