Ruto v Republic; Odhiambo & another (Interested Parties); Otieno (Intended Interested Party) (Miscellaneous Criminal Revision E075 of 2023) [2024] KEHC 316 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS CRIMINAL REVISION E075 OF 2023

RE ABURILI, J

JANUARY 24, 2024

IN THE MATTER OF THE CRIMINAL PROCEDURE CODE (CAP 75)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF NYANDO PMCR NO. 497 OF 2017 AND NYANDO SOA NO. 22 OF 2017 AT THE PRINCIPAL MAGISTRATES COURT AT NYANDO

BETWEEN

EVERLINE RUTO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

AND

CHRISPINE ODHIAMBO ..... INTERESTED PARTY

AND

DANCUN OTIENO ..... INTENDED INTERESTED PARTY

AND

AUGUSTINE ODHIAMBO ..... INTERESTED PARTY

RULING

1. This ruling determines a simple issue raised by the applicant who is the complainant/ victim in Nyando SPM Sexual Offence Case No. 22 of 2017 and SPM CR 497 of 2017 a matter that appears to have been pending before the subordinate court for the longest time. The interested parties are the accused persons in the said cases. The case was part heard before Hon Temu who was transferred from the station upon which his successor Hon Kiniale took over the conduct of the case and in the process, issues arose on whether to recal the complainant, to identify documentary exhibits which were the treatment notes and a P3 form. The trial magistrate in her ruling of 3rd October, 2023 allowed the state prosecutor to recall the complainant to identify the said documents. The record shows that the complainant had already testified before Hon Temu and that her testimony referred to documents which were nonetheless not marked for identification. The record also shows that the state prosecution counsel was equally new in the matter and therefore wanted the trial court record to be complete with the testimony of the complainant identifying the said documents. Counsel for the accused persons protested the recalling of the complainant and reference to the documents in issue as they had not been supplied to him but the trial magistrate observed that it was not the fault of the complainant for the documents not to have been marked and that it was in the interest of justice that the same be marked for identification and that the accused persons'counsel be served with the said documents, with a corresponding right of the accused person to cross examine the witness to be recalled including the doctor who prepared them. Apparently, the makers of the said documents had not testified yet. This is pursuant to section 150 of the Criminal Procedure Code.The trial magistrate also recognized the constitutionally guaranteed rights of the victims of offences as well as that of the accused person and in ensuring fairness in the entire process of the criminal trial.

2. From the trial court record, the events leading up to that ruling are what prompted the application by the complainant to this court seeking for review of the proceedings. In the said proceedings, after the state prosecution counsel had asked for leave to recall the complainant to identify the treatment notes and the P3 form, noting that he was new in the matter and that his colleague prosecutor had erroneously not referred the witness to the said documents, Mr. Odeny advocate representing the complainant stated that he wished to address the court. The court then recorded as follows:

> " Counsel watching brief has limited participation and it is this court's view that he should have the issues raised through the state unless it is a matter that causes grave injustice to the complainant which in this case it is to recall the complainant."

3. It is the above quoted remark by the trial court that prompted the complainant's counsel to apply to this court vide Notice of motion dated 8th November, 2023 under certificate of urgency, seeking for stay of the court proceedings in the matter and revie of the order denying the complainant's advocate audience before the court, citing the provisions of Sections 4,9 and 13 of the Victim's Protection Act, 2014. The grounds upon which the application is predicated are among others, that justice will not be served f the case proceeds to hearing without the participation or limited particuipation of the complainant as his counsel was denied audience with the trial magistrate stating that he can on;y speak through the sate prosecution counsel unless on an issue of grave injustice.

4. The affidavit in support is sworn by the applicant/ complainant reierating what I have already stated above being what the trial court record states verbatim.

5. The application is vehemently opposed by the interested parties as well as the respondent state through the ODPP. The interested parties filed an affidavit in reply sworn by Dennis Asembo, one of the accused persons in the lower court and whose name was not listed as one of the interested parties in this application but who in my view, has every right to participate in these proceedings.

6. In the detailed affidavit in reply sworn on 5th December, 2023, the deponent gives the history of this age old matter and laments that the complainant in the lower court was hell bent to extort money from the accused persons in that the case was supposed to be withdrawn following a consent duly signed but she reneged on the consent by demanding for payment of huge sums of money. That she had used delaying tactics to frustrate the accused persons, that the charge sheet had been amended several times and that the former presiding magistrate then sensed mischief and declined the ammendments, that the complainant had always been allowed to speak whenever it was necessary,that the case had been adjourned severally due to absence of witnesses, that they are aggrieved by the order allowing introduction of new documents which issue they will take up later, that the application herein is a misrepresentation since the complainant's application to introduce the documents was allowed which is an injustice to the accused persons as their rights under Article 50 of *the Constitution* were violated by her lawyers and the prosecution and that they wonder how much power the complainant can be allowed to wield to influence the course of justice, that the power to recall witnesses is discretionary, the court must give permission to the victim's lawyer to address the court and it is discretionary ower which is inherent and an be exercised by the magistrate as deemed fit.

