Republic v Weru & another (Criminal Revision E162 of 2023)
[2024] KEHC 13593 (KLR) (4 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13593 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL REVISION E162 OF 2023

DKN MAGARE, J

NOVEMBER 4, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

FRANCIS WERU ..... 1ST RESPONDENT

DANIEL NDURU ..... 2ND RESPONDENT

RULING

1. This is a ruling over a Notice of Motion application dated 4/4/2024 by the Applicant seeking to review the finding of the trial court acquitting the Respondent under Section 210 of the Criminal Procedure Code.

2. The application is supported by the affidavit of Kilenyet Leonard, Prosecution Counsel and it was deposed in material as follows:

    a. The Prosecution applied that the Respondent be discharged under Section 87(a) of the Criminal Procedure Code due to absence of witnesses and the court file.

    b. The trial court was therefore supposed to discharge the Respondent by dint of the said section of the law.

    c. The trial court instead acquitted the Respondent by virtue of Section 210 of the Criminal Procedure Code.

    d. The trial court erred in applying the said section 210 of the Criminal Procedure Code when no witnesses had testified on the documents produced as evidence.

    e. This court has revisionary powers.

3. The court directed the ruling to be delivered on 7/10/2024. The same was again relisted for today, wherein I placed aside to read the ruling to the parties. The true Respondent was not served. It is the complainant who has been appearing in court but not in the court below.

    f. I was urged to allow the application for review and allow the charge to be withdrawn under Section 87(a) of the Criminal Procedure Code instead of Section 210 thereof.

4. After several mentions, the court directed that it will give a ruling suo motu. The Applicant was not keen on serving the Respondent.

Analysis

5. Article 157(1) of *the Constitution* establishes the Office of the Director of Public Prosecution. Article 157(6) and Section 5(1)(a) & (b) of the ODPP Act stipulates the DPP's powers to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment is delivered.

6. In a recent 3 judge bench, the court observed as follows: -

> Article 157(10) and Section 6 of the ODPP Act provide that the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority. Article 157(11) however requires the DPP to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process while exercising the powers conferred by *the Constitution*.

7. The constitutional independence of the Director of Public Prosecution, was considered in the case of Republic v The Director of Public Prosecution & 7 Others [2013] eKLR where Odunga, J. (as he was then) stated:

> The law is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the discretion conferred upon that office. The mere fact that the intended or ongoing criminal proceedings are in all likelihood bound to fail is not a ground for interfering with those proceedings by way of judicial review since judicial review proceedings are not concerned with the merits but with the decision making process.
>
> The learned Judge went on to state:
>
> It follows that the office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.

8. In that decision we relied on the case of Saisi & 7 others *v Director of Public Prosecutions & 2 others (Petition 39 & 40 of 2019* (Consolidated)) [2023] KESC 6 (KLR) (Civ) (27 January 2023) (Judgment), where the Supreme Court reaffirmed the independence of the office of the DPP as follows:

> 81. Article 157(6) of *the Constitution* empowers the DPP to institute and undertake criminal proceedings against any person before any court in respect of any offence alleged to have been committed. Being one of the independent Constitutional offices established, article 157(10) of *the Constitution* safeguards this independence by decreeing that the DPP shall not require the consent of any person or authority before commencement of proceedings,

neither shall he be under the direction or control of any person. That is not to say that this power is absolute. Article 157(11) requires the DPP in exercise of his duties to have regard for public interest, interests of administration of justice and to prevent or avoid abuse of the legal process.

82. Stemming from these provisions of the law, the courts have consistently held that whenever it seems that the DPP is utilizing criminal proceedings to abuse the court process, to settle scores or to put an accused person to great expense in a case which is clearly not otherwise prosecutable, then the court may intervene. These decisions include Commissioner of Police & the Director of Criminal Investigation Department & another v. Kenya Commercial Bank Ltd & 4 others, Civil Appeal No 56 of 2012 (2013) e KLR by the Court of Appeal. It also includes the case of Cyrus Shakhalanga Khwa *Jirongo v Soy Developers Ltd & 9 others, SC Petition No 38 of 2019*; (2021) eKLR where this court held that although the DPP is not bound by any direction, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any question arising and make appropriate orders. The court found the following guidelines read alongside article 157(11) of *the Constitution* to be a good gauge in the interrogation of alleged abuse of prosecutorial powers:

i. Where institution/continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice;

ii. Where it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings, eg. want of sanction;

iii. Where the allegations in the First Information Report or the complaint take at their face value and accepted in their entirety, do not constitute the offence alleged; or

iv. Where the allegations constitute an offence alleged but there is either no legal evidence adduced or evidence adduced clearly or manifestly fails to prove the charge.

9. It cannot be gainsaid that the Applicant has power to institute and undertake criminal proceedings, take over and continue any criminal proceedings commenced in any court and discontinue any criminal proceedings at any stage before judgment. The independence is not independence from court. The applicant, in instituting, continuance and discontinuance of proceedings must have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

10. The Applicant made the decision to discontinue not in the public interest or the interests of the administration of justice but in order to circumvent the court order to proceed. This was a matter where the 2nd Respondent, now the sole Respondent was charged with simple assault. The Applicant could not proceed and the court ordered them to proceed. They opted to withdraw the charge under section 87(a). The said section states as follows:

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;

b. if it is made after the accused person is called upon to make his defence, he shall be acquitted.

