REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 128 OF 2019

BENJAMIN KOOME KAITHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the ruling and order of the Hon. E.W. Ndegwa SRM

made on the 25/7/2019 in Githongo PMC SO No. 8 of 2019)

R U L I N G

1. **Benjamin Koome Kaithu ("the appellant")** was originally charged with the offence rape contrary to ***section 3 (1) a, b and (3) of the Sexual Offences Act, No.3 of 2006***. He is alleged to have intentionally raped **BK ("the complainant")** on 16/01/2019 at [particulars withheld] Town, Imenti North sub-county.

2. He faced an alternative count of committing an indecent act with an adult contrary to ***section 11(A) of the Sexual Offences Act, No.3 of 2006.*** It was alleged that on 16/1/2019 at about 15.30hrs at [particulars withheld] Town, Imenti North sub–county, the appellant intentionally touched the buttocks/breasts/anus/vagina of BK with his penis against his (sic) will.

3. The appellant denied the charge and the prosecution called two witnesses, the complainant and the doctor. However, on 25/7/2019, the prosecution applied to withdraw the charges under ***section 87 (a) of the Criminal Procedure Code and section 40 of the Sexual Offences Act.*** The appellant did not object to the application.

4. In a short ruling, the trial Court rejected the application. Relying on the decision in the **DPP vs. Martin Mbithi (2016) eKLR**, the trial Court held that the matter was one of public interest and for that reason, it has to proceed to full trial.

5. Aggrieved by that decision, the appellant appealed to this Court setting out three grounds of appeal which can be summarized into one, *viz*, that the trial Court exercised its discretion wrongly in rejecting the application for the withdrawal of the charge by the DPP.

6. The appellant submitted that the responsibility of instituting and undertaking criminal proceedings is on the office of the Director of Public Prosecutions (DPP) in terms of ***Article 157 of the Constitution.*** That those powers are exercisable even under ***section 40 of the Sexual Offences Act.*** That the trial Court should have encouraged reconciliation under ***section 176 of the Criminal Procedure Code (CPC).***

7. On behalf of the respondent, it was submitted that it was within the powers of the DPP to make the application under ***Article 157(6) of the Constitution*** and ***section 87(A) of the CPC*** to apply to withdraw the charges against the appellant. That it was in the public interest to do so under ***Article 157(11) of the Constitution.*** That the facts in the case of **DPP vs. Martin Mbithi (supra),** which was relied on by the trial Court, were inapplicable in the present case. That there was need to prevent the abuse of the legal process as the evidence will not support the charge.

8. **Part XI of the CPC** makes provision for *appeals from the Subordinate Courts. **Section 347*** thereof provides: -

> ***"347(1) Save as is in this Part provided: -***
>
> ***a) A person convicted on a trial held by a* subordinate court of the first or second class *may appeal to the High Court: and***
>
> ***b) (Repealed)***

(2) An appeal to the High Court may be on a matter of fact as well as on a matter of law".

9. From the foregoing, it would appear that an appeal only lies against a conviction and not otherwise. The Court of Appeal had an opportunity of considering ***section 379 of the CPC*** in the case of **Thomas Patrick Gilbert Chomondley v. Republic [2008] Eklr** wherein it stated: -

> ***"In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379(1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence. As far as we understand the position the basis on an appeal cannot be that an order made in the course of a trial is highly prejudicial to an accused person: …"***

9. The procedure obtaining in the High Court also obtains in the subordinate Courts. In this regard, appeals are only on conviction or acquittal. No right of appeal exists on interlocutory orders. The remedy for interlocutory orders is to be found in ***section 362 of the CPC,*** application for review.

10. In the present case, the prosecution made an application to withdraw the case against the appellant on the basis that the complainant had already reconcile with the appellant. The trial Court rejected that application on the basis of public interest. In this regard, that order being not of conviction or acquittal, no appeal could lie against it. Accordingly, the appeal has no basis and is hereby struck out.

11. Having struck out the appeal, what is the remedy for the appellant. His remedy would be found in having the order revised under ***section 362 of the CPC.*** Under that section, this Court has jurisdiction to call for the record of a lower court and satisfying itself as to the regularity, legality or otherwise of a proceeding, order or ruling.