7. The interested partry urged this court to dismiss the application and reverse the orders allowing for recalling of the applicant to testify, that it is prejudicial to serve the interested parties with new documents and a witness 6 years after being charged and finally, that the applicant is a vexatious litigant.

8. The applicant's counsel, the respondent and the interested party filed written submissions to urge the application.

The Applicant's Submissions

9. The applicant's counsel submitted giving the history of the matter and what prompted him to file the application subject of this ruling.

10. Citing section 2 of the *Victim Protection Act* which defines a victim as any natural person who suffers injury loss, loss or damage as a consequence of an offence, counsel posed the question of who a victim is as was discussed by the Court of Appeal in IP Veronica & Another -v- Republic (2016) eKLR.

11. Further, that Section 4, of the Act guarantees every victim as far as possible an opportunity to be heard and to respond before any decision affecting him or her is taken. Further submission was that Section 9 of Act provides for the rights of a victim during the trial while under Section 9(2) (a), the victim is entitled to her views and concerns to be presented and considered at stages of the proceedings. In addition, it was submitted that Section 13 of the Act further provides that where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to adduce evidence.

12. According to counsel for the applicant, the move by the prosecurtion to recall the applicant for further evidence was obviously an issue that was bound to affect the applicant hence she was entitled to be heard through her advocate before the court made a decision on the same. Reliance was placed on Republic -v- David Muchiri Mwangi (2018) eKLR where Wakiaga J held that it was a clear reading of the stated sections of the vitims protection Act that the victims have a broader right to have their views heard at any stage of the trial hence, it is open and clear that in the law and decisions of the

courts, victims have a right of audience in court during criminal proiceedings as well as the right to be represented by an advocate. Further relaince was placed on the Supreme Court's decision in Joseph Lendrix Waswa -vs- Republic [2020] eKLR where it concurred that victims had both the right to legal representation and audience and gave principles and guidelines on the same.

13. It was submitted further that the trial court's brief ruling denying the applicant's lawyer audience, did not specify what wrong or excesses that the applicant's lawyer had committed to be denied auidence. That the applicant's lawyer only sought to address the court on the question of recalling his client by the prosecution when he was stopped and directed to speak through the prosecution who had made the application to recall his client. That the applicant's lawyer's request was within the laid down principles and guidelines by the Supreme Court and nowhere has it been demonstrated that it went outside by merely requesting to respond to the application.

14. Counsel for the applicant further submitted that the court in Republic -v- Anthony Kilonzo Saamy [2022] eKLR, when faced with a similar application for review against the decision to deny a victim's lawywer the right to cross examine a witness, found from the above case laws the following to assist the court unpack sections 9 and 13 of the Victims Protection Act:

> " The victim is now part and parcel of court proceedings.
>
> a. The victim's counsel is entitled to present concerns and views of victim.
>
> b. The application by the victim's counsel may be made at any stage of the proceedings.
>
> c. The victim's representation is not restricted to any processess as the victims counsel is entitled to cross-examine or present evidence or file submissions or reply to application."

15. It was therefore submitted that it is clear that the learned trial magistrate's decision to deny audience went against the law, constitutional rights of the victim and occasioned a mistrial. Further, that this is a proper case for this court to recall the proceedings recorded by the subordinate court and satisfy itself as to the regularity and proceed to allow this revision.

16. It was submitted that this court's quick intervention is necessary to avoid further injustice to the victim so that she can be allowed to continue participating in the proceedings through her counsel.

The Respondent's Submissions

17. The Respondent ODPP filed written submissions dated 11th December, 2023 contending that it is wrongly cited as a respondent and that the interested party should be the respondent. However, the ODPP submitted that pursuant to the prrovisions of the Victims Protection Act, the victim through self or counsel has a place in the criminal trial, and the scope of such particpation is as was discussed in the already citted case of Republic v Joseph Lentrix Waswa [2016] Eklr. Counsel for the ODPP submitted that in this case, the discretion exercised by the trial court was not irrational or illegal as the DPP did apply for recalling of the complainant which application was allowed.

The Interested Parties' Submissions

18. On behalf of the Interested parties, it was submitted quite extensively, relying on the powers of the magistrate to conduct trials laid down under the Magistrates Court [Act No. 26 of 2015]at section 4 of the Act which provides that:

> "(1) The objective of this Act is to enable magistrate courts to facilitate just, expeditious, proportionate and accessible judicial services in exercise of the criminal and civil jurisdiction in this Act or any other written law. (2) The parties appearing in a magistrate's court and the duly authorised representatives of the parties, shall assist the magistrates' courts to further the principal objective of this Act."

19. It was submitted that on the parties appearing in a magistrate's court and the duly authorized representatives of the parties, shall assist the magistrates' courts to further the principal objective of the Act. Further, that the Applicant and her lawyer have not been assisting the Court in arriving at a just decision and instead have been placing all kinds of road blocks for the trial of the interested parties for the last six years.

20. It was submitted that on the material day when her advocate was allegedly denied audience before the court, her advocate was intimidating the Court by telling the Court, "you must listen to me or we will go the High Court, " which was being disrespectful of the jurisdiction of the Magistrate to conduct and supervise proceedings.

