



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL REVISION No. 150 OF 2019

(Revision Application from Original Order in Sexual Offence Case no. 37 of 2019 of the SPM’s Court at Limuru)

JGK.....APPLICANT

VERSUS

DPP.....RESPONDENT

AMW..... INTERESTED PARTY

AND

CPW.....SUBJECT

RULING

1. **JGK**, the Applicant herein got married to **AMW**, the Interested Party, in January 2015. At the time, the Interested Party had a son **CPW** born to her in 2006. The Applicant and the Interested Party cohabited in RH area and between them sired a daughter in 2015. It appears that the marriage soon ran into turbulence as a result of which the Interested Party left the matrimonial home in February 2019, taking with her the two children. Soon after she filed for divorce and legal custody of the children *vide* Milimani Children’s Court Case No. 213 of 2019. The proceedings were apparently laced with acrimony between the parties.

2. On or about March 2019, the Applicant complained to Tigoni police that **CPW** had defiled **SNG** in the year 2017. Police took up the matter and interviewed the two minors, and ultimately on 28th June, 2019 a prosecution, being **Limuru SPM’s Sexual Offence Case No. 37 of 2019** was initiated against **CPW**. Because **CPW** was not in attendance on the said date, a warrant of arrest issued against him. On 4th July 2019 **CPW** was arrested from his school and placed in custody. However, the Interested Party having gotten wind of the arrest instructed her lawyer to move the court as a result of which **CPW**’s plea was taken late in the afternoon of 4/07/2019.

3. The charge laid against **CPW** was Committing an Indecent Act with a Child Contrary to Section 11(1) of the Sexual Offences Act. In that on diverse dates between March and July 2017 at RH estate, **CPW** committed an in decent Act with **SNG** a child aged 2 years by touching her vagina with his fingers. The subject **CPW** pleaded not guilty and was released on a free bond, the court further directing that the matter be mentioned on 15/07/2019 for further directions.

4. During the interlude, a complaint was received by the Director Public Prosecutions (DPP) regarding the matter and the DPP having reviewed the case instructed that the case be withdrawn under Section 87 (a) of the Criminal Procedure Code (CPC). Thus, during the mention of the case on 15/07/2019 the prosecuting counsel made an application to withdraw the case as instructed by the DPP, on grounds that having reviewed the file, it was found that the case did not meet the requisite evidentiary threshold and that the manner in which investigations had been conducted was wanting. The application made in the presence of the minor subject and his lawyer was not opposed and was allowed by the court. The subject minor was accordingly discharged under Section 87 (a) of the Criminal Procedure Code.

5. This order prompted the revision herein, filed by the Applicant under certificate of urgency on 16th July, 2019. Apparently, the urgency hinged in part upon the fact that the Children’s case in the Milimani Children Court was scheduled to be heard on 18th July, 2019 and the subject minor **CPW** was expected to testify on behalf of the Interested Party.

6. Three key complaints can be distilled from the 18 grounds in the revision application. Two of these complaints relate to the proceedings. The first being that the trial court conducted the proceedings irregularly and unprocedurally. The second which is related to the first is that the trial court denied the Applicant the right to be heard and thus violated his rights and those of the victim **SNG**, enshrined in Articles 27(1), 50 (1) and Sections 4 (2) (b) and 9 of the Victim Protection Act. The Applicant has set out the incidences supporting these complaints in his grounds. The Applicant’s third complaint is levelled against the DPP and relates to the decision by the DPP to withdraw the criminal case without the “input” of the Applicant who asserts to be the complainant in the withdrawn case.

7. The Applicant therefore prays that the discharge order of 15/07/2019 be quashed and that he be allowed to participate in the trial and to be heard before any decision affecting the victim is made. He also sought an order to stop proceedings in Milimani Children's Court Case No. 213 of 2019 scheduled for hearing on 18th July 2019.

8. On 17/07/20 the court had directed that this matter be mentioned together with Petition No. 23 of 2019 filed on behalf of **CPW** prior to the withdrawal of the Sexual Offence Case against him and seeking to stop the said prosecution. The petition was subsequently withdrawn but the Applicant herein indicated that he intended to proceed with the revision application. Both counsel for the Interested Party and **CPW** and the DPP filed replying affidavits in opposition to the revision application.

