



**Director of Public Prosecutions v Mwalimu (Criminal Case
E013 of 2022) [2022] KEMC 24 (KLR) (31 March 2022) (Ruling)**

Neutral citation: [2022] KEMC 24 (KLR)

**REPUBLIC OF KENYA
IN THE KWALE LAW COURTS
CRIMINAL CASE E013 OF 2022
ZK KAGENYO, RM
MARCH 31, 2022**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS REPUBLIC

AND

ALI MWALIMU ACCUSED

RULING

1. The accused person was charged on the 4th day of February 2022 for the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the offence were that on diverse dates between 13th day of April 2021 and July 2021 at [particulars withheld] village, Ng'ombeni location, Matuga sub county in Kwale county within Coast Region, the accused person, intentionally and unlawfully caused his penis to penetrate the vagina of K.N.K a girl aged 16 years.
2. He was also charged with an alternative count of committing an indecent act with a child contrary to section 11 (1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars were that on diverse dates between 13th day of April 2022 and July 2021 at [particulars withheld] village, Ng'ombeni location, Matuga sub county in Kwale county within Coast Region, the accused person, intentionally and unlawfully caused his penis to touch the vagina of K.N.K a girl aged 16 years.
3. After the pre-trial conference on 4th February 2022, the matter was certified as ready for hearing and a hearing date slated for 21st February 2022. On this date, two witnesses testified being the victim and the investigating officer. The investigating officer was stood down to enable him obtain the original immunization card that was brought in court. The same was produced as P. Exh 2 the following day being 22nd February 2022. After PW 2 testified, the matter was adjourned to 3rd March 2022 for further prosecution hearing. On this date, PW 3, Dr. Nuru Mohammed testified and on behalf of his colleague Dr. Doreen Matumbi, produced P. Exh. 1, an age assessment report.



4. After the evidence of PW 3, the DPP represented by the learned PPC Mr. Mulama applied for an adjournment seeking for an opportunity to review the prosecution file. The matter was stood over to 17th March 2022.
5. On the 17th March 2022, Mr Mulama, PPC, came on record and made the application to have the matter withdrawn under section 87 (a) of the Criminal Procedure Code and Section 25 (2) of the ODPP Act. Mr. Mulama's application was based on the evidence of PW 3 who according to him, testified that the complainant was aged 18 years. P. Exh 1 actually indicated 19 years.
6. It was Mr. Mulama's further submission that the offence was alleged to have been committed in 2019 and 2021. He stated that this means that during the commission of the offence the complainant was 18 years old or just turning 18 years. The DPP further informed the Court that the I.O, PC Njeru had informed him that the complainant who is since then an adult now is having a 2nd born from the accused. He informed the court that he did hold a meeting with the two families and the two families informed DPP that indeed it is the accused's family which is feeding the complainant and her child.
7. It was the DPP's view that continued prosecution of this present offence will not serve the best interest of the children born from the relationship of the two, complainant and the accused.
8. In summation of his application, Mr Mulama informed the court that he was reviewing the decision to charge which was made by Ms. Mwaura, PPC, on the 4th February 2022. To buttress this, he stated that the information on age was not available when the DTC was made. He stated that the immunization booklet, P. Exh. 2 as provided was not legible and hence was ordered for age assessment.
9. The Accused/ Respondent did not oppose the application.

Analysis

10. The DPP's application is brought under section 87 (a) of the CPC which states that;

In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;
11. A plain reading of the said section is that such a withdrawal can only be done with the leave of the Court or the express permission from the DPP in person.
12. However, the text inferring that such withdrawal may be done without leave of the court if authorized by the DPP is not in sync with the present developments in the law, understandably being a pre-2010 legislation. In fact, the footnote expounding the two asterisks thereat defines the DPP referred to in the section as,

Powers delegated to the Solicitor-General; Deputy Public Prosecutor; Assistant Deputy Public Prosecutor; Principal State Counsel; Provincial State Counsel, Central and Eastern Provinces; Provincial State Counsel, Coast Province; Provincial State Counsel, Nyanza Province; Provincial State Counsel, Rift Valley Province; and Provincial State Counsel, Western Province. (L.N. 106/1984.)
13. Undoubtedly, this is a formation which has been overtaken by the developments of the law and should be read mutatis mutandis with Article 157 (8) CoK.



