



**Lokale v Maranga & 2 others (Criminal Appeal E019 of 2021)
[2024] KEHC 7433 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E019 OF 2021
RC RUTTO, J
JUNE 21, 2024**

BETWEEN

ELOUAI LOKALE APPELLANT

AND

SIMON KARIUKI MARANGA 1ST RESPONDENT

STEPHEN NDIRANGU 2ND RESPONDENT

REPUBLIC 3RD RESPONDENT

JUDGMENT

1. This is a Petition of Appeal under section 350 of the *Criminal Procedure Code (CPC)* Cap. 74 Laws of Kenya. The appellant seeks to challenge the acquittal of the 1st and 2nd respondents under section 210 of the *CPC*. The appellant was the complainant in Nyeri Chief Magistrate Court Criminal Case No. 714 of 2018 Republic v Simon Kariuki Maranga and Stephen Ndirangu. Where the 1st and 2nd respondents were the accused persons.
2. The 1st and 2nd respondents were charged with the offence of malicious damage to property contrary to section 339(1) of the *Penal Code* while the 3rd respondent is the Director of Public Prosecution in exercise of his powers under Article 157 of the *Constitution* (acting on behalf of the State).
3. Upon being arraigned, the 1st and 2nd respondents pleaded not guilty and the matter proceeded for hearing. To prove its case, the prosecution called 8 witnesses and closed its case. At the closure of the prosecution case, the trial court considered the evidence adduced before it and in ruling delivered on 24th June, 2024 found that the State had failed to establish a *prima facie* case against the accused persons and proceeded to acquit them under section 210 of the *CPC*.
4. Aggrieved by this ruling, the complainant, citing the provisions of section 350 of the *CPC* lodged this appeal challenging that acquittal.



5. The appeal is premised on the following grounds that;
 - a. The learned magistrate erred in fact and in law by failing to find that the prosecution had established a *prima facie* case against the accused persons.
 - b. The learned magistrate misdirected herself in not appreciating the evidence of the prosecution witness that were called before the trial court.
 - c. The learned magistrate erred in fact and in law by advancing and relying on theories rather than relying on the evidence that was adduced before the trial court.
 - d. The learned magistrate erred in fact and in law by not following the holding of this Honourable Court in *Director of Public Prosecution v Margaret Shipai* (2019) eKLR, which held that in the offence of “destroying crop of cultivated produce contrary to section 334(a) of *Penal Code*”, the dispute in ownership of the land where the destroyed crops were growing was not an ingredient of the offence and which decision was binding before the trial court.
 - e. The learned magistrate erred in fact and in law by placing relevance of the ownership of land disputes between Mr. Duncan Nderitu Ndegwa and the appellant on one and Mr. James Githitho on the other, to the dispute before the trial court.
 - f. The learned magistrate erred in fact and in law by holding that the State was wrong in not charging Mr. James Githongo with the same offence before the trial court.
 - g. The learned magistrate erred in fact and in law by holding that there was no clear-cut evidence that the accused persons committed the offence before the trial court.
6. In urging his appeal, the appellant relies upon his submissions dated 8th July 2022 as well as the victim/complainant submissions on whether or not the accused persons had a case to answer dated 18th May 2021.
7. All the respondents oppose the appeal. The 1st and 2nd respondents opposed the appeal and filed submissions dated 14th July 2022 while the 3rd respondent filed submissions dated 26th May 2022. Together with the 3rd respondent submission is a letter dated 25th May, 2022 objecting to the complainant lodging this appeal on the ground that it contravene the procedural tenets of the Constitution specifically, Article 157(6), (9) and 10 of the *Constitution* as well as sections 23, 24 and 28(2),(3) of the *ODPP Act*, as well as Section 348 of the *CPC*.
8. My understanding of this appeal is that the appellant by dint of section 350 of the *CPC* is urging this Court to set aside the ruling of the trial court that acquitted the 1st and 2nd respondent under section 210 of the *CPC*.
9. However, before delving into the merits of the appeal, it is incumbent upon me to first address the issue of locus standi as raised by the 3rd respondent. That is whether a victim/complainant in a criminal case, in exercise of his right, can lodge an appeal seeking to challenge the trial court decision to acquit the accused persons under section 210 of the *CPC*.
10. In *Legal Advice Centre t/a Kituo Cha Sheria v Attorney General* (Advisory Opinion Reference E001 of 2023) [2024] KESC 15 (KLR) (12 April 2024) (Ruling) the Supreme Court guided as follows in regard to the question of *locus standi*:
 - “ 4. That question raised in regard to locus standi of a party goes directly to the issue of whether the Court has jurisdiction to hear this matter. It is therefore



imperative that this Court should settle this question at the onset before moving forward with the hearing of the reference itself.”

