



**DPP v Kupalo (Criminal Revision E235 of 2023)
[2023] KEHC 20308 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL REVISION E235 OF 2023
PJO OTIENO, J
JULY 14, 2023**

BETWEEN

DPP APPLICANT

AND

FLAVIOUR KUPALO RESPONDENT

RULING

1. Before me is the Applicant’s Notice of Motion application dated April 14, 2023 brought pursuant to sections 362 and 364 of the *Criminal Procedure Code* and Article 157 of the *Constitution* seeking, in the main, the orders that the orders issued on May 12, 2023 discharging the accused under section 176 of the *Criminal Procedure Code* be set aside and the matter be set down for full hearing before another court of competent jurisdiction.
2. The application is supported by the Affidavit of Catherine Onyango, a Prosecution Counsel, sworn on April 14, 2023 in which she avers that the Respondent was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. In the alternative he faced the charge of handling stolen goods contrary to section 322(1)(2) of the Penal Code.
3. The background is given to be that the Respondent took plea on February 27, 2023 and the matter was fixed for hearing on June 13, 2023 with a mention date on March 13, 2023. On March 15, 2023 she was instructed to deal with a letter dated March 13, 2023 in which the Complainant sought to withdraw the charges against the Respondent. Vide a letter dated March 16, 2023, the Investigating Officer indicated that the Complainant wished to withdraw the charges for the reason that he needed his phone which is alleged to have been stolen by the Complainant and that he was not in a position to keep attending hearing.
4. When the matter came up in court on March 21, 2023, the Court directed that the Complainant be given back his phone and gave a hearing date of June 8, 2023. Before then, the Complainant in a



letter dated April 6, 2023 complained that the said Prosecuting Counsel and the Investigating Officer were demanding for a bribe of Kshs 20,000/- from him in order to have the matter withdrawn. This prompted the matter to be fixed for mention on April 12, 2023 during which day the Prosecutor recused herself from conducting the matter but the application for withdrawal was allowed with the Respondent being discharge under section 176 of the Criminal Procedure Code.

5. It is the discharge that brings rise to this application with the Applicant arguing that the proceedings by the trial Court subsequent to the recusal of the Prosecution Counsel were unprocedural including the withdrawal which contravened the provisions of article 157 of the Constitution. On that foundation, it is argued that the discharge of the Respondent under section 176 of the Criminal Procedure Code is an illegality because it only applies to common assault or any offence of a personal or private nature not amounting to a felony and not aggravated in nature. Being a revision, all the Court requires is a report however received, and the Court duty in supervision the mandates it to scrutinize the file and establish if a ground for revision had been made out.
6. Consequently, the issue that arises for my determination is whether the decision by the trial Magistrate to discharge the Respondent under section 176 of the Criminal Procedure Code without the involvement of the prosecution was unlawful.
7. The jurisdiction of the high court to revise the decisions of the lower court in criminal matters is stipulated under section 362 and section 364 of the Criminal Procedure Code, CAP 75 Laws of Kenya.
8. The discharge of the accused in Criminal Case No. E344 of 2023 was allowed by the trial Magistrate after the recusal of the Prosecution Counsel. The overall mandate to initiate, maintain and terminate criminal proceedings by way of withdrawal rests with the prosecution for various reason as may be justifiable in law. One of the reasons is where the Complainant satisfies the Prosecution and the Court that he desires to withdraw the case or just not to proceed with the matter.
9. On who the law recognizes as the Complainant has been discussed in several decision including R v Judith Achola Mulala [2019] eKLR to suggest that the word means both the direct victim of the crime as well as the Prosecutor. In that case the Court held; -

“ 19. My view of this is that the complainant, within the context of the Criminal Procedure Code, would be that person who initiates the complaint that is envisaged in section 89 of the Criminal Procedure Code. That complaint, or charge, is what initiates the criminal proceedings. Under the Kenya criminal justice system, criminal proceedings are initiated in court by the Director of Criminal Prosecutions, and it is that office that conducts the actual prosecutions. My understanding, therefore, is that the complainant is the prosecutor, who stands for the Republic or state in criminal proceedings. Proceedings are started, continued and terminated at the behest of the state through the prosecutor. It is the state through the prosecutor that is the party to criminal proceedings, and the matter is styled as a dispute between the state and the accused person. Reference, therefore, to complainant in the Criminal Procedure Code must be reference to the prosecutor, the initiator of the criminal case.

