



Republic v Barno & 5 others; Sayan Investments Limited (Victim) (Criminal Appeal E322 of 2024) [2025] KEHC 8652 (KLR) (Crim) (11 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8652 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E322 OF 2024
CJ KENDAGOR, J
JUNE 11, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

DAVID SOME BARNO 1ST RESPONDENT

PETER GATHII 2ND RESPONDENT

CATHERINE NJERI NGANGA 3RD RESPONDENT

ESTHER FURA SOME 4TH RESPONDENT

SADHANI LIMITED 5TH RESPONDENT

KEIBUKWO INVESTMENT LIMITED 6TH RESPONDENT

AND

SAYAN INVESTMENTS LIMITED VICTIM

RULING

1. The Respondents were charged with several offences namely, conspiracy to defraud contrary to Section 317 of the *Penal Code*, obtaining registration of land by false pretenses contrary to Section 320 of the *Penal Code*, making a false document contrary to Section 347 (A) as read together with Section 349 of the *Penal Code*, and forgery contrary to Section 345 as read with Section 349 of the *Penal Code*. The trial Court heard the Prosecution’s case and delivered a ruling on whether the Respondents had a case to answer. In the ruling delivered on 1st December, 2023, the Court found that the prosecution had failed to establish a prima facie case to warrant the Respondents being placed on their defence and acquitted them under Section 210 of the *Criminal Procedure Code*.



2. The Office of the Director of Public Prosecutions (ODPP) was dissatisfied with the Ruling and appealed to this Court vide a Petition of Appeal dated 11th December, 2023. The Appeal raises the following grounds;
 - i. The Learned Trial Magistrate erred in both law and fact in failing to find that the prosecution had established a prima facie case to warrant the respondents being placed on their defence and thus acquitting the respondents.
 - ii. The Learned Trial Magistrate erred in both law and fact to failing to properly analyze the entire prosecution evidence thereby acquitting the respondents.
 - iii. The Learned Trial Magistrate erred in both law and fact by concerning himself to the standard of proof required to convict the respondents of beyond reasonable doubt thereby acquitting the respondents.
 - iv. The Learned Trial Magistrate erred in both law and fact by disregarding the exhibits produced by the prosecution and relying on documents marked by the respondents and thereby acquitting the respondents.
 - v. The Learned Trial Magistrate erred in both law and fact by disregarding the testimony of PW1 and the expert opinion of PW11 and thereby acquitting the respondents.
3. However, before the appeal Court be heard, the ODPP made an oral application to this Court on 4th November, 2024 seeking to abandon and withdraw the appeal.
4. The Applicant opposed the same and filed the instant application dated 11th November, 2024, seeking the following orders;
 1. Spent.
 2. That the honourable court disallows any and all attempts by the Director of Public Prosecution to abandon and/or withdraw the appeal herein and be pleased to order that the Director of Public Prosecution prosecutes the same to its logical hearing and determination.
 3. That this honourable court be pleased to allow the Victim/Complainant to take over the prosecution of this appeal and prosecute the same until its logical hearing and determination in the interest of justice.
 4. That this Honourable Court be pleased to issue such other order as it may deem fair and just to secure a fair and just hearing and determination of this appeal.
 5. That there be no order as to costs on this application.
5. The grounds are set out on the face of the application and in a supporting affidavit by Nazlin Nizar Jetha sworn on 11th November, 2024. She averred that she is a Director of the Victim, Sayani Investments Limited. She stated that the withdrawal of the appeal will infringe on the Applicant's right to be heard. She stated that the Applicant was the victim of the offences, yet the ODPP did not give it a chance to respond or to be heard concerning the planned withdrawal of the appeal. She deponed that she is a beneficiary of the appeal and that the DPP's decision to withdraw the same greatly affects the Applicant.
6. The Respondents filed Grounds of Objection dated 27th January, 2024 in which they opposed the application. They argued that the application has not been made in the interest of justice. They claimed that the application seeks to infringe on their interests and interfere with the mandate and



independence of the ODPP. They stated that the ODPP is not mandated by any law to consult any person before it renders a determination on whether to withdraw and or stop the prosecution of any suit, whether at the trial stage or the appellate stage.