21. Relying on caselaw, it was submitted that the Applicant and her representative's views stem from the fact that they do not understand the Supreme Court's ruling in the case of Joseph Lendrix Waswa v Republic [2020] eKLR. That their understanding was that the Supreme Court gave them the carte blanche opportunity to control the proceedings and act as the DPP whose office is created under Article 157 of *the Constitution*. It was submitted that at all time,s the Conduct of the proceedings is by the Director of Public Prosecutions and the Private Counsel for complainant must not be allowed to swing his weight around and compete with the DPP. Reliance was placed on the case of Joseph Lendrix Waswa v Republic (supra) where the Court stated as foloows:

> "We agree with these sentiments. The trial Judge must protect the rights of all parties involved in criminal proceedings. There is a public interest in ensuring that trials are fair. This interest can be served by safeguarding the rights of the accused, the objectivity of the prosecution and, by acknowledging the victim's interest. The rights of the accused should be secured and fulfilled. So too the public interest. The rights of victims, properly understood, do not undermine those of the accused or the public interest. The true interrelationship of the three is complementary.
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> 70. Therefore, we fail to see how the 'participatory rights of the victim' violate the 'fair trial' rights of the accused. A victim can participate in a trial in person or via a legal representative. So then, who determines the manner and extent of a victim's participation in a trial?
>
> 71. Once a victim or his legal representative makes an application to participate in a trial, it is the duty of the trial Court to evaluate the matter before it, consider the victim's views and concerns, their impact on the accused person's right to a fair trial, and subsequently, in the judge's discretion, determine the extent and manner in which a victim can participate in a trial. Since participatory rights are closely related to the rights of the accused and the right to a fair

and expeditious trial, they should be granted in a judicious manner which does not cause undue delay in the proceedings and thus prejudice the rights of the accused.

72. Discretionary pronouncements of a Court, as we have stated in several decisions, form an integral part of a Court's jurisdiction and should not be interfered with unless an Appellate Court is satisfied that the exercise of that discretion was improper and, therefore, warrants interference. So, for instance, a Court must be satisfied that the Judge in exercising discretion misdirected herself or himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice. In the instant case, we see no need to interfere with the trial judge's discretionary pronouncements.

73. At this point, we feel compelled to make a few observations on the powers of the DPP. Article 157(1) of *the Constitution* establishes the office of DPP. The State's prosecutorial powers are vested in the DPP under Article 157 of *the Constitution*. That office, under sub-article 10, neither requires the consent of any person to institute criminal proceedings nor is it under the direction or control of any person or authority. These provisions are also replicated in Section 6 of the *Office of the Director of Public Prosecutions Act*, 2013. This office is the sole constitutional office with the powers to conduct criminal prosecutions.

74. In interpreting how the DPP exercises his powers, Lenaola J (as he then was) in Republic v Director of Public Prosecutions exparteMeridian Medical Centre Ltd & 7 Others Petition No. 363 of 2013 expressed himself as follows:

> "I also agree with the submission of Mr. Kilukumi that the decision to prosecute is a quasi-judicial decision which should not be taken lightly given the penal consequences inherent in any criminal proceeding ... There is also no doubt that the office of the DPP should exercise its mandate and discretionary power to prosecute within constitutional limits and the independence of his office."

75. We agree with this view and adopt it as the correct position in law. We are of the view that the victim has no active role in the decision to prosecute, or the determination of the charge upon which the accused will finally be tried. This is the sole duty of the DPP. While the victim of a 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 crimes on behalf of the DPP. The DPP must at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process.

76. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord with section 9(2) (a) of the VPA, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to take into account. Victim participation should meaningfully contribute to the justice process. It must be noted, however, that this does not mean that the Court's judgment will follow the wishes of the victim. The trial Judge will, of course, take into account the law, facts, all the different interests, and concerns, including the rights of the defence and the interests of a fair trial to arrive at a sagacious decision.

77. Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under Section 3 of the *Supreme Court Act* as the Court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial Court when it is considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:

a. The applicant must be a direct victim or such victim's legal representative in the case being tried by the Court;

b. The Court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for;

c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;

d. The victim's presentation should be strictly limited to "the views and concerns" of the victim in the matter granted participation;

e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;

f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the Court that have not been posed by the prosecutor;

g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;

h. The trial Court should ensure that the victim or the victim's legal representative understands that prosecutorial duties remain solely with the DPP;

i. While the victim's views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;

j. The Court may hold proceedings in camera where necessary to protect the privacy of the victim;

k. While the Court has a duty to consider the victim's views and concerns, the Court has no obligation to follow the victim's preference of punishment.

b. What ought to happen when a legal or constitutional issue arises in a criminal trial to avoid delay in the determination of the case?"

22. On discretion of the court, it was submitted that the conditions given by the Supreme Court mean that that the participation is subject to the discretion of the Court and it is not automatic. In this particular matter, it was submitted that the Nyando Court correctly exercised her discretion in asking the victim's lawyer to speak through the DPP. That by saying that the victim's presentation should be strictly limited to "the views and concerns" of the victim in the matter, granted participation means that the Court has a discretion to limit the victims participation.