14. Section 25 (1) of the ODPP Act, states that;

The Director may, with the permission of the court, discontinue a prosecution commenced by the Director, any person or authority at any stage before delivery of judgement.
15. This is the letter and spirit under Article 157 (8) of the constitution that the DPP may not discontinue a prosecution without the permission of the Court.
16. It is therefore the law and procedure that a discontinuation of a matter under section 87 (a) which is replicated under Article 157 (6) (c) of the constitution must have leave of the court.
17. The involvement of the court in the application for such withdrawal is to help the court guard its processes from abuse and ensure a fair administration of justice.
18. The court, while making its determination warned itself that it must do so judiciously and in the interest of justice and further reminded itself on the undisputed independence of the DPP in conduct and control of the public prosecutions in the country.
19. The court deduced the reasons advanced by the Applicant as follows;
 - i. There was information that the victim is now 18 years old;
 - ii. The accused was the father of two children born from the relationship with the victim;
 - iii. The families had agreed that the accused's family should continue catering for the victim and her two children.
20. The first of the three limbs of the DPP's grounds is a legal and factual issue that this court shall have to consider since it forms 1 out of the 3 elements for the offence charged that is, age of the victim, penetration and positive identification.
21. The DPP have adduced evidence in this Court in three forms being one the viva voce evidence by the victim, the Clinic Card and the age assessment by the dentist. That is evidence which is before this Court to aid the Court make its determination and an in-depth analysis at this stage would be the court pre-empting its mind long before even the close of the prosecution case.
22. When the DPP is making the decision to charge, the DPP relied on the Decision to Charge Guidelines as developed by the ODPP. Inevitably, they relied on the evidentiary test and the public interest test as at the time the matter was being set down for hearing, they had all the sufficient evidence to rely on and hence made disclosures of the same to the Accused/ Respondent. They Applicant must have had evidence satisfying themselves of the age of the victim, age being a primary element in these charges and if they had doubt at that stage, that would have halted the charging process to first confirm the age of the victim.
23. By referring to the evidence the DPP produced for consideration by the Court, the DPP is asking the Court to consider the veracity and probative value of the evidence on record at an interlocutory stage and yet this is information the DPP verily had way before PW 1 testified in this case.
24. This Court poses a rhetorical question to itself that, what need was there then to proceed with the hearing, adduce evidence and after adduction of that evidence challenge what one has produced? That is calling upon the Court to make a determination which in my view it ought not be done at an interlocutory stage.
25. The DPP cannot bring evidence on record using the left hand and by the right hand seem to expunge or challenge it. The test for the value of the evidence, its veracity and probative value, once produced,



- should be left to the court as the trier of facts. By asking the Court to make a finding that indeed that evidence as adduced is substandard, the DPP is by extension usurping this Courts role of determining what a certain piece of evidence establishes.
26. On the other two limbs forming the foundation of the DPP's application, the Applicant informed the Court that there were discussions initiated and held by the two families and attended by the DPP.
 27. This Court is guided by Article 157 (11) 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.
 28. Whereas this Court is invited to uphold alternative forms of dispute resolution mechanisms including reconciliation and traditional dispute resolution mechanisms under Article 159 (2) (c) of the CoK, it is also reminded and warned that such traditional dispute resolution mechanisms should not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or such should not be inconsistent with the constitution or any written law.
 29. The offence of defilement, such as one the Respondent is charged with is an offence that involves another person taking the innocence of the vulnerable juvenile girl or boy.
 30. Children have a special place in the life of our laws which indeed the supreme law of the land ensured that it reserved a whole Article to address on the Children rights and also our legislature enacted a whole statute to address on children welfare. All this is to protect the vulnerable children.
 31. The law classifies children as vulnerable for among other reasons lack of a legal capacity to make decisions affecting their lives by themselves. It is my humble view that such fortified protection, if its security walls are breached and is invaded, which ultimately would be seen to be the failure by the State and the parents or guardians to that child, the actions of the perpetrator or such invader should not be sanctified, purified and adopted as a good norm by subsequent discussions by the state or such parents.
 32. Whenever there is failure to protect the children of the republic the state should endeavor to pursue the attackers of the innocence of our children but not entering into truces with the perpetrators.
 33. If at all the action of defilement led to the bearing of a child, that child should not be used as a pawn by the defiler to get away with his crime and worst as the free pass to the queen, being the mother to that child and the victim of the defilement. This court is being invited to ratify such armistice but it is this court's humble view that such would be repugnant to justice, morality and contrary to the spirit and letter of the constitution.
 34. It would appear that the initiation of this criminal case by the applicant herein provoked the two families to have a dialogue and a consensus on how the victim in this matter and the issue born out of what the Respondent allegedly did to the victim herein would be catered for. In other words, if the charges were not preferred against the accused/ Respondent, could be that such talks could have never have happened. This is a clear demonstration of abuse of the legal process and the criminal justice system as a whole. It is my finding that an application by the Applicant grounded on such a background, defeats the very spirit of Article 157 (11) of the CoK by disregarding the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. As such the application is to fail.



35. The Applicant also relied on Section 25 (2) of the ODPP Act in the application. The effect of the application under section 25 (2) is to seek to stay the proceedings in the trial subject for the withdrawal pending the taking over of the proceedings by the Director. It was not demonstrated that the Director would be taking up this matter and hence the application is disallowed.

Determination

36. The upshot of the foregoing is that the Application by the DPP is hereby disallowed. The matter shall consequently proceed to full trial.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT KWALE ON THIS 31ST DAY OF MARCH, 2022.

KIONGO KAGENYO ZACHARIA

RESIDENT MAGISTRATE

In the presence of;

Ms. Faith Luseno, for the DPP

Mr. Felix- Court Assistant.

Ali Mwalimu

