



**Republic v DJ (Miscellaneous Criminal Application E019 of 2023)
[2023] KEHC 21282 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21282 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MISCELLANEOUS CRIMINAL APPLICATION E019 OF 2023**

RB NGETICH, J

JULY 20, 2023

BETWEEN

REPUBLIC APPLICANT

AND

DJ RESPONDENT

RULING

1. The respondent has been charged in Eldama Ravine Senior Principal Magistrate's court vide S/O case No. E007 of 2023 with two counts of offences. Count I is the offence of incest contrary to section 21 as read with section 20(1) of the *Sexual offences Act* No. 3 of 2006. The particulars of the offence is that the accused on diverse dates between January 1, 2022 and February 21, 2023 in Mogotio sub-county within Baringo county, willfully, unlawfully caused his penis to penetrate the vagina of LA against her will whom to his knowledge knew to be his daughter.
2. Alternative charge to count I is the offence of committing an indecent act with a child contrary to section 11(1) of the *sexual offences Act* No.3 of 2006, the particulars are that the accused on diverse dates between January 1, 2022 and February 21, 2023 in Mogotio sub-county within Baringo county caused his penis to come into contact with the vagina of LA against her will whom to his knowledge knew to be his daughter.
3. Count II is offence of sexual assault contrary to section 5(1)(A)(1)(2) of the *Sexual Offences Act* No. 3 of 2006, the particulars being that the accused on diverse dates between January 1, 2022 and February 21, 2023 in Mogotio sub-county within Baringo county unlawfully used his fingers to penetrate the vagina of LA.
4. The accused was presented to court for plea and upon the charges being read over to him, he denied both counts and alternative charge. During the hearing, the prosecution presented Pw1 the



- complainant and Pw 2 Dr. Sammy Kirwok who testified on the 19.05.23 and were cross examined by the accused herein.
5. After the doctor (Pw 2) testifying, the prosecution applied to re-call Pw 1 under sections 150 of the *Criminal Procedure Code* and section 146(4) of the *Evidence Act* for further examination in chief. That the witness appeared untruthful during her examination in chief, which was not the case when she was being cross examined.
 6. The prosecution applied for recall of Pw1. The accused opposed the application by the prosecution to recall Pw 1 stating that she has already testified. The complaint on her part told the court that she did not wish to come to court again, that she is a candidate and she cannot interrupt her studies again.
 7. The court found no reasonable basis for the recall of Pw 1 who had just testified and stated that every conceivable question has been put to her during her examination in chief and cross examination and it would be prejudicial to the accused if the witness is recalled; that it would be risky and prone to abuse and declined to allow the application for the recall of Pw 1.
 8. Following the court's ruling, the prosecution applied to withdraw the case under section 87 (a) of the *Criminal Procedure Code* on reason that there is no sufficient evidence on record to support the charges against the accused which application was not opposed by the accused.
 9. On 24.05.23, the court delivered a ruling declining to grant leave to the prosecution to withdraw the charges against the accused under section 87(a) of the *CPC* and consequently ordered the trial against the accused to proceed to its logical conclusion.
 10. Dissatisfied with the ruling of the court dated 24.05.23, the prosecution has moved this court through an application dated 2nd June, 2023 urging this court to exercise its supervisory authority under articles 50, 159, 165 (6) of the *Constitution* of Kenya, 2010 and sections 362 and 364 of the *Criminal Procedure Code* cap 75 Laws of Kenya by reversing the rulings of the Honourable Principal magistrate court at Eldama Ravine (Hon. Richard Koech) dated 19th and May 24, 2023 refusing to grant prosecution leave to recall its key prosecution witness and/or withdraw the prosecution's case under section 87(a) of the *Criminal Procedure Code* respectively.
 11. The grounds on the face of the Application are that the court declined to grant leave to the prosecution to recall key witness in in S/O No. E007 of 2023 and subsequent application to withdraw the case; that the orders by the learned trial magistrate were improper and incorrect and therefore urge this court to exercise its revisionary powers.
 12. The application is supported by an affidavit sworn by Vena Odero who states that she is an advocate of the High court and a Senior prosecution counsel employed by the Office of the Director of Public Prosecutions based at Eldama Ravine station and in conduct of the matter in question.
 13. She avers that the matter herein proceeded for hearing on the 19.03.23 at Olkokwe mobile court where the complainant testified and during cross examination, she retracted the testimony tendered during examination in chief and after re-examining the witness, the prosecution counsel who was proceeding virtually applied to step down the complainant and have her recalled under Section 150 of the *Criminal Procedure Code* and section 146(4) of the *Evidence Act* but the court declined to entertain the application by the prosecution and ordered that the doctor who was present proceeds in tendering his evidence.
 14. She further avers after the doctor's testimony, she applied for an adjournment and reiterated the application earlier made to recall Pw1 for further examination which the court disallowed stating that there was no reasonable basis to recall Pw1 as every conceivable question had been put to the witness



