



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**REVISION NO. 178 OF 2015**

**REPUBLIC.....APPLICANT**

**VERSUS**

**EDWIN SHANDA.....RESPONDENT**

**RULING**

[1] This application for revision was initiated vide the letter dated **14 October 2015**. That letter was written by **Mr. Wambua Kigamwa**, Advocate, on behalf of **PK**, a minor victim who was the Complainant in **Eldoret Chief Magistrate's Criminal Case No. 3471 of 2015: Republic vs. Edwin Shanda**. The Respondent herein, had been charged in that case with the offence of Defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act, No. 3 of 2006**; with an Alternative Charge of Indecent Act with a Child, contrary to **Section 11(1)** of the **Sexual Offences Act**. The Charges were however withdrawn under **Section 87(a)** of the **Criminal Procedure Code, Chapter 75 of the Laws of Kenya**, on the instructions of the Director of Public Prosecutions vide the letter dated **26 July 2015**.

[2] Being aggrieved by that decision, Counsel for the Complainant approached the Court pursuant to the provisions of **Sections 362, 364 and 365** of the **Criminal Procedure Code**, for the Court to call for and examine the record of the criminal proceedings before the lower court for purposes of satisfying itself as to the correctness, legality or propriety of the findings and orders recorded therein with particular regard to the following concerns:

[a] Whether the rights of the victim as enshrined in **Section 9** of the **Victim Protection Act No. 17 of 2014** were taken into consideration in arriving at the decision to terminate the proceedings by the court;

[b] Whether it was proper for the court to consider the contents of the letter dated **26 July 2015** when it contained material errors in so far as it related to a deceased person named **Pius Musa Kibanya** and not the victim before the lower court; and in so far as it alluded to the age of the victim to be 14 years and not 15 years;

[c] Whether it was proper for the lower court to receive a letter by the Prosecution discussing the merits or demerits of the Prosecution Case and where no *nolle prosequi* was being sought to be entered;

[d] Whether the lower court, in admitting the contents of the letter dated **26 July 2015** by the Prosecution, ought to have satisfied itself that the victim's rights under the provisions of **Article 47** of the **Constitution of Kenya, 2010** and **Section 4** of the **Fair Administrative Action Act, 2015** had been taken into account by the Prosecution.

[3] All the concerned parties, including the Respondent, as the Accused person before the lower court, were given audience on **21 January 2019** when this matter came up for hearing. **Mr. Mogambi**, Learned Counsel for the Victim/Complainant, opted to rely on the letter dated **14 October 2015**, by which the Complainant sought revision; while **Ms. Mumu**, Learned Counsel for the State, relied on their letter dated **26 July 2015**. On his part, **Mr. Miyianda**, Learned Counsel for the Respondent supported the position taken by the Director of Public Prosecutions in the letter dated **26 July 2015** and submitted that the basis upon which the Charges were withdrawn were well explained; and that this Revision Application has failed to challenge those grounds. He was in agreement with the position taken by the Director of Public Prosecutions that the issue of identification was not properly handled; and that the decision to terminate the criminal case was therefore sound. Counsel further submitted that, by dint of **Article 157** of the Constitution, the Office of the Director of Public Prosecutions is independent; and therefore that the decision to terminate the criminal case was made in that spirit.

[4] I have carefully considered the application in the light of the proceedings held before the lower court as well as the contents of the two letters filed herein, dated **26 July 2015** and **14 October 2015**. There is no doubt that the Director of Public Prosecutions is endowed with decisional independence when it comes to the making of prosecutorial decisions, for **Article 157(10)** of the **Constitution** ordains that:

**"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."**

[5] However, having commenced criminal proceedings, the Constitution recognizes that the Director of Public Prosecutions is accountable and must comply with the applicable provisions of the Constitution and the relevant Acts of Parliament in managing the prosecution process, including applications for termination of criminal cases. Accordingly, whereas in **Article 157(6)(c) of the Constitution**, it is stipulated that the Director of Public Prosecutions may, discontinue at any stage before judgment is delivered any criminal proceedings instituted by or taken over by him, **Sub-Article 8** is explicit that:

**"The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court."**

[6] Similarly, **Article 157(11)** of the **Constitution** requires that the powers of the Director of Public Prosecution be exercised in the public interest. It provides that:

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

[7] Accordingly, any decision to terminate a criminal trial is not one of the decisions shielded from scrutiny. In any case, the application for revision is targeting, not the prosecutorial decision to terminate the lower court case, but the propriety and legality of the proceedings conducted by the Learned Trial Magistrate in **Eldoret Chief Magistrate's Criminal Case No. 3471 of 2015**; and whether, in permitting the Director of Public Prosecutions to withdraw that case under **Section 87(a)** of the **Criminal Procedure Code**, the lower court applied its mind to the relevant provisions of the law.

[8] What was before the lower court was a criminal case involving charges filed under the **Sexual Offences Act**; and in the letter dated **26 July 2015**, the Director of Public Prosecutions acknowledged thus:

**"We have perused the entire file and noted the nature of the evidence in this case. It is very clear that the complainant ... was defiled by an unknown person on 11th July 2014 at around 7 am while on her way to school. It is also very clear that when the complainant was taken for medical examination, there was evidence of penetration. It is also very clear though she did not know the name of the assailant, she knew him physically and could identify him if she saw him. It is also very clear that she identified the assailant as one of the men who deliver milk in the area and this is what led to the search and arrest of the alleged assailant..."**

[9] Having so found, it was to be expected that the question as to the propriety of the identification of the suspect and the veracity of the evidence of the Complainant be left for determination by the lower court. Consequently, it was improper, in my view, for the Learned Trial Magistrate to accede to the application for termination on those grounds as it amounted to a usurpation of the role of the lower court as the trier of facts.

[10] Secondly, and more importantly, **Section 9(2)** of the **Victim Protection Act, No. 17 of 2014**, provides that:

**"Where the personal interests of a victim have been affected, the Court shall--**

**(a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate; and**

**(b) ensure that the victim's views and concerns are presented in a manner which is not--**

**(i) prejudicial to the rights of the accused; or**

**(ii) inconsistent with a fair and impartial trial..."**

[11] It is a fact, from a perusal of the lower court record, that the views of the Complainant were not taken into account by the lower court when the decision was taken to terminate the criminal case; a case that concerned her interests. The record of the lower court shows that, whereas an explanation of the import of the letter dated **26 July 2015** was made to the accused person, the victim's interests were not given any attention or consideration. Accordingly, the ensuing decision was flawed.

[12] In addition to the foregoing, it is noteworthy that the letter dated **26 July 2015** contained pertinent factual errors that appear to have escaped the attention of the lower court. The said letter was in respect of a Deceased person named **Pius Musa Kibanya**, and therefore required correction to reflect the realities of the facts of the lower court case that the Director of Public Prosecutions sought to have terminated.

[13] It is for the foregoing reasons that I find that the decision to terminate **Eldoret Chief Magistrate's Criminal Case No. 3471** was improper. Accordingly, I would quash that decision and grant orders as hereunder:

**[a]** That the file be remitted to the Chief Magistrate's Court for hearing and disposal on the merits;

**[b]** That the suspect be re-arrested and presented before the lower court for the due process of the law to take its course as to his trial to its logical conclusion;

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 6<sup>TH</sup> DAY OF MARCH 2019**

**OLGA SEWE**

**JUDGE**