



**Kuriuki v Director of Public Prosecution (Criminal Revision
E013 of 2023) [2024] KEHC 1174 (KLR) (6 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL REVISION E013 OF 2023
HM NYAGA, J
FEBRUARY 6, 2024**

BETWEEN

PETER KAMAU KURIUKI PLAINTIFF

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. The background facts are that the Applicant was charged *vide* Criminal Case No. 80 of 2020 with defilement contrary to section 8(1) as read with section 8(2) of the [Sexual Offences Act](#). The particulars are that on 25th May, 2020 in Nakuru East Sub-County within Nakuru County intentionally and unlawfully caused his male genital organ namely Penis to penetrate a female genital organ namely Vagina of SN, a child aged 6 years.
2. In the alternative, he is charged with indecent Act with a child contrary to Section 11(1) of the [Sexual Offences Act](#). Particulars being that on 25th May, 2020 at White House in Nakuru East Sub-County within Nakuru County intentionally and unlawfully committed an indecent act with a child by touching the private parts namely vagina, breast and buttocks of SN a child aged 6 years with his hands.
3. On 4th June, 2020, the Applicant pleaded not guilty to both the main and alternative charge.
4. When the matter came up for hearing on 4th of May, 2023 the prosecution counsel applied to withdraw the matter under Section 87(A) [Criminal Procedure Code](#) (CPC) due to unavailability of witnesses. The defence counsel on his part urged the Court to withdraw the matter under Section 202 of the [Criminal Procedure Code](#) for grounds that the witnesses' despite being bonded failed to attend Court. He was apprehensive of what would become Section 87(A) of the accused person if the matter is withdrawn under as no witnesses had testified since the year 2020.



5. The trial Court in its ruling held as follows: -

“The prosecutor herein represents the victim, the presence of the prosecutor, cannot allow Court to have the accused acquitted under section 202 of the Criminal Procedure Code. Application by the state is allowed, accused person discharged under Section 87(A) of the Criminal Procedure Code. Bail to be refunded to the depositor”

6. The above ruling precipitated the instant revision vide a certificate of urgency dated 16th June, 2023 which was filed by the Applicants before this Court on 24th July 2023.

7. In brief, the Applicant was aggrieved by the trial Court’s decision and feels the same was unlawful and irregular for the reason that the correct section of the Criminal Procedure Code that ought to have been applied under the circumstances was Section 202 and not Section 87(A).

8. He contends that by having the matter withdrawn he lost the chance to clear his name in the matter and his bond terms lapsed with the withdrawal. He is apprehensive of being re-arrested at any time and charged afresh. He avers that should that happen, all the time expended and efforts made to defend himself in this matter since June 2020 will be rendered futile.

9. The Application was canvassed through written submissions.

Applicant’s Submissions

10. The Applicant submitted that this Court has jurisdiction to revise a decision of the trial Court. He submitted that the jurisdiction of the High Court to review or revise orders of the subordinate Court is provided under Article 165(6) of the Constitution and Section 362 as read together with Section 364 of the Criminal Procedure Code.

11. The applicant referred this Court to the case of Republic v Director of Public Prosecutions & another Ex-Parte Wilfred Thiong’o Njau [2015] eKLR which discussed the revisionary powers of the High Court as provided for under Sections 362 and 364 of the Criminal Procedure Code.

12. It was the Applicant’s submissions that non availability of the witnesses when the matter came up twice for hearing prompted him to apply for a discharge under section 202 of the Criminal Procedure Code.

13. He argued that the trial Court improperly invoked section 87A of the Criminal Procedure Code to allow the prosecution withdraw the case in the circumstances presented before Court rather than apply section 202 of the Criminal Procedure Code on acquittal for no appearance of the complainant and his witnesses. In buttressing his submissions, the Applicant relied on the cases of Republic v Edwin Otieno Ocbolla & another [2018] eKLR; Republic v Janet Ngusia Hochili & 2 others [2009] eKLR; & Republic v Director of Public Prosecutions & another Ex-Parte Wilfred Thiong’o Njau [2015] eKLR.

Respondent’s Submissions

14. The Respondent submitted that under article 157(6) (c) of the Constitution, it has powers to discontinue any case before judgment as it has to have regard to the public interest, justice and need to prevent abuse of the due process.