20. The complaint envisaged in the Criminal Procedure Code is not that made by the victim of the crime with the police. The police may refer to the information they receive from a victim of a crime as a complaint, and to they may even refer to the victim to that extent as a complainant, but those words as used



in the Criminal Procedure Code are not used in that context. They can only be construed in the narrow context of the information laid before a court by the person initiating the criminal matter formally in court, and to refer to that person. I have read and reread the provisions of the Criminal Procedure Code, and I am not persuaded that the word complainant refers to anything more than the person who initiates the cause in court through a complaint.”

10. While I do concur with the above reasoning, a plain reading of sections 89, 137E(e), 175, 2(b), 202, 203, 204, 206, 334, in particular, and 394 leave no doubt that the word ‘Complainant’ means the direct victim of crime where the crime is personal to the individual. If one narrows it down to section 334, it is obvious that the Complainant is specifically distinguished and treated separately from the Prosecution.
11. This difficulty in defining in explicit terms who a Complainant is continues due to lack of definition in the statute. We came near certainty when in 2003 through Criminal Law Amendment Act No 5 of 2003 by which the legislation taking cognizance of the omission of definition of who is a Complainant amended Section 2 of Criminal Procedure Code to define the word to mean a person who lodges a complaint with the police or any other lawful authority. However, within just four years, Parliament revisited the issue vide Statute Law Miscellaneous Amendment Act of 2007 and deleted definition of word Complainant under Section 2 of *Criminal Procedure Code* pursuant to Criminal Law Amendment Act No.5 of 2003 and threw back the uncertainty to the courts and general public to grapple with.
12. That development still does not change the meaning of the word in the sections I have cited above. It is however important to remember that the Prosecutor has the exclusive mandate over the control of the process of prosecution hence once a charge is presented in Court he owns it and thus he takes the position of the Complainant and is able to proceed with the matter even on a date the victim of crime is absent provided other witnesses be present. It is that need to protect the mandate of the Prosecution that informs the purposive rather than literal interpretation that the word Complainant, as much as it means the victim of the crime includes the Prosecutor. Thus for the effective prosecution there are instances when a provision of the code would show that the term Complainant is the victim only and in other instances, it includes the prosecutor. Many decades ago, in *Rubi v Republic* 1985 KLR 373 the High Court held as follows;

“We must state at the onset that we are satisfied that the term complainant in Section 208(1) of the Criminal Procedure Code includes; The prosecution as well as the person so described in the particulars of the charge.”
13. It is thus to this court permissible for the victim of crime to approach the Court, through the Prosecutor, and indicate that for his own reasons, he wishes not to pursue the complaint. When such a request is given to the Prosecution and the Prosecutor chooses not to present it to court, the Complainant has the right to address the Court directly, at a session attended by the Prosecution, and the Court then has a duty, under section 204, *CPC*, which the Court consider to have sound foundation on article 159 of the *Constitution*, to hear him and determine whether to allow the withdrawal or not.
14. In this matter, the grievance is that the matter was withdrawn, pursuant to section 176 of the Code, in the absence of the Prosecutor who had recused herself. It is to this court an outright irregularity in that the conductor of the Prosecution needed to have been present for no Criminal Case need to proceed in the absence of the Prosecutor without an element of an affront to article 157 of the *Constitution* occurring.



15. Secondly, section 176 of the Code excludes compromise of felonies and the matter before the Court was indeed a felony. On that basis I do revise the order and set it aside. Maybe had the matter been withdrawn under section 204, the considerations could have been different.
16. It is thus my finding that the withdrawal of Criminal Case No E344 of 2023 by the trial Court under section 176 of the Criminal Procedure Code without the involvement of the Prosecution was irregular and unlawful.
17. Having done so, and being aware that the trial Judicial Officer no longer serves in the station, it is directed that the matter be placed before the Judicial Officer in charge of criminal division, in the presence of a Prosecutor other than that who recused herself, to deal with the matter while taking into account that the victim of crime may not be willing to give evidence, even though he remains a competent and compellable witness. It is also the dawn of Alternative Justice System the Court and the Prosecution may not wholly ignore.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF JULY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

Ms. Owora for the Applicant

No appearance for the Respondent

Court Assistant: Polycap

