



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL REVISION NO 83 OF 2020

REPUBLIC.....APPLICANT

-versus-

JEREMIAH KOILEL.....RESPONDENT

RULING

Withdrawal of sexual offences charge

[1] The State vide a letter dated 30th July 2020 applied for revision of the trial court's decision which allowed the victim of to withdraw charges of attempted rape in NARK CMCRC (SOA) NO 6 OF 2020 under section 204 of the Criminal Procedure Code, and reinstate the case for hearing and disposal. They cited the following reasons for the request;

(1) That cases under the Sexual Offences Act can only be withdrawn by the DPP under section 40 of the Act and not by the victim under section 204 of the CPC; and

(2) That the offence is a sexual offence and prevalent in the area, thus, the DPP's intention to prosecute the case.

[2] The respondent was served with Notice but chose not to appear or respond to the application.

ANALYSIS AND DETERMINATION

[3] The court has supervisory jurisdiction over subordinate courts under article 165(6) & (7) of the Constitution which 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 purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or 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.

[4] Whereas the overall object of supervisory jurisdiction remains to ensuring the fair administration of justice, the specific purposes and scope of revision power is *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.* See section 362 of the CPC which provides that: -

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.

[5] The complaint herein is that the trial court improperly and wrongly permitted the victim herein to withdraw under section 204 of the CPC a charge of attempted rape which is an offence under the Sexual Offences Act. The prosecution claims that withdrawal of sexual offences ought to be done by the DPP under section 40 of the Sexual Offences Act.

[6] Section 204 of the CPC provides that: -

204. If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are

sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.

[7] Section 40 of the Sexual Offences Act provides that:

40. Attorney-General to decide whether police investigations should be discontinued. The decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be discontinued shall rest with the Attorney General.

[8] The argument by the prosecution brings to bear the **Transitional Provision** of the **First Schedule to Sexual Offences Act** especially clause 2 which provides that: -

2. For greater certainty, the provisions of this Act shall supersede any existing provisions of any other law with respect to sexual offences.

[6] Sexual Offences Act is a special Act enacted to deal with the menace of sexual offences including defilement. Doubtless, the nature of sexual offences depicts moral debauchery; a cruel attack on a person's dignity and person; and, an indelible corrosive hurt of the victim's life. This reality makes sexual offences serious offences, hence, need for protection of victims of sexual offences. I believe, this is responsible for regulation on how sexual offences cases are withdrawn as well as the express exclusion of the sexual offences from any form of amicable settlement including ADR or plea bargaining and agreement. See section 137N of the CPC. This philosophy supports the position taken by the prosecution that sexual offences should be withdrawn by the DPP upon conscientious decision informed by public good or interest rather than on reason of individual desire to terminate the case. Court permission to any such withdrawal is nonetheless required.

[7] Here, I should think it is apt to make reference to article 157(11) of the Constitution on exercise of state power of prosecution by the DPP which provides that: -

(11) 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.

[8] In the upshot, I am of the considered view that, although section 204 does not provide for an express exclusion of sexual offences from withdrawal under the section, I believe transitional clause 2 in the First Schedule to the Sexual Offences Act sets section 40 of the Sexual Offences Act above the general provision in section 204 of the CPC. In any event, the rule on construction of statutes would demand that a later enactment supersedes. Section 40 places the power to determine whether to prosecute a complaint on sexual offence in the DPP. Nonetheless, section 40 is quite untidy and should be aligned with article 157 of the Constitution. Subtle suggestion; legislative intervention may be necessary to expressly provide for exclusion of sexual offences from application of section 204 of the CPC. Needless to state that, a health state of statute law aids administration of justice.

[10] As I close, I am aware that the withdrawal under section 204 of the CPC leads to acquittal of the accused. But, being of the foregoing orientation, I am tempted to think that, the philosophy in article 157(7) of the Constitution on discontinuance of criminal proceedings by the DPP and effects thereto is that: -

(7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

I should think that this case was not heard.

[11] I am also aware that under section 364(2): -

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

The accused was duly served with Notice to appear but chose not to. See the affidavit of service.

[11] As a consequence, I find that the withdrawal order by the trial court of a sexual offence under section 204 of the CPC was improper, and its hereby set aside. The debate commences. The case is re-instated for hearing and disposal. Given the nature of my order, and in order to avoid mischief, the respondent will be summoned to appear before the trial court so that bail shall be determined forthwith to avert prejudice to his liberty. The trial court is accordingly directed. It is so ordered.

Dated, signed and delivered at Narok through Microsoft Teams Online Application this 9th day of February 2021

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F. GIKONYO

JUDGE

In the Presence of:

1. Ms. Torosi for DPP

2. Mr. Kasaso – Court Assistant

3. Respondent - absent

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F. GIKONYO

JUDGE