



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL APPEAL NO.4 OF 2019

SAMWEL KIPKIRUI alias NICHOLAS BOI.....APPELLANT

V E R S U S

REPUBLICRESPONDENT

(Being an Appeal from the Ruling of Hon. B.R. KIPYEGON (SRM) in Kericho CM Criminal Case No.75 of 2018 delivered on 31/1/2019)

J U D G M E N T

1. The Appellant was charged with defilement Contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act No3 of 2006.
2. The particulars were that on 5/1/2018 at Duka Moja Area within Kericho District in Kericho County, the Appellant caused his Penis to penetrate the Vagina of SNN a child aged 16 years old.
3. The Appellant was faced with an alternative charge of Indecent Act with a child Contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006 in that in the same material particulars as in Count 1 above the Appellant intentionally and unlawfully cause his penis to come in contact with the Vagina of SNN a girl aged 16 years.
4. The Appellant pleaded not guilty and the Prosecution called three witnesses who proceeded with the hearing.
5. On 31/1/2019, the Prosecution made an Application to the Trial Court to withdraw the case Under Section 87 A of the C.P.C. and the Court allowed the Application and the Appellant was discharged under the said Section.
6. The Appellant is aggrieved with the order discharging him and he has filed this appeal on the following grounds:-
 - (i) ***THAT the Trial Court erred in Law and in fact in allowing the Prosecution to withdraw the case Under Section 87 A of the C.P.C. instead of making a Ruling Under Section 306 of the C.P.C.***
 - (ii) ***THAT there was no proper legal and factual basis at all upon which to withdraw the case.***
 - (iii) ***THAT the Trial Magistrate erred in Law and in fact in presiding over a case in a manner which amounted to a mistrial.***
7. The parties filed submissions in the Appeal which I have duly considered. The Appellant is challenging the withdrawal of the case Under Section 87 A of the C.P.C. The Appellant urged the Court to discharge him Under Section 210 of the C.P.C.
8. The Respondent submitted that the DPP has the mandate to discontinue cases under Article 157 of the Constitution of Kenya.
9. In the case of **Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another [2018] eKLR** it was held as follows;

“As I understand his role, the DPP is the constitutional custodian, enforcer and defender of public interest in criminal justice which is the due administration of justice so that the offender is punished or otherwise dealt with, as appropriate, for deterrence and rehabilitation, the victim is assuaged and compensated as appropriate, and the society benefits from prevention of crime.

In addition, the DPP ensures the criminal justice system is not abused to persecute the innocent, achieve collateral civil purpose or avoid due punishment for crime. among other improper use of the criminal process. This is the mandate of Article 157 of the Constitution, which only the DPP can discharge and, consequently, his involvement in any proposed compromise in criminal cases is indispensable.”

10. Article 157 (10) of the Constitution provides that the DPP exercises his functions without any direction by any authority and it states as follows:

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

11. In the current case, the Prosecution stated that there was suspicion that the DNA result had been tampered with.

12. I find that the interests of both parties have to be protected. If the DPP finds it necessary to re-charge the Appellant, the Appellant will have an opportunity to defend himself.

13. In the case of **Republic v Abdi Ibrahim Owl [2013] eKLR**, the court had the following to say on a similar issue;

“Unfortunately, trials involve rights of individuals. This court has been lenient enough and had to step in and stop this endless game. The court is placed in a difficult situation where it has to balance the rights of the victim and that of an accused person. To ensure justice for all, every player in the administration of justice needs to take up their roles and play them professionally. I wish to give a word of unsolicited advice to the learned state counsel and his colleagues in Garissa, sometimes withdrawing a case might be a better idea where difficulties of the nature portrayed in this case exist. This gives them a chance to re-arrest and charge a suspect afresh once witnesses are traced and evidence gathered.”

14. I find that the Trial Court was given reasons for the withdrawal of the suit.

15. I find that this Appeal lacks in merit and accordingly dismiss it.

Delivered, Dated and Signed at Kericho this 2nd Day of October, 2020

A.N. ONGERI

JUDGE