23. Counsel for the interested parties emphasized that the Supreme Court stated that the trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the Court that has not been posed by the prosecutor; That the supreme Court in using the word 'may' simply meant to say that the participation of the victim's lawyer may be refused by the Court if it is unnecessary or going to prejudice fair trial in the matter.

24. On whether the Court had jurisdiction to allow or disallow the Complainant's Advocate to participate in the Application to recall a witness under section 150 of the Criminal procedure Code, it was

submitted that the jurisdiction of a court of law is donated by *the Constitution* and the statute as was held in the case of Samuel Kamau Macharia Vs. KCB & 2 others, Civil application No. 2 of 2011 that:

> " A court's jurisdiction flows from either *the constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

25. It was submitted that since it is her discretion to allow or not to allow, then the correct procedure is filing an appeal not revision. Counsel submitted that the general principles on when an appellate court may interfere with a discretionary power of a trial are now well settled as stated in the case of Mbogo& Another vs Shah, [1968] EA, as follows:

> " An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."
>
> "The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

26. Further reliance was placed on Patel v E.A. Cargo Handling Services Limited (1974) E.A. 75, where it was held as follows:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules: the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

27. According to the interested party, this application ideally is questioning the exercise of discretion of the trial court. Counsel submitted that the doctrine of judicial discretion as Desmith defines it:

> " is the legal concept of discretion which implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty.To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem." (See SA Desmith and J M Evans Judicial Review of Administrative Action 4th Edition {1980} 278.

28. Further reliance was placed on Law Keith Hawkins on the use of legal discretion, perspective from Law and Social science (1992, 11,11) where it was observed as follows:

> " discretionary decisions are those where the Judge has an area of autonomy free from strict legal rules, in which the Judge can exercise his or her Judgment in relation to the particular circumstances of the case. Discretion is the space between legal rules in which legal actors may exercise a choice in speaking of autonomy and choice, it must be acknowledged that the exercise of discretion is usually limited by guidelines or principles or by reference to a list of

relevant factors to be considered. While discretion permeates both the Common Law and many, if not most, statutory instruments discretionary powers are never absolute and must also be exercised within, a broader legal and social context."

29. It was submitted that the exercise of discretion properly or improperly is a matter of appeal not revision .That the applicant has come through the wrong procedure. Reliance was placed on the case JaldesaTukeDabelo v Independent Electoral & Boundaries Commission & another [2015] eKLR, where the Court of Appeal had this to say of the matter: -

> ''It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. In the instant case, the *Elections Act* stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of *the Constitution*. Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of petition."

30. It was submitted that if the court disagrees with the interested partry and find that revision is available, then the ingredients of the revision under the Criminal Procedure Code has not been met.

31. It was further submitted relying on the Court of Appeal case of Joseph LendrixWaswa v Republic [2019] eKLR where the Court of Appeal in analyzing section 150 of the Criminal Procedure Code stated:

> By section 150 of the Criminal Procedure Code, a trial court has general power to be exercised suo moto to;
>
> "summon, or call any person as a witness, or examine any person in attendance though not summoned as a witness; or recall and re-examine a person already examined and the court shall summon and examine and recall and re-examine any such person if his evidence appears to it essential to the just decision of the case; provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

32. Counsel also cited what the Court of Appeal in the same matter stated that:

> " The independent and discretionary power given by the trial court by section 150 of the Criminal Procedure Code is intended to help the court to search for the truth and to function as a court of justice. It is not incompatible with the right of a fair trial of an accused person or with the exercise of the prosecutorial powers of the DPP if a victim of an offence, either in person or through his advocate is allowed to exercise the full power of the court in the manner provided by section 150 of the Criminal Procedure Code so long as the safeguards in the proviso thereto are observed. Accordingly, we find that a victim of an offence or his advocate or representative may exercise the plenitude of the powers of the court under section 150 of the Code with the permission and directions of the trial court."(Emphasis added)

33. It was submitted that both the Court of Appeal and Supreme Court authorities brought out two salient points which are as follows:

    a. The power to recall a witness is discretionary and independent

    b. The Court must give permission to the victim's lawyer to address the Court. That is what meant with the permission of the Court

34. According to the interested party's counsel, Section 9(1) of the Victims protection Act which gave rise to the interpretation in Joseph LendrixWaswa v Republic [2020] eKLR case provides for the rights of victims during the trial including the right to be present during the trial either in person or through an appointed representative and the right to have the trial concluded without unreasonable delay. That the victims also have a right to be informed in advance of the charge facing the offender with sufficient details as well as the evidence the prosecution and the defence intends to rely on and to have reasonable access to that evidence.

35. That the Section at all times gives jurisdiction to the trial Court to allow or permit victims lawyer to participate and determine the participate in the proceedings but that his participation is not automatic, which restriction of the victims lawyers participation was confirmed by the Supreme Court of india when it said in the case of Shiv Kumar v. Hukam Chand, (1999) 7 S.C that:

> " From the scheme of the Code the legislative intention ismanifestly clear that prosecution in a Sessions Court cannot beconducted by anyone other than the Public Prosecutor. Thelegislature reminds the State that the policy must strictly conform tofairness in the trial of an accused in a Sessions Court. A PublicProsecutor is not expected to show a thirst to reach the case in theconviction of the accused somehow or the other irrespective of thetrue facts involved in the case. The expected attitude of the PublicProsecutor while conducting prosecution must be couched in fairnessnot only to the court and to the investigating agencies but to theaccused as well. If an accused is entitled to any legitimate benefitduring trial the Public Prosecutor should not scuttle or conceal it."

