



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

HCR REV 5 OF 2017

MAULIDI K. DIWAYU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application seeking revision of the Ruling of the Principal Magistrate Court at Hola Criminal Case 60 of 2017, Hon. A.P. Ndege (PM) dated 1st August 2017)

RULING

1. This Revision came before the court through a letter dated 11th January 2018 and received on the 13th February 2018. By the said letter; the Applicant applied for review of the ruling of the Hon. A.P. Ndege (PM) in Hola Criminal Case No. 60 of 2017.
2. The Applicant was the complainant in Criminal Case No. 60 of 2017 against Maulidi Omari, the accused, who was charged with the offence of trespass upon private land contrary to section 3(1) as read with section 11 of the Trespass Act Cap 294 Laws of Kenya.
3. The accused pleaded not guilty to the offence and at trial, the prosecution called four witnesses to prove its case. At the end of the prosecution case, the trial magistrate found that the accused had no case to answer and acquitted him under section 210 of the Criminal Procedure Code.
4. Being aggrieved with the ruling of the trial magistrate the complainant wrote a letter dated 1st October 2017, to the Director of Public Prosecution at Hola and copied to the High court seeking for a review of the case before a different magistrate on several grounds. It was his belief that there was sufficient evidence against the Accused and that the case was not handled well.
5. The court in exercise of its revisionary powers under section 362 of the CPC called for the file of the trial court.
6. In a bid to clarify the issue to the court, and in view of the fact that the Applicant was not represented, the court gave the complainant a chance to address the court on his grievance. The complainant explained to the court that the evidence adduced by the prosecution in support of its case proved trespass and claimed that he had suffered losses amounting Ksh. 152,000/-. He further told the court that the accused did not deny the charges but had tried to settle the matter both before trial and during trial.
7. Mr. Kasyoka, learned prosecution counsel on his part informed the court that the complainant was trying to sneak in an appeal without going through the State. He left it to the court to give direction on the way forward.
8. I have perused the record of the lower court and note that the prosecution called four witnesses in support of their case. At the close of the prosecution case, the trial magistrate after considering the evidence on record, found that the Accused did not have a case to answer and proceeded to acquit him. I have found nothing in the record to suggest that the proceedings in the trial court did not meet all the procedural requirements. Indeed *prima facie* there is nothing to show any illegality or impropriety in the decision.
9. The correct channel was for the complainant to pursue an appeal of the decision. It is trite under section 364(5) of the CPC that the court cannot entertain a request for revision of a finding, sentence or order, if the requesting party did not appeal even though he was entitled to do so.
10. I also note that the applicant was the complainant in the trial court where the Director of Public Prosecution had conduct of the case. Whereas the Applicant was the complainant and also a victim of the alleged criminal act of the Accused, it is only the DPP who would appeal the decision of the trial court and not the Applicant in a private capacity. The DPP is mandated in law to have conduct of all criminal

prosecutions.

11. Article 157(6) of the Constitution of Kenya, 2010 provides that:-

“The Director of Public Prosecutions shall exercise State powers of prosecution and may—

a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

b.”

12. Similarly, section 23(1) of the Office Of The Director Of Public Prosecutions Act 2 Of 2013 states that:-

“Notwithstanding the provisions of any other law, it shall be the function of the Director to —

a. decide to prosecute or not to prosecute in relation to an offence;

b. institute, conduct and control prosecutions for any offence;

c. carry out any necessary functions incidental to instituting and conducting such criminal prosecutions; and

d. take over and conduct a prosecution for an offence brought by any person or authority, with the consent of that person or authority.”

13. The complainant was not a party to the criminal case in the trial court and therefore lacks the proper locus to institute an appeal or review before this court. He can only pursue the revision or appeal through the Director of Public Prosecutions which prosecuted the case. It is from the DPP that he should inquire on the feasibility of appeal proceedings against the ruling of the trial magistrate.

14. I observe further that the complainant is also seeking damages for the crops that were destroyed by the cattle that trespassed onto his farm. He was issued with a letter from the Ministry of Agriculture Livestock and Fisheries, Galole office showing the value of crops destroyed was to the sum of Ksh. 152,000/-. This clearly reveals a civil claim which claim cannot be brought in the current criminal proceedings.

15. The Applicant can only pursue such a claim through a civil suit in the Magistrate court. It is in that court that he can seek compensation for damages.

16. The application is thus rejected.

17. The Deputy registrar of this court is directed to return the trial file to the Principal Magistrate’s court in Hola.

Orders accordingly

Ruling dated delivered and signed at Garsen on this 13th day of June, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

The Appellant

S. Pacho - Court Assistant

Mr. Kasyoka - For Respondent