- during cross examination and constrained by the circumstances, she applied to withdraw the charges under section 87 (a) of the *Criminal Procedure Code* and on the 24.05.23, the court issued a ruling on the application and refused to grant the prosecution leave to withdraw the matter and ordered the hearing to proceed on 9.06.23.
15. That it was therefore improper and irregular for the trial magistrate to purpose to usurp the powers of the Director of Public Prosecutions in declining the prosecution’s application in the circumstances as there was no ill motive by the prosecution.
 16. That the trial court acted irregularly in declining the prosecution’s application to recall the complainant as made under section 150 of the *Criminal Procedure Code* and section 164(4) of the *Evidence Act* having noted that the complainant was lying under oath.
 17. That in making the said application, the prosecution counsel was acting in the best interest of the minor complainant who was visibly intimidated by the physical presence of the accused person.
 18. She further avers that continually holding the accused person in custody while the evidence on record in the interim already absolves him from blame for lack of identification and further leaving the complainant portrayed as a person of untruthful character is a clear indication of the direction the matter will take.
 19. That by dint of the provisions of article 165(6) and (7) of the *Constitution*, this honourable court has supervisory jurisdiction over the subordinate court and may make any order to give any direction it considers appropriate to ensure fair administration of justice and further, article 165 (6) & (7) of the *Constitution* provides as follows:
 - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
 20. Further, section 362 of the *Criminal Procedure Code* states as follows:

“362. 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. Counsel further stated that pursuant to the foregoing provisions of the law, this court has jurisdiction to revise the orders of the trial court. In the case of *Republic v. Samuel Gathuo Kamau* [2016] eKLR, the court (HPG Waweru J.) observed that:

“Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the *Criminal Procedure Code*). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See article 165(7) of the *Constitution* and section 362 and 364 of the Criminal Procedure Code.”



Determination

22. Record show that the application to withdraw the charge was objected to and declined by the trial magistrate and prosecution ordered to proceed. under article 157 (6), (7), (8), (10) and (11) of the Constitution, the DPP is vested with powers to prosecute all criminal cases on behalf of the state; powers to initiate, take down, continue or choose to discontinue any criminal prosecution before a court of law; the constitutional and statutory responsibility to discharge any of these functions squarely rests with the Director of Public Prosecution.
23. Under section 87(a) of CPC, the public prosecutor may with the consent of the court at any time before judgment withdraw from the prosecution of any person and upon withdrawal:-
 - (a) If it's made before the accused person is called upon to make his defence, he shall be discharged, but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.
 - (b) If is made after the accused person is called upon to make his defence he shall be acquitted the exercise of judicial discretion in determining between the two parameters is to ascertain that the derived power on both ways is reasonable and rationale to the objective sought to be achieved.
24. From the foregoing, section 87(a) of the Criminal Procedure Code permits the prosecutor to apply before the court seized of the case to withdraw the charge or charges against 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.
25. What the trial court ought to consider is whether the threshold has been met before either of the decision in (a) or (b) is reached to discharge or acquit the accused person. What the court ought to consider is whether the DPP has acted within constitutional powers granted. If the application passes the test set by the legislature, then it would not be the business of the court to control the prosecutor acting in accordance within constitutional role and legislative.
26. While the Director of Public Prosecution (DPP) is exercising powers under article 157 of the Constitution, the principle of independence is guaranteed and availed to the office. The article provides that while exercising his powers or functions, the Director of Public Prosecution is not under the direction or control of any person or authority. Therefore, while exercising powers under section 87(a) (b) of the Criminal Procedure Code, one has had to consider whether the reason given is in conflict with the Constitution.
27. However, there are exceptional circumstances where courts can limit powers of the Director of Public Prosecution being when DPP acts improperly, not for the interest of justice, acts beyond the powers vested by the Constitution or carrying out some arbitrary objective under the guise of discharging the functions of the Office of Public prosecution.
28. Placing reliance on the above provisions and the powers of this court on revision under section 362 of the Criminal Procedure Code and supervisory jurisdiction under article 165 (6) and (7) of the Constitution, I am of the view that section 87(a) and (b) of the Criminal Procedure Code is meant to advance the administration of criminal justice and not to frustrate it. It is worth nothing the relationship between the accused and complainant is that of child and father; and as averred by the prosecuting counsel, there is possibility that the complainant was intimidated by the physical presence of her father who is alleged to have committed incest against her and it is the duty of the court to ensure that all parties are given opportunity to be heard without intimidation.



29. Section 150 of the *Criminal Procedure Code* provide for recall of witnesses and once recalled, the defence would be given opportunity to cross examine on any new issue. DPP is mandated to present evidence in court to prove charges against an accused person. The accused has a right to cross examine witnesses on evidence adduced in court. In my view it was irregular for court to conclude that all question had been put to the witness and was not necessary to recall the witness. In my view making such a conclusion amount to usurping the mandate reserved to DPP and denying parties right to fair trial. The constitutional provisions of article 50 engrave fair trial rights until final Judgement is pronounced by the court.
30. It is in the interest of justice and proper working of a criminal justice system that the Director of Public Prosecution should be accorded the discretion to discontinue or withdraw charges at any time before Judgment. Save for instances where exception circumstances captured in paragraph 30 above exist.
31. In view of the above, I find that there is an error on the face of the record and hereby invoke article 165 (7) and (8) of the *Constitution* and section 362 of the *Criminal Procedure Code* requiring intervention to preserve the integrity and fair administration of justice in the matter. From the foregoing, I do allow the application herein

Final Orders: -

1. I hereby quash the trial courts' orders dated 19th May 24, 2023 in respect of Eldama Ravine Criminal Case S/O No. E007 of 2023.
2. The file to be placed before another Magistrate.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET
THIS 20TH DAY OF JULY 2023.**

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**RACHEL NGETICH
JUDGE**

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for state.