12. In this regard, since the impugned order has been brought to this Court, the Court cannot close its eyes to it and send the parties back to that Court. The Court has the jurisdiction to consider the efficacy of the proceedings and the said Order.

13. The order in question is one of refusal to allow withdrawal of a charge by the DPP. The DPP has the ultimate control over investigations and prosecution in criminal matters in terms of ***Article 157 of the Constitution.*** However, that power is not absolute. It is amenable to control by the Court where a matter is already before Court in terms of ***section 157(11) of the Constitution.*** In this regard, where his exercise of the power, including the power to withdraw or discontinue prosecution is not in public interest, the trial Court has the jurisdiction to stop the DPP on his tracks.

14. In **Republic v Leonard Date Sekento [2019] eKLR,** the court held that: -

> ***"The constitutional and statutory responsibility to discharge any of these functions squarely rests with the Director of Public Prosecution. The consideration to initiate or discontinue a criminal proceeding is only to be weighed against the broader doctrine of justice for the public".***

15. In the present case, the complainant was at the time of the commission of the offence aged over 18 years. However, when she went to hospital, she told the medical officer who examined her that she was aged 17 years. Indeed, the evidence on record by **Pw2,** the medical officer was that he examined a minor of 17 years.

16. The complainant wrote a letter dated 21/5/2019 to the DPP expressing her desire not to proceed with the case. She also swore an affidavit on 15/7/2019 giving reasons why she did not wish to proceed with the matter.

17. In his submissions, **Mr. Namiti, Senior Prosecution Counsel** observed that he had been advised by the investigations officer that the evidence in his possession may not take him far. As already observed above, the medical evidence tendered when evaluated will not be that of the complainant who states that she is 19 years when she applied to withdraw the charge.

18. In my view, this case is different from that of **DPP v. Martin Mbithi (supra)** which the trial Court relied on to reject the withdrawal of the charge. In that case, the application was being made by an accused and was vehemently opposed by the DPP on constitutional grounds. In the present case, the application is being made by the DPP at the behest of the complainant. The case belongs to the complainant. She is of age of majority. She has sworn that she should be left to make decisions touching on her life.

19. In my view, offences under the ***Sexual Offences Act*** are not so special that at no time the DPP cannot be allowed to withdraw a charge thereunder. It is only where a minor is involved in my view, who cannot give any informed consent, that public interest demands that the trial Court owns the process. In the present case, the complainant is an adult. She has stated that she has reconciled with the appellant. They are related and the Court should see to it that back in the village, the parties continue to live harmoniously.

20. In my considered opinion, all that the Court has to satisfy itself when a matter is being withdrawn is that there is no coercion, bribery or any other form of undue pressure from any front upon the complainant. That has not been alleged or suggested in the present case.

21. In any event, the Court is under a duty to promote Alternative Dispute Resolution ("ADR") mechanisms as provided for under ***Article 159 (2) (c) of the Constitution.*** In **Mary Kinya Rukwaru v Office of the Director of Public Prosecutions & another [2016] eKLR** the court observed: -

> ***"I would agree with Counsel for the Interested Party that the Constitution of Kenya 2010 recognizes that justice is not only about prosecution, conviction and acquittals [and that] it reaches out to issues of restoration of the parties [with] court assisted***

reconciliation and mediations are the order of the day with Article 159 being the basic test for that purpose.

Accordingly, Alternative Dispute Resolution (ADR), including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms, are available means of settlement of criminal cases under the Constitution, and the Court is enjoined under Article 159 to promote ADR".

22. Further, the DPP himself has cast doubt on the efficacy of the evidence in his possession if he proceeds with the charges. Continuing with the prosecution might be an exercise in futility. In this regard, I am of the view that the trial Court failed to consider all these issues as a result it exercised its discretion wrongly. That exercise cannot be left to stand. It is hereby set aside.

23. Accordingly, the order of the trial Court made on 25/7/2019 is hereby set aside and substituted with an order allowing the withdrawal of the charge against the appellant under ***section 176 of the CPC.***

It is so ordered.

DATED and **DELIVERED** at Meru this 8th day of June, 2020.

A. MABEYA

JUDGE