9. The former affidavit sets out the relevant events and proceedings of 4th July, 2019 and 15th July 2019 in the lower court. Counsel takes issue with the assertions contained in the Applicant's grounds, defends the conduct and orders of the lower court proceedings, and reiterates the DPP's mandate in respect of prosecutions, and especially the power to discontinue criminal cases.

10. The DPP's replying affidavit was sworn by **Caroline Karimi** who describes herself as a Prosecutions Counsel attached to the Children Division of the DPP's office. She deposes that the Applicant and Interested Party were involved in an acrimonious custody dispute in Milimani Children's Court Case No. 213 of 2019; that the complainant in **Limuru S. O. No. 37 of 2019** was **SNG** through the Republic and not the Applicant; that the DPP received a complaint of abuse of the criminal process in relation to the criminal case filed on the instigation of the Applicant against **CPW** for the alleged purposes of gaining advantage in the custody case and that the DPP exercising his constitutional mandate had directed that the file be independently reviewed.

11. She further deposes that upon review, it was found that there was insufficient evidence to sustain the charges preferred against **CPW** and that the circumstances surrounding the prosecution evidenced abuse of the criminal process. That, consequently, the DPP exercising his powers under Article 157 (10) and (11) of the Constitution directed that the criminal case be discontinued. Hence the withdrawal application which was procedurally allowed by the trial court in the presence of the mother of the subject charged and the victim (the Interested Party) as well as the defence counsel.

12. The deponent further disputes the accusations of impropriety leveled against the court concerning the proceedings. She asserts that the DPP did not require the input of the Applicant in making the decision to terminate criminal proceedings. That the evidence in the criminal case fell below the requisite evidentiary threshold and that the rights of the victim though guaranteed, can neither trump the rights of the accused nor be applied in a manner inconsistent with a fair and impartial trial. She defends the decision of the DPP as being consistent with the interest of justice and for preventing abuse of the criminal process and asserts that the revision application lacks merit.

13. The application was canvassed by way of written submissions. On his part, the Applicant framed one composite issue namely; whether the discharge order made without the participation of the Applicant is unconstitutional and irregular and prejudicial to the victim and the Applicant. The submissions reiterate this court's supervisory powers under Article 165(6) of the Constitution and under Section 362 and 364 of the CPC. Further, having set out the victim's rights under Articles 27(1), 50(I) of the Constitution and Sections 4(2) (b) and (9) of the Victim Protection Act and the incidences alleged in respect of the subject proceedings, the Applicant submits that he has demonstrated adequate grounds to warrant revision of the discharge order for being irregular, unconstitutional and illegal.

14. On behalf of the DPP, the submissions address the legality of the discharge proceedings and eventual order; the related powers of the DPP as well as the role and participation of a victim in a criminal prosecution. The DPP's submissions emphasize his constitutional mandate under Article 50 (10) and (11) of the Constitution, Section 4(f) of the DPP Act and clauses of the National Prosecution Policy as well as Section 87(a) of the CPC. The DPP's position being that he has the mandate to discontinue any criminal proceedings, in the furtherance of the public interest, the interests of the administration of justice and the need to prevent and avoid the abuse of the criminal process. And that these were the considerations that informed the withdrawal application, the DPP having determined that the sexual offence case did not meet the evidentiary threshold and appeared to represent an abuse of the criminal process.

15. The DPP dismisses the allegations of misconduct against the trial court as false and reiterates that the trial court was properly constituted at the time of the withdrawal. The DPP's view is that the complainant in the lower court case is the victim through the state and that the victim's mother participated in the proceedings while the Applicant had not placed himself on record on behalf of the victim. And that in any event, the DPP's exercise of his mandate under Article 157(10) was not subject to the direction of the victim or Applicant. Finally, the DPP argued that this court cannot stay the custody proceedings pending before the Children Court pointing out that Applicant's prayer for such order is evidence of the ulterior motive behind the instigation of the criminal case in the lower court.

16. Citing the provisions of Article 53(2) of the Constitution and Section 4 of the Children Act, the DPP urged the court to uphold the withdrawal of the charges in the Lower Court and thereby uphold the best interest of the two minors herein, namely the subject and victim as prescribed in Article 53(2) of the Constitution and Section 4 of the Children Act. In the DPP's view, it would be futile and prejudicial to subject minor to be subjected to a trial based on scanty evidence. The court was therefore urged to dismiss the revision application.

