



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**REVISION APPLICATION NO. 5 OF 2018**

**JOSEPH KANGOGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**DENNIS KOSGEL.....INTERESTED PARY**

**RULING ON REVISION**

**Introduction**

1. The Revision in this matter was provoked by a letter addressed to the Court by the Complainant in KBT PMCCR.CASE NO. 1012 of 2015, **R v. Dennis Kosgei**, on a charge of creating disturbance in a manner likely to cause a breach of the peace contrary to section 95 (1) (b) of the Penal Code.

2. The complainant's said letter dated 21/2/2018 was in the following terms:

JOSEPH KANGOGO,

P.O. BOX 318,

KABARNET.

15/02/2018

0727819636

THE HON. RESIDENT JUDGE,

KABARNET HIGH COURT,

P.O. BOX 66,

KABARNET.

***THRO***

THE PRINCIPAL MAGISTRATE,

KABARNET LAW COURT,

P.O. BOX 66,

KABARNET.

Dear Sir,

**RE: REQUEST FOR REVIEW CASE RM. CRI. NO. 1012 OF 2015**

**R VS= DENNIS KOSGEI**

I am the complainant in this case and I am not satisfied the way it has been handled especially on 22/01/2018 where prosecutor closed my case and I had complained about Investigating Officer to be changed. Since the first one had been transferred to Kinyach Police Station. The case was closed when my lawyer was not inside the Court. This made my lawyer to withdraw from representing me in my case.

My case was closed prematurely and before the Investigating Officer testify I am apprehensive that since that I had made several complaints against Sgt. Hamisi, the Investigating Officer, it is possible that he deliberately failed to attend Court so that I lose the case.

I humbly request for your intervention and allow the investigating Officer to testify before, it is closed.

Yours faithfully

Joseph Kangogo

Complainant

Cc.

1. The trial Court

Kabarnet

2. The Prosecutor

Kabarnet Law Court

3. Despite numerous and lengthy adjournments for purposes of accommodating the Applicant to obtain counsel to lead him in his prosecution of the Revision, the Applicant did not secure the attendance of his counsel to argue the case and the Court proceeded to the consideration of the application upon submissions by the Applicant in person and counsel for the interested party, the accused in the said criminal trial.

#### **Issue for Determination**

4. The Court has considered the matter and framed the issue as being whether the High Court as a revision Court may compel the Prosecution to call a particular witness in a criminal trial pending before the trial Court, in this case the investigating officer, before the closure of the Prosecution's case.

#### **Determination**

5. It is clear from the text of Article 157 (6) of the Constitution that the state powers of Prosecution lie with the DPP who may "*institute and undertake criminal proceedings against any person before any Court*", "*take over and continue any criminal proceedings commenced in any court*", and, with leave of Court, "*discontinue at any stage before judgment any criminal proceedings.*"

The Court may only interfere with the prosecutorial powers of the DPP where he is in breach of the constitutional direction under Article 157 (11) that:

"In exercising the powers conferred by this Article the Director of Public Prosecution shall have regard to the public interest of the administration of justice and the need to prevent and avoid abuse of the legal process".

6. The Court's power of supervision under Article 165 (6) of the Constitution and for Revision under section 362 of the Criminal Procedure Code exist for purposes of ensuring the fair administration of justice and the legality of the process of the Court.

7. In accordance with section 143 of the Evidence Act,

"No particular number of witnesses shall, in the absence of any provision of law to the contrary be required for the proof of any fact".

8. The discretion as to the number of witnesses to be called lies with the prosecution. The Court may only call for witnesses, in *a trial before* it, in the circumstances set out in section 150 of the Criminal Procedure Code as follows:

**150.** A Court may, at any stage of a trial or other proceeding under this code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the Court shall

summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.

As this Revision Court is not the trial court in the matter under reference, there is no basis for the High Court to order the trial Court to take evidence from the Investigating Officer as sought by the applicant.

9. Section 362 of the Criminal Procedure Code empowers of the High Court to call for records on Revision and provides as follows:

**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.

10. Although section 362 of Criminal Procedure Code does not specify who should move the Court for Revision, section 364 on the powers of the Court on Revision suggest that the Court has power to act in any case, "*which otherwise comes to its knowledge*", and this may include information given by a complainant or prison authorities, among others involved in the criminal justice system.

11. While the Complainant may properly have brought the complaint to the attention of the High Court for purposes of Revision, the more appropriate avenue in view of the prosecutorial discretion of the DPP was to refer the matter to the DPP for consideration before it had closed the case. After closure of the Prosecution's case, the Complainant could only await the judgment of the trial Court at the submission of *no case to answer* or upon full trial, and if aggrieved to contest to decision by appeal through the DPP pursuant to section 348 A of the Criminal Procedure Code.

12. It has not been shown that in its prosecution of the matter, the DPP has in breach of Article 157 (11) failed to consider the interest of due administration of justice, or otherwise abused or failed to prevent, abuse of the legal process.

The Court does not, therefore, find a basis for interference with the DPP's prosecutorial powers.

13. On the merits, it would appear from the Reply Affidavit filed by the interested party that the dispute between him and his complainant cousin is a parcel of land **Baringo/Sergonjun/230** where the interested party resides and on which it is alleged the complainant seeks to construct a permanent structure. The question of ownership of a parcel of land is a matter for determination by the Environment and Land Court and not through the criminal process, and, it would appear, that there is an element of abuse of the criminal process by the prosecution. The Court does not, however, make a concluded view on the issue as the same is not properly before the Revision Court. The High Court may only consider the question of abuse of Court process in proceedings filed in that behalf under Article 157 (11) of the Constitution.

### **Orders**

14. Accordingly, for the reasons set out above, the Court does not find merit in the Complaint by the complainant/Applicant in his application for Revision for the failure by the DPP to call the investigating officer as a witnesses in the pending criminal trial.

15. The application for Revision is, therefore, dismissed, and the Court directs that the criminal trial which is now pending defence hearing after the placing on 28/2/18 of the accused on his defence do proceed to hearing and determination without further delay.

16. There shall be no order as to costs.

Order accordingly.

**DATED AND DELIVERED THIS 17<sup>TH</sup> DAY OF JANUARY 2019**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

Appellant in person.

Ms. Macharia, Assistant DPP for the Respondent.

M/S M.K Chebii & Company Advocates for the Interested Party.