7. They stated that the Application is incompetent, on grounds that the Applicant does not have the locus standi to file the subject application. They argued that the Applicant is not a victim within the definition of a ‘victim’ under the *Victim Protection Act*. They stated that the Applicant is a legal person and not a natural person, and thus it is not entitled to the protections provided under Section 4 (2) (b) of the *Witness Protection Act*. The said provision provides that every victim should, as far as possible, be given an opportunity to be heard and to respond before any decision affecting him or her is taken.

Parties’ Written Submissions

8. The application was canvassed by way of written submissions. The Applicant filed their submissions dated 18th March, 2025 and the Respondents relied on their Grounds of Objection dated 27th January, 2024. The Court has carefully considered the above pleadings.
9. The Applicant submitted that the DPP should not be allowed to withdraw the Appeal. It argued that the DPP did not give it a chance to respond and be heard before it made the decision to withdraw the Appeal. In response to this, the Respondents submitted that the DPP was not bound by law to inform and consult the Applicant on the withdrawal. They argued that such rights are only available to natural persons. They stated that the Applicant is a private limited company and, therefore, is not a victim within the definition of the term ‘victim’ under the *Victim Protection Act*.

Issues for Determination

10. In my considered view, the only issue for determination before this Court is whether the Office of the Director of Public Prosecution should be allowed to withdraw the Appeal before this Court.
11. The instant dispute revolves around the definition of the term ‘Victim’ as provided for under the *Victim Protection Act*. Section 2 of the *Witness Protection Act* defines “victim” as follows:

“victim” means any natural person who suffers injury, loss or damage as a consequence of an offence;
12. Also related to this dispute is Section 4 (2) (b) of the *Witness Protection Act* which provides as follows;

“Every victim is as far as possible given an opportunity to be heard and to respond before any decisions affecting him or her is taken.”
13. The dispute is on whether a corporate entity can be regarded as a victim under the *Witness Protection Act* and therefore entitled to the rights provided under Section 4 (2) (b). The authorities on this area are divided. In *Kenneth Njiru Njagi Vs Republic; Lineal Company Limited & Another (Applicant)* (2021) eKLR, the Court held that a corporate entity is not a victim as per VPA and hence not entitled to the rights provided under that law. The Court stated as follows;
 30. That said, in determining whether to allow an applicant participation in a trial or in an appeal either in person or through an advocate, the court must be satisfied that the applicant is indeed a victim within the meaning of Section 2 of the VPA....
 31. Applying the above principles to the instant case, it is my finding that though the 1st applicant suffered financial loss in the transaction that resulted in the prosecution and conviction of the appellant, being a corporate entity, the 1st applicant does not fit the description assigned to a



victim in Section 2 of the Act which defines a victim as a natural person who suffers loss, injury or damage as a result of an offence. For this reason, I find that the 1st applicant does not qualify to be a victim and is not entitled to participate in the hearing of the appeal.

14. However, the above authority is not applicable in the instant case because the High Court has already declared the definition of the term ‘Victim’ under Section 2 of *Victim Protection Act* unconstitutional. The case in point is *Odhiambo v Attorney General & 2 others; Nyanboga (Interested Party)* (Petition E400 of 2021) [2024] KEHC 354 (KLR), where the Court held as follows;

“In the end and for the reasons stated, I find the impugned definition to be discriminative against juristic persons and prevents them from enjoying the rights and support available under the provisions of the VPA. Accordingly, I make the following orders:

- i. A declaration is hereby issued that that the definition of “victim” under Section 2 of the *Victim Protection Act* No. 17 of 2014 is unconstitutional for not providing for the protection, rights and welfare of all victims of criminal offences such as companies, associations or other body of persons whether incorporated or unincorporated who are recognized as persons under article 260 of the *Constitution* and is contrary to article 50 (9) of the *Constitution*.”