36. That the Supreme Court quoted with approval the following passage from Division Bench judgment of A.P. High Court:

> " Unless, therefore, the control of the Public Prosecutor is there, the prosecution by a pleader for a private party may degenerate intoa legalized means for wreaking private vengeance. The prosecutioninstead of being a fair and dispassionate presentation of the facts ofthe case for the determination of the court, would be transformedinto a battle between two parties in which one was trying to get betterof the other, by whatever means available. It is true that in everycase there is the overall control of the court in regard to the conductof the case by either party. But it cannot extend to the point of ensuring that in all the matters one party is fair to the other."

37. Again on jurisdiction, it was submitted that in a matter where the trial Court has jurisdiction to exercise discretionary powers the High Court has no revisional powers. Reliance was placed on the case of REX v Compensation Appeal tribunal 1952 IKB 338 – 347 where it was stated:

> " The court of Kings Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity but in a supervisory capacity. This control tends not only to seeking that the inferior tribunals keep within their jurisdiction, but also to seeking that they observe the law."The control is exercised by means of a power to quash any determination by the

tribunal which, on the face of it offends against the law, when the kings Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it.It is only exercising a jurisdiction which it has always had."

38. Citing Section 362 of the Criminal Procedure Code which provides 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."

39. It was submitted that the Court can only exercise its jurisdiction if

a. Where the decision is grossly erroneous

b. Where there is no compliance with the provisions of the law.

c. Where the finding of fact affecting the decision as not based on the evidence or it is result of mis-reading or non-reading of evidence on record

d. Where the material evidence on the parties is not considered.

e. where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence,

40. Counsel cited the Malaysian case of Public Prosecutor v. Muhari bin Mohd Jani and Another [1996] 4 LRC 728, 734-5 cited in DPP v. Samuel Kimuchu, supra, where it was stated that –

> " The powers of the High Court in revision are amply provided undersection 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision, the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice.... If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion.... This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case".

41. Further reliance was placed on Slaw Wallace & Co. Ltd v GovindasParuSlothamdas& Another [2001] 3SCC 445 where the court observed that:

> " in the High Court satisfying itself as to the regularity of the proceedings of the correctness, legality or propriety of any decision or order passed therein and if, on examination, it appears to the High Court that any such decision or order should be modified, annulled, reversed, or remitted for consideration it may pass such order accordingly."

42. It was therefore submitted that the exercise of discretion properly or improperly is a matter of appeal not revision hence this court lacks jurisdiction to deal with this matter .That the applicant has come to this court through the wrong procedure. Reliance was placed on the case of JaldesaTukeDabelo

v Independent Electoral & Boundaries Commission & another [2015] eKLR, where the Court of Appeal stated as follows on the matter:

> ''It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. In the instant case, the *Elections Act* stipulates that the procedure to challenge membership to the County Assembly is by way of Petition. The appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of *the Constitution*. Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of petition.''

43. The interested parties'counsel lamented that since 2017, the complainant and her lawyers had deployed one trick or the other to either delay this matter or secure a conviction at all costs.That this application is one such example of these games. He cited the case of Manchester Outfitters Limited v Pravin Galot& 4 others [2020] eKLR where the court expressed itself thus:

> " Court delay is costly – to the parties and to the society as a whole. It is the combined responsibility of the parties, their advocates and the courts to ensure disputes are resolved in a more efficient and cost-effective manner. Parties and their counsel, but counsel, particularly being officers of the court, must never be seen to deliberately prolong the cases they have the conduct of indefinitely, by resorting to delaying tricks and tactics. If all courts took active case management seriously, instances like these will be checked and reduced. It is only by being vigilant that backlog and delay can be effectively addressed.

44. It was submitted that the reason why this application has been filed is because the Nyando Court had refused to accede to manipulation by the victim to take the case her way and that therefore the right action for this court is to dismiss this application. as was observed in the case of Kenya Hotel Properties Limited V Willisden Investments Limited & 4 Others [2013]eKLR that:

> ". . . In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."

45. Counsel therefore submitted that this application does not merit any reversal of the orders of the magistrate in limiting the address by the counsel for victims. That the application is completely unfounded and frivolous and should be dismissed and that the victims and their Lawyers should be reprimanded for trying to intimidate the Court.

Determination

46. I have carefully examined the application and the opposition thereto. The main issues for determination are:

    a. whether this court has jurisdiction to hear and determine this application as a revision;

b. Whether the respondent is wrongly enjoined

c. whether the order recalling the complainant should be vacated

d. whether the trial court in limiting the participation of counsel for the complainant violated the complainant's right to participate in the proceedings

e. what orders should this court make

47. On jurisdiction of this court, the interested party contended that as the complainant was challenging the trial court's exercise of discretion, then she should have appealed and not filed this revision. In the case of Joseph Nduvi Mbuvi v Republic [2019] eKLR the court had this to say in interlocutory appeals in criminal trials:

> " It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion. Dealing with the right to appeal in interlocutory ruling in a criminal matter, the Court of Appeal in Thomas Patrick Gilbert Cholmondeley vs. Republic[2008] eKLR, held that:
>
> "We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of *the Constitution*. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court."

