



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL REVISION NO. E026 OF 2020

REPUBLIC.....APPLICANT

VERSUS-

CONSOLATA OJWANG LANGO.....RESPONDENT

RULING ON REVISION

The Applicant, **GEORGE OCHIENG OGWANY**, has asked this Court to grant him leave to mount private prosecution against one **CONSOLATA OJWANG LANGO**.

1. The said **Consolata Ojwang Lango** (*“the accused”*) had been arrested and charged with the offence of **Stealing Stock**, contrary to **Section 278** of the **Penal Code**.
2. In the Alternative, the accused was charged with the offence of **Handling Stolen Property**, contrary to **Section 332 (1)** of the **Penal Code**.
3. The Applicant was the Complainant in the case against the Accused.
4. It was the Applicant’s case that the accused was found in possession of his cow, which had been stolen from him.
5. By the time the cow was traced and found at the home of the accused, it had already got 3 calves.
6. The Applicant has also told this Court that whilst the cow was still being held at the Pap Onditi Police Station, it gave birth to yet another calf.
7. The Applicant claims ownership of the cow and all the 4 calves.
8. However, on 26th September 2019 the learned trial magistrate ordered that the cow be released unconditionally to the accused.
9. It is common ground that prior to the order for the release of the cow to the accused, the prosecution had sought and had been granted leave to withdraw the charges against the accused. The withdrawal of the charges was made pursuant to **Section 87A** of the **Criminal Procedure Code**.
10. Following the release of the cow to the accused, the Applicant felt aggrieved, hence the application herein.
11. The Applicant blamed the trial court for failing to give him a hearing before releasing the cow to the accused. He said that the trial court ought to have taken note of his hearing disability, and to have accorded appropriate opportunity to give evidence.
12. According to the Applicant, he used to diligently attend court, whenever he was required to do so. However, he blamed his hearing disability for failure to follow the proceedings.
13. He also blames the prosecution for having the charges withdrawn against the accused, without first having discussed the issue with him.
14. As a consequence of the termination of the criminal proceedings against the accused, the Applicant feels that there has been a blatant disregard of his fundamental rights.

15. In answer to the application, the Respondent pointed out that the case against the accused had come in court for hearing, on 6 occasions.
16. Ms Odumba, learned prosecution counsel deponed that on all the 6 times the case failed to take-off because the Applicant was absent from the court.
17. I have carefully perused the record of the proceedings before the trial court. I note that on 19th February 2019, the prosecution was ready to proceed with the case, and he had one witness in court.
18. On 30th May 2019 the trial court issued warrant for the arrest of the accused, because she was not in court. However, later that day, at 12.00 noon, the court lifted the warrants of arrest after the accused explained that she had been in court, but she did not hear her name being called out.
19. To my mind, what transpired on 30th May 2019 is probably corroborative of the Applicant's contention that he had been unable to follow the proceedings. I say so, because if the accused, (who is not known to have impaired hearing ability) did not hear her name being called out, it would be understandable why a person who has hearing disability was unable to follow the proceedings.
20. The record of proceedings shows that on 12th June 2019, it is the advocate for the accused who sought an adjournment. There is no indication that the Applicant was absent from court.
21. On 4th July 2019, the trial court was on leave.
22. On 1st August 2019, the prosecuting counsel asked for an adjournment because the Investigating Officer had not bonded the witness.
23. On both 28th August 2019 and 26th September 2019, the case did not take-off because the prosecuting counsel had not received the police file.
24. I also note that on 26th September 2019 the prosecuting counsel informed the trial court that there were no witnesses in court. However, there is no indication whether or not the prosecution or the Investigating Officer had bonded the Applicant.
25. In the light of the foregoing, I find that there was no basis for attributing the failure of the case to begin, to the alleged failure by the Complainant to attend court.
26. The Respondent was wrong to assert that the Complainant failed to follow up on his case despite having full knowledge about when the case was scheduled to proceed in court.
27. I also find that the orders made by the learned trial magistrate were prejudicial to the Complainant because the subject matter of the case, whose ownership is claimed by the Complainant, had been released to the accused before there was a determination on the issue.
28. On the other hand, I find that the Applicant cannot fault either the trial court or the prosecuting counsel for failing to provide him with an interpreter. I so find because neither the court nor the prosecuting counsel could have known about the hearing disability of the Complainant unless he had provided that information.
29. In my considered view, justice cannot be attained by apportioning blame to either the prosecuting counsel or the Complainant.
30. Justice can only be attained through a fair trial.
31. The Respondent submitted thus;

‘It is important to note that the cow was the subject of dispute, and without a hearing and a proper and logical conclusion, that the owner of the cow was the accused, as she had not been found guilty of any offence.’

32. I think that the said submission is at the very core of justice; because it is only through a trial that the dispute would be resolved by the court.

33. I appreciate that the case was withdrawn through **Section 87 (a)** of the **Criminal Procedure Code**, and that therefore the accused could still be re-arrested and charged again.

34. Having given due consideration to the record of the proceedings, I find that justice demands that the Respondent has two options, and I now put him to an election as follows;

a. The Respondent should exercise his authority and have the accused re-arrested, charged and tried afresh;

OR

b. The Applicant may institute private prosecution against the accused if the Respondent fails to take steps to prosecute the

said accused within the next 30 days.

35. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY 2021

FRED A. OCHIENG

JUDGE