15. It was submitted that there was no evidence adduced to prove that the above was not the case.

16. The Respondent posited that the Lower Court had jurisdiction to reject or allow the application for withdrawal depending on the circumstances of the case and the Court did not err in allowing its application. In buttressing its submissions, the Respondent relied on the case of Samson K. Kaniu v



Republic of Kenya [2018] eKLR for the proposition that DPP has power to withdraw a case and in disallowing such an application the Court will be overstepping the powers of the DPP.

17. The Respondent argued that the case of Republic v Edwin Otineo Ocholla & another(*supra*) cited by the Applicant is distinguishable from this case since the Complainant herein had been bonded unlike in the instant case.
18. The Counsel for the Complainant associated himself fully with submissions made on behalf of the Respondent.

Analysis & Determination

19. The only issue for determination is whether the Applicant's request for an order of revision is merited.
20. The powers of the Court on revision is as provided under Section 362 of the Criminal Procedure Code. It states 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.”

21. Section 367 of the said Code further provides that;

“When a case is revised by the High Court it shall certify its decision or order to the Court by which the sentence or order so revised was recorded or passed, and the Court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.”

22. In view of the above, it is patent that the powers of revision under Section 362 of the Criminal Procedure Code are invoked to enable this Court satisfy 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 subordinate Court.
23. Therefore, if the Subordinate Court's decision is wanting in its correctness, legality or propriety or the proceedings are irregular, this Court will no doubt step in and correct the same.
24. It follows that if no such situation arises, then this Court cannot purport to exercise those powers therein and revise a lawful, legal and regularly issued order of the trial Court.
25. Having stated the above, the next thing that I have to do is examine the Court record to find out if the proceedings were regular, lawful and procedural.
26. The Applicants contends that the Court erred by allowing withdrawal under Section 87(A) of the Criminal Procedure Code instead of invoking Section 202 of the said Code.
27. It is factual that the prosecution witnesses did not attend Court on 4th May, 2023 when the matter came up for hearing and the prosecution applied for withdrawal of the Accused's case under Section 87(A), and Court allowed its application.
28. Article 157 (6), (7), (8), (10) and (11) of the Constitution vests the DPP with express powers to prosecute all criminal cases on behalf of the state. The Director of Public Prosecution can therefore initiate, continue or choose to discontinue any criminal prosecution before a Court of law.



29. Section 87A *Criminal Procedure Code* provides:

“In a trial before a subordinate Court a public prosecutor may, with the consent of the Court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—

- (a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.”

30. In this context section 87(A) of the *Criminal Procedure Code* which is relevant to this application it permits the prosecutor to apply before the Court seized of the case to withdraw the charge or charges facing an accused person at any time before final Judgement. This power is deemed to be exercised in the interest of the administration of justice and to avoid abuse of the process. It must be read alongside the provisions of article 157 of the *Constitution*.

31. The Trial Court therefore has discretion to allow or disallow the application for withdrawal of a case depending on the prevailing circumstances. The Court only needed to establish whether the threshold had been met before deciding to discharge the accused as provided above.

32. The above was the holding in the case of *George Taitumu v Chief Magistrate Court, Kibera & 2 others* [2014]eKLR the Court stated:

“Section 87(a) of the *Criminal Procedure Code* gives the learned magistrate broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. In light of Article 157(11) of the *Constitution*, such discretion has to be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interest of administration of justice and the need to prevent and avoid an abuse of the legal process.”

33. In the instant case the Applicant submitted he will suffer travesty of justice if the case is to be withdrawn under Section 87A owing to the fact that he has all along been ready to defend himself but the matter never took off due to unavailability of the prosecution witnesses.

34. I have perused the Lower Court record. I note this matter took long to be prosecuted due to unavailability of the complainant and even the accused. In several instances, the applicant was absent and the Court at some point issued warrants of arrest against him. For example, on 17th June, 2020, 28th September, 2020, 20th January, 2021, 3rd March, 2021, 25th March, 2021, 30th June, 2021, 4th August, 2021, 13th September, 2021, 30th September, 2021, 4th November, 2021, 28th February, 2022 and 28th March, 2022 the Applicant did not attend Court. The court is keenly aware that in 2020, the country was under a lockdown owing to the Covid 19 pandemic.

35. It is also on record that on 31st August, 2022, 5th October, 2022, 28th November, 2022 the matter was adjourned at the instance of the Applicant as he was away in school. On 13th April, 2023 the victim was away in school and the hearing could not proceed.