48. On whether the court should allow the applicant to file an appeal at the interlocutory stage, the court in the case of John Njenga Kamau v Republic [2014] eKLR held as follows:

> " It is clear from the foregoing provisions of the Criminal Procedure Code that only a party who is convicted can file an appeal to this court. The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court's considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case. This position is supported by the finding made by the Court of Appeal in Thomas Patrick Gilbert Cholmondeley –vs- Republic [2008] eKLR. At page 19 of its judgment, the court stated:

"In ordinary criminal trials, there is generally no interlocutory appeals allowed for Section 379(1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand, the position the basis of an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person;... the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental rights, falls by the way side and causes no harm to such an accused person."

49. The Supreme court in the case of Joseph Lendrix Waswa v Republic Sup. Court Petition No.23 of 2019 (2020)eKLR gave clear guidelines on what circumstances an interlocutory appeal can be allowed in the following terms:

> " 94. Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is available to a party in a criminal trial but should be deferred, and a wait the final determination by the trial court. A person seeking to appeal against an interlocutory decision must file their intended notice of appeal within 14 days of the trial court's judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be sparingly be allowed. These include:
>
> a) Where the decision concerns the admissibility of evidence which if ruled inadmissible will eliminate or substantially weaken the prosecution case.
>
> b) When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal.
>
> c) Where the decision entails the recusal of the trial court to hear the cause"

50. In this case, the challenge is not against any of the three scenarios stated above. It is against the trial Court's order limiting the participation of the complainant's counsel in the criminal proceedings. Furthermore, Article 165(6) and (7) of the Constituition clothes this court with supervisory jurisdiction over subordinate courts and in exercisikng such jurisdiction, the court does not always act as an appellate court over the decisions of the subordinate court. Revisionary power is one of such powers of this court. Accordingly, I find that the applicant was right in filing an application for revision, whether the limiting or denial of the said particpatipon was in exercise of discretion or not.

51. On whether the respondent was correctly cited as the respondent, it was argued by the respondent that the respondent in these proceedings should have been the interested parties who are the accused persons in the lower court. I disagree. This is becauise the trial court in limiting the active participation of the complainant's counsel in the proceedings was not necessarily doing so for the benefit of the accused persons/ interested parties but in the exercise of judicial discretion where the main player and initiator of the proceedings was the respondent herein. That said, the respondent herein does not support the applicant's application and no prejudice is demonstrated to be occasioned to any party by the citing of the respondent herein as respondent in these criminal revision proceedings.

52. On whether this court should reverse or vacate the orders of the trial court recalling the complainant to testify and identify the documents being the treatment notes and P3 form, the interested parties

have urged this court to reverse the order recalling the complainant to be examined and to identify documents being the treatmcent notes and the P3 form because the order was prejudicial to the interested parties right to a fair trial.

53. The Interested Parties' counsel has said so much about recalling of the complainant to identify the documents. He has even asked this court to vacate the orders of the trial magistrate to recall the said witness. However, this was in response to the application by the complainant. The interested parties did not challenge the order of the trial court to recall the complainant as applied by the prosecution counsel. Their counsel has even submitted that he shall still take it up at a later stage and he reserves that right although he has opted to argue vehemently against that order and made specific prayers to this court in his detailed submissions.

54. For this Court to vacate orders of the trial magistrate in revision proceedings, it must be demonstrated that the orders are overtly illegal or irregular. The law provides for the recalling of witnesses and therefore an order recalling witnesses cannot be illegal or irregular per se. Section 146(4) of the *Evidence Act* Cap. 80 provides that:

> " The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so the parties have the right of further cross-examination and re-examination respectively."

55. On the other hand, Section 150 of the Criminal Procedure Code which was relied on by the prosecution counsel provides that:

> " A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness."

56. The above provision empowers the trial court with discretion to allow the recall of any witness who has already testified, for good reasons to be given before the court recalls any such witness. In the instant case, it is clear that the prosecutor was new to the case and so was the trial magistrate as the magistrate who had taken the evidence of the complainant had been transferred. The parties hereto did not tell the court whether during the taking of directions under section 200 of the Criminal Procedure Code, they ever asked the court to have any of the witnesses who had testified recalled. Nonetheless, from the above sections, either party or the court on its own motion may order that a witness who had testified be recalled.

57. Article 50 (2) of *the Constitution* guarantees an accused person the right to fair trial which right cannot be limited which includes the right: -

> " (a) to be presumed innocent until the contrary is proved;
>
> (c)) to have adequate time and facilities to prepare a defence;

(g) right to choose and be represented by an advocate;

(k) to adduce and challenge evidence."