11. Under the foregoing section the discharge of an accused person does not operate as a bar to subsequent proceedings against him on account of the same facts. A court hearing these matters is under duty to prevent and avoid abuse of legal proceedings.

12. The issue thus raised in this application was whether the decision of the trial court erred in acquitting the Respondent under Section 210 of the Criminal Procedure Code. The revisionary powers permit this Court to 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. Section 362 of the Criminal Procedure Code provides 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.

13. It is pertinent that the court addressed the charge before it. The Respondent was charged of the offence of assault, causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the offence were that on 27/9/2022 at Muruguru area in Nyeri Central Sub-county within Nyeri County, assaulted Francis Weru Kariuki thereby occasioning him actual bodily harm.

14. The Respondent was apprehended to court on 24/10/2022. The Respondent pleaded not guilty and the matter was set down for hearing. The matter did not proceed for hearing for one reason or another, which the Respondent had no hand in. The Respondent remained in custody for some time. Knowing the Applicant's circumstances, the Applicant never bothered to proceed. The Respondent informed the court that they had reached a reproachment with the complainant but he did not turn up in court.

15. On 4/9/2023, the matter came up for hearing before the trial court and the Prosecution applied that the accused person be discharged under Section 87(a) of the Criminal Procedure Code. The justification was that there were no witnesses in court and there was also no police file. The Accused prayed that he be released under another section of the law as in his view the Complainant had finished the case.

16. The court gave a decision in which it acquitted the Respondent under Section 210 of the Criminal Procedure Code. The said section provides as follows:

> If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

17. Aggrieved the Applicant filed for revision of the finding of the trial magistrate. The question that is obliquely being asked is whether the Applicant's power of withdrawal is absolute. The said power is not absolute as it is limited. If the power is used in such a way as to abuse the court process, by dangling the threat of prosecution like a Damocles sword, then the court had a right to intervene. It is mechanistic

to imagine that the court will be left with no remedy, when the court notes that the primary purpose of withdrawing is not lack of evidence in terms of incomplete investigations, but witnesses who refuse to turn up in court on a misplaced notion that they hold all the four aces. The court below had power to close the case if it appeared to the court that a case is not made out against the accused person sufficiently to require him to make a defence to dismiss the charge and acquit the Respondent.

18. It is not the Applicant's case that sufficient evidence was tendered to place the Respondent on his defence and comply with section 211 of the Criminal Procedure Code. The said section provides as follows:

    1. At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

    2. If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

19. The evidence in the file does not meet standards to place the Respondent on his defence. Simply put, there is no evidence on record. I am satisfied that on the perusal of the record of the subordinate court, the order given is correct, legal, regular and made properly. There is no error or any impropriety disclosed in the proceedings requiring intervention of this court. The court exercised its discretion judiciously.

20. Being a discretionary order, this court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is not enough that had I been sitting, I will have come to a different conclusion. In other words, the order made is not such an order that a court properly applying its mind will not have issued. It is irrelevant that some courts could hold a contrary view. As held in Peters vs Sunday Post Limited [1958] EA 424, the jurisdiction to review the evidence should be exercised with caution as it is not enough that the appellate court might have come to a different conclusion.

21. I am alive to the decision by Ngugi, J. (as she was then) in the case of Kipoki Oreu Tasur v Inspector General of Police & 5 others [2014] eKLR, where she posited as follows:

> 20. The criminal justice system is a critical pillar of our society. It is underpinned by *the Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.

22. Before dealing with revision, I note that the Respondent was not served for this matter to proceed. It must be remembered that the right to fair trail is nonderogable and sacrosanct as provided under Article 25(c) of *the Constitution* which provides as follows:

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited–

c. the right to a fair trial;

23. The Respondent had a right to confront his accusers who chickened out. He has now been acquitted. It serves absolutely no purpose to have the matter withdrawn for a second round. This is not a matter where the complainant was maimed or seriously injured. It is a public order issue that should not unduly concern the Applicant. They did their best and brought the case. Witnesses decided not to come to court. They cannot even blame the police, as it is their duty to follow up on their cases.

24. This court is persuaded that the revisionary powers are paternal or supervisory in nature in order to correct or prevent a miscarriage of justice. In the High Court of Malaysia in Public Prosecutor vs. Muhari bin Mohammed Jani and Another [1996] 4 LRC 728 at 734, 735 it was stated as doth:

> " The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammeled and free, so as to be fairly exercised according to the exigencies of each case"

25. I have to consider whether there is abuse of discretion leading to injustice in the trial magistrate acquitting the Respondent under Section 210 instead of discharging him under Section 87(a) of the Criminal Procedure Code. In my evaluation, the trial magistrate did not commit any error in the matter. The court had two ways to rule and picked one. No one can begrudge her.

26. In the circumstances, I find no reason to interfere with the finding of the trial magistrate. Consequently, I decline the orders sought.

Determination

27. I therefore make the following orders: -

a. The application for revision dated 4/4/2024 be and is hereby dismissed.

b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 4TH DAY OF NOVEMBER, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the Applicant

1st Respondent – present

No appearance for the 2nd Respondent

Court Assistant – Jedidah