36. On the material date of 4th May, 2023 the Respondent applied to withdraw this matter. It is this order that the Applicant is aggrieved by. To him the Court ought to have acquitted him under Section 202 of the *Criminal Procedure Code*.



37. Section 202 *Criminal Procedure Code* provides as follows:

“If, in a case which a subordinate Court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the Court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the Court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the Court thinks fit.”

38. The application of this section has been interpreted by the superior Courts.

39. In *Republic v Edwin Otineo Ocholla & another* [2018] eKLR it was held that:

“Clearly, section 202 of the *Criminal Procedure Code* applies to instances where the complainant having been summoned to attend Court to testify in a case, and then fails to do so, the Court may acquit the accused person or adjourn the hearing of the case, depending on the circumstances that may be prevailing”

40. In Director of *Public Prosecutions v Perry Mansukh Kansagara & 8 others* [2020] eKLR the Court held that;

“A Prosecution Counsel is defined in section 2 of the ODPP Act as including:

“the Director of Public Prosecutions, every legally qualified member of the office and any other legally qualified person appointed by the Director under this Act to undertake any prosecution under his or her general or special instructions”.

Thus, whenever a prosecution counsel appears in a matter his appearance must be construed to be on behalf of the DPP as complainant. In this case, therefore, due to the DPP’s presence at the hearing, section 202 *Criminal Procedure Code* was not applicable.”

41. In *Republic v John Thuku Gicheba & another* [2018] eKLR, the Court held that:

“I would readily agree with Mr. Kinyanjui, following the reasoning of Justice Lenaola in *DPP vs Nairobi Chief Magistrate’s Court & Another* (2016) eKLR, that the DPP is the functional complainant for purposes of section 202 of the *Criminal Procedure Code* and that it is inappropriate for a Court to dismiss a matter under that section when a Prosecutor is present in Court”.

42. From the trial Court record, the Prosecutor was in Court. He is the one who sought to have the matter withdrawn. Clearly, going by the authorities cited above the Court could not have proceeded to dismiss the case under Section 202 *Criminal Procedure Code* as urged by the Applicant.

43. In the circumstances, I do not find any improper acts on the part of the Respondent and withdrawing the matter was within its mandate. I deem the same was done in the interest of the administration of justice and to avoid abuse of the process. The Trial Court in allowing the Respondent’s application



correctly exercised its discretion. Such a discretion cannot be interpreted to be an illegality or impropriety on the part of the Court.

44. I have looked at the case of *Republic v DPP & Another Ex- parte Wilfred Thiong'o Njau* (supra) cited by the Applicant. The Court at paragraph 17 stated as follows: -

“A keen look at the facts of the matter before me shows that the Applicant’s criminal case has been in Court for close to four years. It had been adjourned many times at the request of the prosecution. In a scenario where the trial Court had found that the application for adjournment was not merited, the trial Court ought to have rejected an application for discontinuation under Section 87(a) *Criminal Procedure Code* and asked the prosecution to close its case on the evidence on record. It does not serve any purpose to deny the prosecutor an adjournment and then proceed to allow withdrawal under section 87(a) *Criminal Procedure Code* as this amounts to an application for adjournment through the backdoor as the accused person is likely to land in Court again.”

45. The Trial Court in that case had rejected an application for adjournment. The prosecution then sought to withdraw the case under Section 87(a) of the *Criminal Procedure Code*. That case is clearly distinguishable from the one herein. In the present case, there was no adjournment sought and none was rejected. The Court was asked to deal with an application to withdraw the case and it allowed it. The Court exercised its discretion in the matter and gave its reasons. It cannot be said that the Court acted improperly.

46. Further in this case, the record is silent on whether the Complainant or her witnesses had been summoned to attend Court and failed to do so. The case of *Republic v Edwin Otineo Ocholla & another* [2018] eKLR cited by the Applicant is therefore inapplicable.

47. I am therefore of the opinion that the holding by the trial magistrate was the correct position in law.

48. In conclusion, I do not find any illegality or other defect that would warrant a revision under section 362 of the *Criminal Procedure Code*.

49. Consequently, the application dated 16th June, 2023 is dismissed.

50. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF FEBRUARY, 2024.

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H. M. NYAGA,

JUDGE.

In the presence of;

C/A Jeniffer

Wanjiku for the state

Mr. Bore for the Applicant

Applicant - present