58. Article 25 (c) of *the Constitution* further provides that a right to fair trial shall not be limited. The trial magistrate in granting the prosecution leave to recall the complainant was conscious of the constitutionally guaranteed right to a fair trial hence she directed that the interested parties' counsel be served with the documents which the complainant was to identify so that their advocate can peruse, take instructions and prepare for the hearing which was given a far off date. In my view, the court did not violate any right of the accused persons as guaranteed under Article 50(2) of *the Constitution*. This right to fair trial, in my humble view, was well balanced with the right of the complainant as victim of the alleged crime to refer to documents which the previous prosecution counsel had not led her to identify yet the documents are the reason for the charges that were preferred against the accused persons who nonetheless remain innocent until proven guilty.

59. The request to recall the witnesses could as well have been made by the accused persons since the trial magistrate who had taken the evidence of the other witnesses had been transferred and the prosecution's case had not been closed. See the case of D I v Republic & another [2020] eKLR where this court elaborated on the right to recall witnesses in a criminal trial.

60. Accordingly, I find the request by the interested parties' counsel to vacate the orders of recalling the complainant to testify to be devoid of any merit and the request is declined and dismissed.

61. On whether the order limiting the active participation of the complainant's counsel in the criminal proceedings should be revised and set aside, both patrtioes have argued out their respective positions which, when weighed, are valid because those positions as set out in the extensive submissions reproduced above, are backed by law and judicial pronouncements.

62. What I however observe is that the limitation was made during the application for recalling of the complainant by the prosecution counsel, which application though opposed by the accused persons, was allowed by the trial magistrate. It therefore follows that the complainant has no reason to complain that she was prejudiced by the limitation which was an exercise of the trial court's discretion and which discretion regarding recalling of the complainant was exercised in her favour. The situation would have been different if the trial magistrate would have declined to allow the prosecution's application to recall the complainant.

63. The above position notwithstanding, I must add my voice to what the parties have brought before this court which is the role of the complainant in criminal proceedings and to what extent can the complainant be allowd to participate in the said proceedings besides giving testimony as a complainant and observing proceedings.

64. This is not the first time that this court is being confronted with this question which has been answered and settled by the Supreme Court in the case cited herein above of Joseph Lendrix Waswa v Republic Sup. Court Petition No.23 of 2019.

65. Article 50 (7) and (9) of *the Constitution* provides that:

(9)) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.

66. To give effect to the above constitutional provisions on the rights of victims of crime, more specifically sub Article 9, Parliament enacted the Victims Protection Act No. 17 of 2014 whose preamble or long title is:

> " An Act of Parliament to give effect to Article 50 (9) of *the Constitution*; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services, to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes."

67. The Victims Protection Act provides for rights of victims of offences and stipulates at section 9 that:

> " 9. Rights during the trial process
>
> (1) A victim has a right to —
>
> (a) be present at their trial either in person or through a representative of their choice;
>
> (b) have the trial begin and conclude without unreasonable delay;
>
> (c) give their views in any plea bargaining;
>
> (d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;
>
> (e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;
>
> (f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and
>
> (g) be informed of the charge which the offender is facing in sufficient details.
>
> (2) Where the personal interests of a victim have been affected, the Court shall—
>
> (a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and
>
> (b)) ensure that the victim'ss views and concerns are presented in a manner which is not—
>
> (i) prejudicial to the rights of the accused; or

(ii) inconsistent with a fair and impartial trial.

(3) The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.

68. Section 20 of the Act provides for the Right to submit information and states:

(1) A victim has a right to submit any information for consideration to the-

(a) police or prosecution on a decision whether or not to lay a charge, or to appeal or withdrawal;

(b) court during plea bargaining, bail hearing and sentencing;

(c) Advisory Committee on the Power of Mercy established under the *Power of Mercy Act*, 2011 (No. 21 of 2011), on the release or pardonof a convict.

(2)) Where a victim gives any information to a law enforcement officer, the officer shall inform the victim that —

(a) the information shall be ascertained for submission to the Court;

(b) the victim shall ensure that any information that the victim gives is true; and

(c) the information may be recorded and signed by the victim.

3) The collection of any views from a victim under this section shall not prejudice or delay any proceedings relating to the offence complained of.

69. Further, where a victim of a crime is a complainant, the Act provides at Section 13 of the Act as follows:

" 13. Victim as a complainant

Where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to—

(a) subject to the provisions of the *Evidence Act* (Cap. 80), adduce evidence that has been left out;

(b) give oral evidence or written submission.

70. In the above cited Joseph Lintrex Waswa Case, the Supreme Court settled the question of to what extent should the victim participate in criminal trials where the victims are also the complainants and stated that The rights of victims, properly understood, do not undermine those of the accused or the public interest. The true interrelationship of the three is complementary.

71. The Supreme Court further and in details stated that:

70. Therefore, we fail to see how the 'participatory rights of the victim' violate the 'fair trial' rights of the accused. A victim can participate in a trial in person or via a legal representative. So then, who determines the manner and extent of a victim's participation in a trial?

71. Once a victim or his legal representative makes an application to participate in a trial, it is the duty of the trial Court to evaluate the matter before it, consider the victim's views and concerns, their impact on the accused person's right to a fair trial, and subsequently, in the judge's discretion, determine the extent and manner in which a victim can participate in a trial.