It thus follows that the issue of locus standi falls for determination first.

11. Section 350 of the [CPC](#) provides for the procedure, form, timelines and guidance in filing and amending a petition of appeal by an appellant or his advocate. This section does not provide for the right to appeal. Consequently, of importance is section 348A of the [CPC](#) which provides for the right to appeal against acquittal, order of refusal or order of dismissal. This section provides;

348(A) (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately. (Emphasis supplied)

12. In this instance, the appellant in his submissions state that, he is exercising his rights as a victim pursuant to section 350 of the [CPC](#) and section 9 of the [Victim Protection Act](#). He contends that it is a misapprehension of the rights of the victim for the DPP to raise the objection on the *locus standi*. To support his argument the appellant relies on the Supreme Court decision of [Joseph Lendrix Waswa v Republic](#) (2019) eKLR.
13. Notably, while section 350 of the [CPC](#) is on the procedure and guidance in filing of the petition of appeal, section 9 of the [Victim Protection Act](#) provides for the rights of a victim during the trial process. These provisions do not explicitly provide of the rights of a victim/complainant to file an appeal before court.
14. The 3rd respondent stated that there is contravention of procedural tenets of the Constitution, the [ODPP Act](#) and the CPC and made reference to Article 157 of the [Constitution](#), sections 23, 24, and 28 of the [Office of Director of Public Prosecution Act](#) as well as section 348 of the [CPC](#).
15. Article 157(6) of the [Constitution](#) provides as follows;

The Director of Public Prosecutions shall exercise State powers of prosecution and may—

- (a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
- (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
- (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).



16. This is further amplified by the *Office of Director of Public Prosecution Act* (ODPP Act) which was enacted to give effect to Articles 157 and 158 of the *Constitution*. Section 23 of the *ODPP Act* provides as follows;

Notwithstanding the provisions of any other law, it shall be the function of the Director to —

- (a) decide to prosecute or not to prosecute in relation to an offence;
- (b) institute, conduct and control prosecutions for any offence;
- (c) carry out any necessary functions incidental to instituting and conducting such criminal prosecutions; and (d) take over and conduct a prosecution for an offence brought by any person or authority, with the consent of that person or authority.

17. Further section 28 provides for private prosecutions, it states that

- (1) Notwithstanding any provision under this Act or any other written law, any person may institute private prosecution.
- (2) Any person who institutes private prosecution shall, within thirty days of instituting such proceeding, notify the Director in writing of such prosecution.
- (3) In accordance with Article 157 of the Constitution and this Act, the Director may undertake, takeover or discontinue any private prosecution.

18. The mandate of the DPP was further espoused in the case of *Joseph Lendrix Waswa v Republic* (2019) eKLR where the Supreme Court stated that;

“76. 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.

77. 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.”

19. Based on the above, it suffices to say that the exercise of the prosecutorial powers of the DPP has been subjected to in-depth legal scrutiny and appropriate principles and guidelines developed. These guidelines all put together show that the decision to prosecute is one that wholly remains with the DPP. Section 23 of the Act is emphatic that the decision whether to prosecute or not remains solely that of the DPP.
20. Notably, even under section 28 of the ODPP Act which allows for private person to undertake prosecution, the person is obligated to notify the DPP within 30 days of instituting such proceedings. After being notified the DPP still retains the powers to undertake, takeover or discontinue any private prosecution.
21. It is also worth-noting that in providing for the mandate of the DPP in Article 157, the Constitution uses the phrase “criminal proceedings”. Criminal proceedings have to be understood in their broad sense to include the trial and any other reviews, revisions and appeals that emanate from such criminal trials. Further, the ODPP Act defines prosecute to “mean a prosecution under the jurisdiction of the Director, a proceeding respecting any offence, the prosecution or prospective prosecution which is under the jurisdiction of the Director and related to such a prosecution or proceeding and includes extradition proceedings and any appeal, revision or other proceeding related thereto.
22. Understood in this sense, then it follows that the power to decide whether to prosecute or not include the powers to decide whether to appeal or not.
23. In this appeal, the appellant asserts to be exercising his rights under sections 350 of the CPC. However, as I have stated above, this section provides a right which is a preserve of the DPP. This provision does not provide of the right to a complainant to file an appeal before this court.
24. Consequently, in line with the provisions of section 350 of the CPC as read together with the provisions of sections 23, and 28 of the ODPP Act, and with the guidance of the Supreme Court’s decision in Joseph Lendrix Waswa v Republic (2019)eKLR, I find that the appellant has no locus standing to institute this appeal.
25. Consequently, I proceed to strike out this appeal. Orders accordingly.

Dated this 21st day of June 2024

RHODA RUTTO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

For Appellants:Mr. Munyori

For Respondent:Ms. Lubanga

Court Assistant: Peter Wabwire

