



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL REVISION NO. E007 OF 2021

COUNTY COORDINATOR OF CHILDREN SERVICES.....APPLICANT

VERSUS

REPUBLIC.....1ST RESPONDENT

JNM.....2ND RESPONDENT

(Revision from the order in CM's S. O. No. 5 of 2021 at Murang'a

by E. M. Nyagah, Senior Principal Magistrate dated 15th April 2021)

RULING

1. The applicant has moved the court for *revision* against the order by the lower court made on 15th April 2021 *discharging* the 2nd respondent.
2. On 19th July 2021, I called for the original record. In view of the nature of the revision, I directed that the 2nd respondent and the Republic be served and heard on the matter.
3. The grounds are set out at length in the letter dated 7th May 2021. The 2nd respondent was charged for *incest* of his daughter PWN [*particulars withheld*] who was aged 11 years. The offence was alleged to have taken place on 24th January 2021 in Murang'a County.
4. On 12th April 2021, the victim's mother authored a letter to the lower court stating that the complaint "*arose out of a family dispute*" with her husband (the 2nd respondent) and that they had agreed to have the complaint withdrawn. She sought a mention for that purpose on 15th April 2021.
5. On the latter date, she made the application before the learned trial magistrate. Learned prosecution counsel, *Mr. Waweru*, did not object. The learned trial magistrate then ordered as follows-

Matter withdrawn under section 204 CPC. Accused is discharged. Cash bail to be refunded to depositor.
6. On 27th October 2021 I heard all the parties on this revision. In a synopsis, the applicant's case is that the offence was a felony affecting a minor who was not heard before the complaint was withdrawn; and, that the withdrawal was against her interests.
7. Learned Prosecuting Counsel, *Ms. Gakumu*, supported the applicant adding that the mother of the child had not been appointed an intermediary; and, that the order by the lower court flew in the face of the **Constitution** and the **Victims Protection Act**.
8. *Mr. Mbugua*, learned counsel for the 2nd respondent opposed the revision. He cited Article 159 (2)(c) of the **Constitution** which promotes alternative dispute resolution and section 176 of the **Criminal Procedure Code** which speaks to reconciliation. He also relied on section 40 of the **Victims Protection Act** on restorative justice. Reliance was also made on the decision in *Mary Kinya Rukwaru v ODPP & another*, Nairobi Pet. 285 of 2016 [2016] eKLR. Counsel submitted that there was sufficient cause shown to have the complaint withdrawn under section 204 of the Code.
9. Section 362 as read with section 364 of the **Criminal Procedure Code** vests the High Court with wide power to alter or reverse the impugned order.
10. From the brief record of the lower court, the minor, who was aged 11 at the time of the incident, was not in court when the matter was

withdrawn. Her mother had not been appointed as an intermediary in any event. Like I stated, the 2nd respondent was facing a grave charge of incest. Although the learned prosecution counsel did not oppose the withdrawal of the charge, I find that the order was *not* in the best interest of the child. True, her mother and father may have resolved their domestic dispute but it did not cure the underlying complaint of incest. In all the circumstances of this case, I find that the order discharging the 2nd respondent was irregular.

11. The revision is accordingly *allowed*. The 2nd respondent shall now be presented on 15th December 2021 before any magistrate other than *Hon. E. M. Nyagah, SPM*, to take fresh plea and for directions on his trial. In the meantime, and to be fair to the 2nd respondent, I extend his free bond granted by the High Court on 6th October 2021. For the avoidance of doubt, the lower court will be at liberty to set fresh bond terms once plea is taken.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 14TH DAY OF DECEMBER 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of-

The applicant.

The 2nd respondent.

Ms. Muriu for the Republic.

No appearance by counsel for the 2nd respondent.

Ms. Dorcas Waichuhi & Ms. Susan Waiganjo, Court Assistants.