Since participatory rights are closely related to the rights of the accused and the right to a fair and expeditious trial, they should be granted in a judicious manner which does not cause undue delay in the proceedings and thus prejudice the rights of the accused.

72. Discretionary pronouncements of a Court, as we have stated in several decisions, form an integral part of a Court's jurisdiction and should not be interfered with unless an Appellate Court is satisfied that the exercise of that discretion was improper and, therefore, warrants interference. So, for instance, a Court must be satisfied that the Judge in exercising discretion misdirected herself or himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice. In the instant case, we see no need to interfere with the trial judge's discretionary pronouncements.

73. At this point, we feel compelled to make a few observations on the powers of the DPP. Article 157(1) of *the Constitution* establishes the office of DPP. The State's prosecutorial powers are vested in the DPP under Article 157 of *the Constitution*. That office, under sub-article 10, neither requires the consent of any person to institute criminal proceedings nor is it under the direction or control of any person or authority. These provisions are also replicated in Section 6 of the *Office of the Director of Public Prosecutions Act*, 2013. This office is the sole constitutional office with the powers to conduct criminal prosecutions.

74. In interpreting how the DPP exercises his powers, Lenaola J (as he then was) in Republic v Director of Public Prosecutions exparteMeridian Medical Centre Ltd & 7 Others Petition No. 363 of 2013 expressed himself as follows:

> "I also agree with the submission of Mr. Kilukumi that the decision to prosecute is a quasi-judicial decision which should not be taken lightly given the penal consequences inherent in any criminal proceeding ... There is also no doubt that the office of the DPP should exercise its mandate and discretionary power to prosecute within constitutional limits and the independence of his office."

75. We agree with this view and adopt it as the correct position in law. We are of the view that the victim has no active role in the decision to prosecute, or the determination of the charge upon which the accused will finally be tried. This is the sole duty of the DPP. While the victim of a 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 crimes on behalf of the DPP. The DPP must at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process.

76. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord with section 9(2) (a) of the VPA, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to take into account. Victim participation should meaningfully contribute to the justice process. It must be noted, however, that this does not mean that the Court's judgment will follow the wishes of the victim. The trial Judge will, of course, take into account the law, facts, all the different interests, and concerns, including the rights of the defence and the interests of a fair trial to arrive at a sagacious decision.

77. Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under Section 3 of the *Supreme Court Act* as the Court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial Court when it is

considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:

a. The applicant must be a direct victim or such victim's legal representative in the case being tried by the Court;

b. The Court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for;

c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;

d. The victim's presentation should be strictly limited to "the views and concerns" of the victim in the matter granted participation;

e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;

f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the Court that have not been posed by the prosecutor;

g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;

h. The trial Court should ensure that the victim or the victim's legal representative understands that prosecutorial duties remain solely with the DPP;

i. While the victim's views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;

j. The Court may hold proceedings in camera where necessary to protect the privacy of the victim;

k. While the Court has a duty to consider the victim's views and concerns, the Court has no obligation to follow the victim's preference of punishment.

b. What ought to happen when a legal or constitutional issue arises in a criminal trial to avoid delay in the determination of the case?"

72. What I have done in this case is basically to reproduce the decision of the Supreme Court which is clear and which speaks for itself on the subject of the extent to which the victim or complainant in a criminal case can participate.

73. In this case, the trial court only limited the extent to which the then advocate for the complainant should participate in the criminal trial on behalf of the complainant since the prosecution counsel was on hand to address the court and not that she barred the advocate for the complainant from addressing the court on issues which the Victim's Protection Act and the Supreme Court in the above case has refered to.

74. I therefore must be cautious and avoid the risk of this court trying to set new parameters for participation of the complainant or victim in criminal proceedings when the Supreme Court has already pronounced itself on the extent and all I can do and say is to adopt wholly what the Supreme

Court has laid bare and restate that the complainant applicant herein has a right to participate in the criminal trial to the extent stipulated in law and as elaborated by the Supreme Court in the above cited case. As this is not an appeal, and as the complainant is still a particpnat in the criminal trial, I conclude at this stage by echoing the words of the SC that a victim cannot and does not wear the hat of a secondary prosecutor. The participation of the victim is subject to the discretion of the trial Court and unless it is shown that the discretion has been exercised caprisciously and injudiciously, this court on revision or even on appeal will not interfere with such discretion. It is also correct to say that the trial court may decline to allow views of the victim or his or her advocate that may prejudice fair trial of the accused persons, but that is only after hearing those views, not to completely prevent the victim from presenting the views or asking questions to that limited extent.

75. In the end, I find that the victim has a right to participate in the criminal trial where she is a complainant, to the extent stipulated in law and as clarified by the Supreme Court and that right is not absolute but exercised in the discretion of the trial court.

76. Accordingly, the Nyando SPM SO Case NO. 22 of 2017 and CR 497 of 2017 should proceed to hearing and determination unhindered, with the above clarifications in mind.

77. I so order. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF JANUARY, 2024

R.E.ABURILI

JUDGE