15. The Court in *Odhiambo v Attorney General* (Supra) took a divergent position on whether a corporate entity can be regarded a victim under the *Witness Protection Act*, and therefore enjoy the rights provided under Section 4 (2) (b). The Court held that a corporate entity qualifies to be a victim within the meaning of a victim under the *Victim Protection Act*, and thus entitled to the statutory rights provided under the *Victim Protection Act*. It held as follows;

“Reading the above provision, it is clear to my mind that recognizing and giving effect to the rights of victims of crime can apply to both natural and juristic persons. Similarly, protection of the dignity of victims through provision of better information, support services, reparations and compensation from the offender, establishment of programs to assist vulnerable victims, supporting reconciliation by means of a restorative justice response, etc can also apply to juristic persons. This is because juristic persons are also often victims of offences such as theft by servant, stealing, arson, malicious injury to property, rioters injuring building or machinery, forcible entry, etc. As such, they also need protection of the law. There is no justifiable reason why juristic persons should not also be protected under the provisions of the VPA. Accordingly, the contention that extending the provisions of the Act to juristic persons would render the same unimplementable, is not merited.”

16. This Court associates itself with the reasoning of the Court in *Odhiambo v Attorney General* (Supra). I therefore agree that a corporate entity qualifies to be a victim within the meaning of a victim under the *Victim Protection Act*, and is thus entitled to the statutory rights provided under the *Victim Protection Act*.

17. I have perused the record of the trial Court. I have established that the Applicant, Sayani Investments Limited, is recorded as the victim in all the 5 counts outlined in the charge sheet. I have also confirmed that one of the prosecution witnesses, PW12 is a director of the Applicant. I therefore find that the Applicant is the victim in the instant criminal proceedings.



18. The Court in *Abdi v Republic* (Criminal Appeal E010 of 2023) [2024] KEHC 6570 (KLR) (31 May 2024) (Ruling) underscored the place of the victim in criminal prosecution and the essence of involving the victim in the proceedings. It held as follows;

“42. Having considered the whole Trial court record, I note that the victim or complainant was not involved in the process of withdrawal of the charges, they allege that they were not consulted and this has not been denied by the Respondent. Criminal litigation is a tripartite relationship in this day and age with the enactment of the *victim protection Act*, the victim plays a vital role in these proceedings. The victim was not copied in the letters. The issue of locus standi cannot arise because she is a witness from a cursory perusal of the charge sheet.”

19. The next question is to determine whether the ODPP’s attempt to withdraw the Appeal violates the Applicant’s rights under Section 4 (2) (b) of the *Witness Protection Act*. The provision mandates the ODPP to give every victim, as far as possible, an opportunity to be heard and to respond before any decisions affecting him or her is taken. This court is being invited to look at the evidence and determine whether the ODPP gave the Applicant an opportunity to be heard and to respond to its planned withdrawal of the Appeal.

20. I have read the Applicant’s Application dated 11th November, 2024. It stated that the ODPP did not give it a chance to respond or to be heard before the DPP decided to withdraw the Appeal. The ODPP were served with said application and they acknowledged service. On 5th December, 2024 the Counsel from the ODPP prayed for more time to put in their response, to which this court granted. The matter came up again for a mention on 5th February, 2025 where the counsel from the ODPP told this court that they had not filed their response but maintained that they intended to file. The court graciously gave them leave to put in their response to the application.

21. The matter came up again for a mention on 18th March, 2025. On that day, the Counsel from the ODPP stated that they still had not filed their response but promised to put in their responses by close of business the following day. The court yet again gave the ODPP leave to file their response within 7 days. They did not file. Without the response from the ODPP, this court cannot tell whether the DPP’s decision to withdraw the appeal is justifiable. The ODPP has not adduced reasons why they made the decision to withdraw the appeal. They did not inform this court whether they had informed or sought to obtain the victim’s input regarding the decision to withdraw the appeal.

22. Based on the above analysis, I am inclined to find that the ODPP’s decision to withdraw the appeal was wrong to the extent that it did not give the Applicant the opportunity to be heard and to respond, as required under Section 4 (2) (b) of the *Witness Protection Act*. The DPP’s oral application made on 4th November, 2024 seeking to withdraw the appeal is disallowed. Having found as such, Prayer (3) of the instant Application is disallowed.

Disposition

23. The DPP’s oral application made on 4th November, 2024 seeking to withdraw the appeal is disallowed.

24. Prayer (3) of the instant Application dated 11th November, 2024 is disallowed.

25. Parties to take a date for directions as to the hearing of the appeal.

26. It is so ordered.



**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 11TH DAY OF JUNE, 2025.**

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Chebii, ODPP for Respondent

