



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL REVISION NO. 157 OF 2018

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

SELINA MUTHONI ITA.....RESPONDENT

R U L I N G

1. In this application dated 9/07/2018 the applicant seeks for orders that this court be pleased to call for and examine the Siakago Misc. Criminal Application No. 2 of 2018 for purpose of satisfying itself as to the correctness, legality, or propriety of the court's ruling delivered on 19/06/2018. It also seeks for review of the said ruling and for termination of criminal proceedings of Criminal Misc. No. 2 of 2018.
2. The background facts are that the respondent in her application in Criminal Misc. No. 2 of 2018 obtained orders to institute criminal prosecution proceedings against one Stephen Ngai Kithumbu. The orders were issued by the court after the police who were seized of the matter arrested and charged the same suspect with the same charges.
3. The respondent then instituted criminal proceedings in the same file Misc. Application No. 2 of 2018 which are running parallel with the applicant's Criminal Case No. 267 of 2018 in the same court. This case is scheduled for hearing on 15/10/2018.
4. The applicant faults the learned magistrate for issuing the orders in favour of the respondent without calling for a report from the police investigation team so as to confirm the status of their investigations.
5. Bearing in mind that the powers of the applicant under Article 157(6) of the Constitution, the applicant urges the court to find that the magistrate's ruling was a misdirection and to accordingly review the same.
6. The application was opposed by the respondent on grounds that the charge in Criminal Case No. 157 was in bad faith and not intended to achieve public interest or justice. The respondent states in her replying affidavit that she was assaulted twice by the accused Stephen Ngai Kithumbu on 22/02/2012 and on 12/08/2012 and made the necessary reports to the police vide OB No. 17/22/08/2012. She obtained the P.3 form following the assault which was duly filled.
7. It was after the applicant totally failed to charge the suspect that the respondent filed an application seeking orders to institute private prosecution against the suspect which orders were granted.
8. The respondent contends that the magistrate was within the law to issue the said orders and no miscarriage of justice would be suffered by the applicant.
9. The respondent states that she has every reason to believe that the applicant cannot competently prosecute the case against the suspect for it had previous used him as a witness in trumped up charges.
10. The only issue arising from this application is whether it meets the threshold of Section 362 of the Criminal Procedure Code.
11. He provisions of Article 165(6) and Section 362 of the Criminal Procedure Code empower this court to call for the record of the lower court with a view of satisfying itself as to the correctness, regularity, legality and propriety of any order made on sentence passed.
12. The Misc. Criminal Application No. 2 of 2018 whose ruling is in issue here was filed in court on 9/02/2018 and is dated the same day. The prayers read as follows:-

i. That the applicant be grant leave to institute and conduct private prosecution against Stephen Ngai Kithumbu.

ii. That the charge drawn out by the applicant against Stephen Ngai Kithumbu be admitted.

iii. That summons do issue against Stephen Ngai Kithumbu to appear before court to take plea in the charge.

iv. That Mwaniki Gachuba Advocate be appointed prosecutor on behalf of the applicant.

v. That the respondent do surrender to Mwaniki Gachuba Advocate OB No. 17/22/2/2012, the investigation diaries, witness statements, medical forms and over the evidence and material related to the matter.

13. The grounds supporting the application were contained in the affidavit of Selina Muthoni the respondent herein. It was deposed that the respondent had reported having been assaulted by on Stephen Ngai Kithumbu at Kiritiri police station and that no action had been taken which demonstrated failure of private and public justice.

14. The respondent further stated that the omission on part of the applicant was motivated by malice or ulterior considerations or bad faith, having suffered injury, the respondent urged the court to allow her to seek justice before a court of law through private prosecution.