17. The Interested Party submitted on two issues framed as follows; whether in the circumstances of the case the trial magistrate properly exercised her discretion in allowing the withdrawal of the charges against **CPW** under Section 87(a)CPC as read with Section 40 of the Sexual Offences Act, and Article 157(5)C, (7) and 8 of the Constitution and whether there is a basis laid by the applicant in this case to warrant the court's exercise of its revisionary powers under Sections 362 and 364 of the CPC. On the first issue, the Interested Party relied on the provisions of Section 87(a) of the CPC, Section 40 of the Sexual Offences Act, and provisions of Article 157(5) (c), 7 and 8 of the Constitution to submit that the DPP was empowered to give instructions for the withdrawal of the lower court case and gave sufficient reason therefor and the trial court having been satisfied allowed the withdrawal.

18. The Interested Party contends that the Applicant has failed to demonstrate *mala fides* on the part of the DPP and the court, and that there was no requirement for the Applicant or complainant to be present at plea taking or such event. Therefore, the Interested Party contends that no error, illegality, or impropriety has been demonstrated on the part of the court. Concerning the second issue, the Interested Party reiterates the provisions of Section 362 and 364 of the CPC and relies on the decision in **Republic v. Hammond Anderson Kwesi and 3 Others**

(2017) eKLR regarding the circumstances in which this court may invoke its revisionary jurisdiction.

19. The Interested Party also cited the persuasive Singaporean decision in **Public Prosecutor v. Yangyin [2015] 2SLR 78** to emphasize that to succeed, an applicant seeking revision must demonstrate that the error, irregularity or omission complained of has resulted in a failure of justice. In conclusion, the Interested Party submits that the application herein does not rise up to the requisite threshold and is motivated by the Applicant's desire to gain an upper hand in the children's case between them and should thus be dismissed.

20. The court has considered the material canvassed in respect of the revision application. The Applicant has raised three basic complaints which the Court proposes to consider seriatim and determine whether this is a proper case for the Court to intervene as empowered to do under law in deserving cases.

21. The supervisory powers of this court are underpinned by article 165(6) and (7) of the Constitution. With regard to criminal proceedings, this Court's revisionary powers are set out in Sections 362 and 364 of the Criminal Procedure Code (CPC) the former which provides that:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate 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.”

22. Though not expressly spelt out under the provision, the underlying object of this power as alluded to in Article 165 (7) is to **“ensure the fair administration of justice”** or as intimated in the Singaporean case of **Yingyan** to remedy any failure of justice or serious injustice. There is no gainsaying the fact that the DPP enjoys wide prosecutorial powers under Article 157(6) to (10) of the Constitution. However, these wide powers are exercised subject to the provisions of Article 157(11) of the Constitution to the effect that:

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall 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”.

23. Indeed, the DPP's answers to the instant application is hinged upon this provision and clause 5 of the National Prosecution Policy 2015 formulated under the ODPP's Act, and which sets out the factors for consideration in making a decision whether or not to prosecute or the review of such decision, and which factors include the evidentiary and public interest tests.

24. On the other hand, the right of participation by the victim in criminal cases has been substantially expanded with the enactment of the Victim Protection Act and court pronouncements such as in **Joseph Lendrix Waswa v. Republic [2019] eKLR (Court of Appeal) and (2020) eKLR (Supreme Court in 2020)** and **IP Veronica Gitahi and Anor v. Republic [2016] eKLR**. However, the victim of an offence while a key party in criminal proceedings brings his complaint, ordinarily through the DPP.

25. It is fair to say on the authority of the above decisions and others such as **Republic V. Mwaura [1979] KLR 209; Roy Richard Elirema & Anor V. Republic Cr. Appeal No. 67 of 2002; and Republic v. Pattni [2005] I KLR 310** that the term “complainant” in the CPC encompasses both the DPP and the victim of the offence stated in the charge sheet. This does not mean however, that the victim enjoys similar powers as the DPP in criminal prosecutions. For instance, the victim cannot unilaterally withdraw a complaint without the DPP's approval or make key decisions concerning the prosecution of his case.

26. In this instance, the victim/complainant in the lower court was **SNG** whose parents are the Applicant and the Interested Party. As **SNG** was a minor, both her parents as next friends would be legally entitled, as complainants pursuant to the definition section of the Sexual Offences Act, to represent her interests through the DPP. Both parents were thus potentially entitled to be enjoined in the criminal case facing **CPW** and to participate in such manner as the court found fit (see section 4 and 9 of the Victim Protection Act). However, such enjoyment and participation is not automatic.

