



Ntiba v Kivuva & 2 others; Republic (Interested Party) (Criminal Appeal 123 of 2023) [2024] KEHC 7520 (KLR) (Crim) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
CRIMINAL
CRIMINAL APPEAL 123 OF 2023
CM KARIUKI, J
JUNE 20, 2024**

BETWEEN

LINDA KAGENI NTIBA APPELLANT

AND

JOHN KIVUVA 1ST RESPONDENT

ANTONY MWENESI 2ND RESPONDENT

ANTHONY MUNGAI 3RD RESPONDENT

AND

REPUBLIC INTERESTED PARTY

(Being an Appeal against the original conviction by Honourable – E. Wanjala, Principal Magistrate, delivered on 9th May of 2023 in the Senior Principal Magistrate Court at Engineer Criminal Case No. E1210 of 2022)

JUDGMENT

1. The Respondents /Accused persons in the trial court were charged in Criminal Case No. E1210 of 2022 at Engineer Law Courts with the offense of Assaulting and causing bodily harm contrary to Section 251 of the [Penal Code](#).
2. They pleaded not guilty, and the matter went to full trial after the close of the Prosecution case; by ruling dated 9/5/2023, the trial Court found no prima facie case to warrant putting accused persons on their defense and thus acquitted them over section 210.
3. The complainant, unhappy and without prompting, said that the Office of the Director of Public Prosecutions (ODPP) lodged an appeal herein and set out three grounds.



- a. The Learned Magistrate erred in law and, in fact, in acquitting the accused persons under section 215 of the [Criminal Procedure Code](#) Cap 75 of the Laws of Kenya.
 - b. The evidence adduced satisfied the burden of proof beyond reasonable doubt of the accused persons/the respondents.
 - c. The Learned Magistrate erred in law and fact in how he weighed the evidence, particularly in acquitting the respondents despite sufficient evidence.
4. This attracted a preliminary point of law on the competence of appeal as the same was not lodged by the Office of the Director of Public Prosecutions; thus, the appeal purely turns on a Single issue, namely, can a complainant in a matter instituted by the Office of the Director of Public Prosecutions appeal against an order or judgment in the same matter?
 5. It is the mandate of ODPP, as derived from Article 157 of the [Constitution](#), to institute and undertake the prosecution of criminal matters and all other related incidents.
 6. Generally, state prosecutorial powers are vested in the Office of the Director of Public Prosecutions (“the ODPP”). Therefore, private prosecutions are an exception to this general rule.
 7. The Purpose of Private Prosecutions
 8. The main aim of private prosecutions is to bring to the ambit of the law the person(s) the public prosecuting authority is unable or unwilling to prosecute. In the case of [Gouriet v Union Workers](#) [1977] 3 All ER 70, Lord Wilberforce opines that: “So, it is the duty... of the director of public prosecutions or the attorney general, to take steps to enforce the law in this way...failure to do so, without good cause, is a breach of their duty... the individual, in such situations, who wishes to see the law enforced has a remedy of his own: he can bring a private prosecution.”
 9. The Law on Private Prosecutions
 10. The Constitution
 11. Article 157 establishes the [ODPP](#). More important to our discussion, Article 157 (6) (b) seemingly provides a constitutional basis for private prosecution by guaranteeing the power of the DPP to take over and continue prosecutions by another person or authority, with the permission of the person or authority.
 12. The [Office of the Director of Public Prosecutions Act](#), 2013
 13. Section 2 (1) of the [Act](#) provides for the definition of a prosecutor to include private prosecutors. Additionally, Section 28 of the same Act provides that any person can commence private prosecution but requires a thirty (30) day notification to the ODPP of the commencement of such proceedings. The exact section also guarantees the power of the ODPP to take over or discontinue any private prosecution.
 14. The [Criminal Procedure Code](#), Cap 75
 15. The enabling provision under the [Criminal Procedure Code](#), Cap 75 (“the CPC”) is Section 88. Section 88 (3) provides that “any person conducting the prosecution may do so personally or by an advocate.” This provision further requires requesting leave or permission to institute private prosecution.
 16. Thus, the instant appeal is not within the ambit of what is provided in the realm of private prosecution; thus, the instant appeal is incompetent. The court thus makes the orders;



- i. The appeal is struck out for want of locus and absence of requisite leave or permission by appellant to prosecute the same.
- ii. There is no order as to costs, as the appellant never contested the Preliminary Objection.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 20TH DAY OF JUNE 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

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CHARLES KARIUKI

JUDGE