15. The replying affidavit sworn by one Margaret Muraguri a prosecution counsel admitted receipt of the report vide OB No. 17 of 22/08/2012. The officer who was appointed to investigate later went on transfer to Kakamega. Another officer was appointed to proceed with investigations and the applicant's office was also seized of the matter following up the investigations through correspondence. Consequently, a charge against the suspect was registered in court in Criminal Case No. 267 of 2018. A pre-trial session was conducted and hearing date is scheduled for 15/10/2018.

16. In his ruling, the learned magistrate noted that the offence was allegedly committed in the year 2012 and that police were in possession of all material required to conduct investigations which they failed to do. He found the application merited and allowed it.

17. I have examined the correspondence annexed to the application before me which formed part of the Misc. Criminal Application material. I have also perused the supporting and opposing affidavits of the parties.

18. It was not denied that the report of assault was made at Kiritiri police station on 22/08/2012. The P.3 form duly filled was in possession of the police and the complainant (respondent herein) was available to record a statement. The transfer of a police officer does not affect investigations since handing over to another officer normally takes place even before the officer seized of the matter leaves the station.

19. It is noted from the correspondence that the office of the Director of Public Prosecutions (DPP) only got involved after the miscellaneous application was filed. The investigations, if any, were carried out as the hearing of the miscellaneous application was going on. The suspect was arrested on 23/03/2018 and arraigned in court on 10/04/2018. These facts are supported by documentary evidence produced by the applicant herein.

20. There was no satisfactory explanation given on why the prosecution could not investigate a simple report of assault for over a period of six (6) years. The action of the investigation authority was a travesty of justice and the applicant came on board too late in the day.

21. The powers of the office of DPP to institute criminal proceedings against any person are not in question. Neither are the powers to take over investigations instituted by another person. Article 157 of the Constitution donates these powers to the office of DPP. The question is what happens in the event that the office of DPP fails to do its noble duty. The aggrieved person has a remedy before the court of law under Section 88 of the Criminal Procedure Code.

22. The applicant relied on the case of **KIMANI VS KIHARA [1985] KLR** where the court set principles to be followed in dealing with an application of this nature. Of the principles, it was stated is that the court should adjourn the matter and allow for filing of the report by the Attorney General/Director of Public Prosecutions.

23. I have looked at the said authority and not that holding No. 4(a) states:-

It ought to be ascertained whether the Attorney General or the police have been informed. The court may adjourn the matter to enable a report to be made. However, in simple cases such as trespass and assault this may not be necessary.

24. This authority is self-defeating to the applicant in that it exempts the simple charges of assault (as it is the case here) and trespass from calling for a report from the police or from the Director of Public Prosecutions. Further, the facts of this case are different from those of the **Kimani case** in that the prosecution admitted from the word go that a report had been made to them in 2012 and that no action had been taken...years down the line. There was no need for a report in this case given the facts of the case. The **Kimani case** otherwise set very sound principles to be followed by courts in applications seeking order for private prosecutions.

25. The respondent relied on the case of **ISAAC ALUOCH POLO VS STEPHEN KALONZO MUSYOKA & 218 OTHERS [2013] eKLR** where the court relied and applied the **Kimani case** principles.

26. The **Polo case** set out the basis of allowing and continuing private prosecution which I find applicable in the case before me. The respondent had made a report to the police which was not acted on for a very long time without any reasonable cause which resulted into failure of private and public justice. The respondent had suffered in jury in that she was shut out from the doors of justice by the police and the respondent. The action of the applicant must have been motivated by ulterior motive because not even a feedback was given to the respondent in respect of the report she made to the police. Should this kind of social evil is allowed to flourish, the very purpose of criminal justice would be defeated.

27. It is my finding that the orders made by the magistrate in his ruling delivered on 19/06/2018 cannot be said to be incorrect, illegal or

irregular for this court to intervene by way of revision.

28. The application does not pass the test set out under Section 362 of the Criminal Procedure Code.

29. I find no merit in the application and dismiss it accordingly.

30. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF OCTOBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the applicant

Mr. Njage for Gachuba for respondent