27. In **Joseph Lendrix Waswa v Republic [2020] eKLR** which was an appeal to the Supreme Court from Court of Appeal decision, the Supreme Court observed as follows: -

“(70) A victim can participate in a trial in person or via the legal representative. So then, who determines the manner and extent of a victim's participation in a trial?

(71) Once a victim of his legal representative makes an application to participate in a trial, it is the duty of the trial court to evaluate the matter before it, consider the victim's views and concerns, their impact on the accused person's right to a fair trial, and subsequently, in the Judge's discretion, determine the extent and manner in which a victim can participate in a trial. Since participatory rights are closely related to the rights of the accused and the right to a fair and expeditious trial, they should be granted in a judicious manner which does not cause undue delay in the proceedings and thus prejudice the rights of the accused”. (emphasis added).

28. Implicit in this passage and the guiding principles formulated by the Supreme Court at the end of the above judgment is the endorsement of the practice obtaining in the courts since the passage of the Victim Protection Act. That is, the victim or victim's representative who wishes to participate in a criminal trial makes an application to the trial court which determines the application for participation and the nature and scope of such participation.

29. In its decision, the Supreme Court was careful to reiterate the powers of the DPP *vis-vis* the victim by stating that: -

75.. 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.

76. 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."

30. The Applicant herein was apparently aware at least by 4th July, 2019 that pursuant to his complaint to police, charges had been laid against the subject *vide* a charge sheet registered on 28th June 2019 in **Limuru SPM's Court. S. O No. 37 of 2017**; that the subject was absent on 28/6/2019 and a warrant of arrest had been issued against him. Similarly, although in his application he complains that the trial court issued *ex parte* orders for the arraignment of the subject on 4/7/2019 "*before the accused was even arrested,*" he confirms at paragraph 6 of his application that he learned on 5/7/2019 that the subject had taken plea and the matter fixed for mention on 15/7/2019 and asserts that he had instructed counsel to place himself on record on his behalf. Nonetheless, there is no evidence that any intimation had been made to the trial court of his intention to participate in the proceedings.

31. The Applicant further claims that he had attended court on 15/7/2019 but did not participate in the proceedings as the subject case was mentioned in chambers without notice. The copy of proceedings of 15/7/2019 attached to the Replying Affidavit of **Emanuel Mwangambo Mwagona** as exhibit "**EM7**" indicates a full coram consisting of the trial magistrate, the prosecuting counsel, court assistant, subject and his advocate. It has also been asserted by the Interested Party and DPP, and this is not disputed by the Applicant, that the Interested Party was present during these proceedings.

32. The trial court cannot be faulted for holding proceedings in respect of a minor in chambers rather than in open court in the glare of other participants unconcerned with the case. There is no explanation why only the Applicant and his counsel missed the proceedings in chambers if indeed they were waiting in open court on the material morning, were in the chambers too. Significantly neither the Applicant nor his counsel swore an affidavit concerning this issue.

33. So that while the Applicant has correctly articulated the rights of a victim or his representative under Articles 27(1) 50(1) of the Constitution and Sections 4 and 9 and possibly Section 20 of the Victim Protection Act (VPA) to participate in a trial, such victim ought to avail himself of such opportunity by placing himself on record and applying to be allowed to participate in the trial. The trial court in this instance was not obligated or expected to anticipate, without any notice by the Applicant, that he desired to participate in the matter and therefore, claims by the Applicant that the trial court denied him an opportunity to be heard have no basis.

34. Turning now to the complaints at paragraph 3 to 7 of the application, this court has looked at the copy of the record of proceedings in the lower court, as well as the affidavits sworn on behalf of the DPP and the Interested Party. The former indicates that **Limuru SPM's S.O Case No. 37 of 2019** was initiated through a charge sheet dated 28/6/2019 and filed into court on the same date, and that a warrant of arrest was issued for the subject who was not present on the initial date.

35. The circumstances in which the court issued two production orders on 4/7/2019 for the subject are explained in the affidavit of **Emmanuel Mwangambo Mwagona** and supported by the court record. The police having arrested the subject from his school on 4/7/2019 had evinced every intention to present him to court on the next day, prompting the application by his counsel for production, which was not opposed by the prosecuting counsel. The first production order, and the second like it, prompted by non-compliance by the **OCS Tigoni** were not made *ex parte* as claimed by the Applicant. The reasons are on record: the trial court was informed by the subject's counsel that the subject was sickly.

36. Eventually the subject was presented at 4.30 p.m. and the plea was taken before a duly constituted court. The record shows that the final order of the day, after plea, was made at about 4.47 p.m. and not after 5p.m. as the Applicant, who at any rate was not present, asserts. Concerning the subject's release on free bond after plea, the court heard the submissions by the defence and prosecuting counsels before ruling as follows: -

"I have considered the submission by both sides. The prosecutor is proposing cash bail. However, I realize that it is now 4.47 p.m. and the Bank is closed. Cash bail can only be paid through the Bank. At the same time the minor is said to be commencing his exams tomorrow. It would not be fair to keep him in custody and make him miss his exam. More so since at this point, he is still considered innocent.

In the best interest of the child who is standing trial before me, I shall allow the application for free bond just so that he can conclude his exams without interruption. The matter shall then be mentioned on 15/7/19 for further directions."

37. A copy of the exam timetable referred to in the defence counsel's submissions is annexed to his affidavit as annexure "**EM6**". While it is true that the Applicant would have been entitled to participate in the bail hearing, he had neither placed himself on record nor given notice of such intention to the court. The circumstances in which production orders were made and plea taken are well documented and explained. It is not clear from the Applicant's complaint whom he expected to inform him of the plea proceedings. Certainly, the court had no inkling on his interests and intentions and cannot be blamed for this failure. Besides, there is no requirement that a complainant or victim must represent for a plea to be taken.

38. Reviewing the entire record of plea taking and the uncontroverted explanations offered by the DPP and counsel for the subject, I cannot find any basis for the complaint in respect of alleged irregularity of proceedings raised by the Applicant. The orders issued on 4/7/2019 were in the circumstances of the matter procedural, legal, and justified. The orders made accord with the rights of the accused subject minor to be arraigned before a court as soon as reasonably possible in court, to be charged at the first appearance and to be released on reasonable bail terms (See Article 49 (f), (g) and (h) of the Constitution), and the right to a fair trial (Article 50 as read with Article 157 (11) of the Constitution).

39. This court has already found, with respect to proceedings of 15/7/2019 that the Applicant inexplicably failed to avail himself the opportunity to be heard and cannot lay the blame at the feet of the trial court. Thus, the Applicant's twin complaints concerning alleged unconstitutional, irregular and unprocedural proceedings and denial of an opportunity to be heard on the part of the court cannot stand.

40. The Applicant's final complaint is primarily an attack on the exercise of the mandate of the DPP in withdrawing the charges against CPW. He complains that his "input" ought to have been sought prior to the decision being made. The specific provision of the law cited is Section 4(2)(b) of the VPA to support his submissions that the DPP required the "input" or consent of complainant/victim before applying to withdraw the criminal matter. The court has already set out the general scope of the constitutional and statutory mandate of the DPP in criminal cases. Commenting thereon, the Supreme court observed in **Joseph Lendrix Waswa v. R. [2020] eKLR** that :

73. At this point, we feel compelled to make a few observations on the powers of the DPP. Article 157(1) of the Constitution establishes the office of DPP. The State's prosecutorial powers are vested in the DPP under Article 157 of the Constitution. That office, under sub-article 10, neither requires the consent of any person to institute criminal proceedings nor is it under the direction or control of any person or authority. These provisions are also replicated in Section 6 of the Office of the Director of Public Prosecutions Act, 2013. This office is the sole constitutional office with the powers to conduct criminal prosecutions.

74. In interpreting how the DPP exercises his powers, Lenaola J (as he then was) in Republic v Director of Public Prosecutions ex parte Meridian Medical Centre Ltd & 7 Others Petition No. 363 of 2013 expressed himself as follows:

"I also agree with the submission of Mr. Kilukumi that the decision to prosecute is a quasi-judicial decision which should not be taken lightly given the penal consequences inherent in any criminal proceeding ... There is also no doubt that the office of the DPP should exercise its mandate and discretionary power to prosecute within constitutional limits..."

75. We agree with this view and adopt it as the correct position in law"

41. Pursuant to the provisions of Article 157(6) (c) of the Constitution, Sections 87(a) CPC and 40 of the Sexual Offences Act the DPP is empowered to discontinue criminal proceedings instituted or taken over by him. This power is exercised subject to Article 157(11) of the Constitution and the National Prosecution Policy. There may be some merit in the Applicant asserting that he ought to have been informed or had his views sought prior to the DPP's decision to withdraw the case against CPW. This is consistent with the victim's rights under Section 4(2) (b) and Section 20(1) (a) of the Victim Protections Act, the latter which provides that:

"A victim has a right to submit any information for consideration to the -

(a) Police of prosecution on a decision whether or not to lay a charge, or to appeal or withdraw."

Sub-Section (3) adds the rider that:
"The collection of any views from a victim under this section shall not prejudice or delay any proceedings relating to the offence complained of."

42. So far as a trial court is concerned, Section 4(2) (b) of the Act in my opinion does not impose a duty on the court before which a withdrawal application is made to inquire whether Section 20(1) (a) of the VPA has been complied with especially in circumstances where a victim is not participating. Such a requirement would be onerous and possibly an encroachment as the DPP's mandate. There may be cases where the trial court may on its motion or on information received inquire and possibly reject a withdrawal application for this reason. However, it seems to me that where a victim is not participating in a trial, the provisions of section 4(2) (b) and Section 20 (1) (a) of the Act read together impose a duty, subject to Sub-Section 3 of Section 20, upon the DPP to obtain the views of the victim or his representative whenever he contemplates withdrawing charges. It is not the duty of the trial court before which the victim is not participating to seek to go behind the instructions of the DPP for withdrawal and inquire whether the victim's views have been sought.

43. The duty bearer in such case is the DPP alone but where a victim is participating in the trial, both the Court and DPP bear their respective duties under the two sections of the VPA. That is not to say the input from such victim will be binding or that the DPP must necessarily go by such views in reaching his decision. Ditto for the trial court. It seems in this case that the Applicant's views were not sought as anticipated in Section 20(1)(a) of the VPA prior to the withdrawal. However, the Interested Party who is also the mother of the victim was aware and had no objection.

44. For his part, the DPP has given reasons why the withdrawal was found necessary. It seems that the DPP was content with the fact that the mother of the victim and also the subject was present during the withdrawal proceedings and did not object to the withdrawal application. The record of proceedings on 15/07/2019 indicates that the prosecuting counsel addressed the court as follows:

"This matter is for mention for review of bond terms. However, I have instructions from the DPP to withdraw this matter under Section 87(a) CPC as read with section 40 of the Sexual Offences Act.

We have reviewed the matter and we have found that it does not meet the evidential threshold and the manner in which the investigation were conducted is wanting.”

45. The defence did not oppose the application, which was allowed by the court, discharging the subject. The DPP has reiterated the position on this application that the subject case in the lower court failed the evidentiary and public interest tests and had been instituted for the sole purpose of giving the Applicant an upper hand in the custody dispute between him and the Interested Party. The Applicant’s complaint was to some degree about the substance or merit of the DPP’s application in the lower court but to a greater degree about the alleged requirement to be consulted for his input prior to the withdrawal decision. This court can neither gloss over the reasons advanced by the DPP to justify the withdrawal, nor ignore the seeming failure by the DPP to seek the Applicant’s personal views prior to withdrawal of the case.

46. That said, these matters relate to the manner of the DPP’s exercise of his mandate and “backroom” decisions made outside of the court proceedings. The question whether in the circumstances of this case the DPP wrongly exercised his mandate in handling the case before lower court, to my mind is one that cannot be properly examined in proceedings of the nature before me. Revision proceedings under Section 362 of the CPC are neither appeals nor judicial review proceedings and the remit of the High Court under the section is to satisfy itself as the **“correctness legality or propriety of any finding or sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”**

47. By his third complaint, what the Applicant is asking this court to do is to interrogate the propriety of the exercise of the DPP’s mandate in arriving at the decision to withdraw the charges against the subject in addition to examining the propriety of the orders of the court. And ultimately determine whether there was a failure of justice calling for redress by way of revision. With respect, my view is that the confines of Section 364 CPC are too narrow to accommodate such a wide inquiry.

48. Besides, even if the court were to consider the complaints against the DPP and find them merited, the appropriate remedy would not be to set aside the withdrawal order but to quash the DPP’s decision. Furthermore, a withdrawal under Section 87(a) CPC does not bar further prosecution and the Applicant could potentially still pursue his complaint with the DPP and press for a fresh prosecution. The court therefore declines to entertain the Applicant’s third complaint as it is unsuited for revision proceedings under section 362 and 364 of the CPC. In the result, the court finds no merit in the entire revision application and will dismiss it.

Delivered and signed electronically on this 10th Day of February 2021.

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C. MEOLI

JUDGE