Mwangi (As father and next friend to TK - A minor) & another v Republic through the DPP (Criminal Revision E085 of 2025) [2025] KEHC 17675 (KLR) (Crim) (25 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17675 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL REVISION E085 OF 2025

AM MUTETI, J

NOVEMBER 25, 2025

BETWEEN

PETER MWANGI (AS FATHER AND NEXT FRIEND TO TK - A MINOR) .... APPLICANT

AND

TK .... SUBJECT

AND

REPUBLIC THROUGH THE DPP .... RESPONDENT

RULING

1. The applicant in this matter by way of a Notice of Motion dated the 9th May 2025 expressed to be brought under Articles 50(1), 165(3)(d) (ii) and (6) of *the Constitution* of Kenya ,2010, Sections 362, 364(1) (b) , 367 and 382 of the Criminal Procedure Code, Cap 75 of the Laws of Kenya and all other enabling provisions of the Law moved this court for the grant of orders that;-

    a. Spent

    b. The Honorable court be pleased to order the stay of Proceedings in Milimani S.O E004 of 2025 Republic Vs T.K pending the hearing and determination of the instant application.

    c. The Honorable court be pleased to call for and examine the record of the trial court in S.O E004 of 2025 and review the legality, propriety and correctness of the directions and orders issued by Hon. Elizabeth Muiru on 15th April 2025, and substitute the same with an order upholding the DPP's decision to terminate / withdraw the proceedings under Children's Act.

d. The honorable court be pleased to issue any further or alternative order it may deem fit in the interests of justice and to protect the Constitutional rights of the subject.

2. The application was premised on the following ground as particularized by the applicants counsel in his application;-

i. defilement in Milimani S.O Case E004 of 2025, despite overwhelming evidence and legal justification that the matter should not proceed to The 1st Applicant is the father of the 2nd Applicant, a minor charged with criminal trial.

ii. The Director of Public Prosecutions (DPP), exercising powers under Article 157 of *the Constitution*, reviewed the matter and, by a letter dated 3rd February 2025, concluded that the case should be terminated. The DPP cited serious factual and legal concerns, including:

a) The alleged acts occurred when the minor was below 12 years (some at age 7);

b) The minor's lack of criminal responsibility at the time; and

c) The overriding need to protect the child's welfare through diversion and rehabilitation.

iii. The DPP's position was unequivocally reiterated in open Court on 15th April 2025, confirming that the charge sheet was defective and that the matter should not proceed.

iv. Despite this, the trial magistrate unilaterally rejected the DPP's lawful decision and ordered the matter to proceed, contravening the constitutional limits of her role, prosecutorial independence, and the principle of the child's best interest.

v. The Court further disregarded three psychiatric and child welfare assessments- including one from Mathari National Teaching and Referral Hospital-opting instead to order further evaluations and forcibly summon the minor to Court without cause, amounting to a re-traumatization of a child already under significant psychological stress.

vi. The Honourable Magistrate's actions amount to an unlawful usurpation of prosecutorial discretion, a violation of Article 157 of *the Constitution*, and a breach of the child's rights under Article 53 of *the Constitution* and the *Children Act*.

vii. The insistence on conducting a criminal trial, against expert medical advice and the DPP's reasoned decision, not only undermines justice but also perpetuates grave harm to the child's emotional, developmental, and educational well-being.

viii. The record of proceedings shows the trial court dismissed valid concerns raised by the DPP, including:

a) Improper voire dire examination;

b) Disregard for the age of criminal responsibility;

c) Disregard of a defective charge sheet

d) Refusal to recognize diversion as the preferred option under the *Children Act*;

e) Dismissal of legal and factual errors on the record.

ix. No proper application was filed to reinstate the matter, and the Court acted suo motu without jurisdiction, fairness, or regard to procedural propriety.

x. The continued criminal prosecution of the subject minor is unconstitutional, unlawful, and irreparably prejudicial. The minor stands to suffer continued psychological trauma and public stigma, contrary to his best interests and all international standards on the treatment of children in conflict with the law.

xi. It is just and necessary that this Honourable Court intervenes to prevent further miscarriage of justice, uphold the rule of law, and protect a vulnerable minor from unlawful judicial overreach.

xii. Counsel watching brief informed Court of their Application dated 19th January 2025, seeking to privately prosecute the matter to which the Applicant opposed vide their replying affidavit.

xiii. The trial Magistrate reserved the matter for Ruling and/or further directions to the Application dated 19th January 2025 seeking private prosecution.

xiv. Hon. Elizabeth Muriu-PM, on 18th March 2025 issued directions on the Application dated 19th January 2025, dismissing the Application as no ground to support or warrant the orders being made. Further, the honorable magistrate directed that the decision of the DPP in terminating criminal proceedings and recommending diversion was also wrong.

Xv). It is of importance that the decision by the Magistrate was made without considering the parties views, given no party submitted on the issue of diversion, as it was not an area of contention.

xvi) In making that decision, the DPP exercised his power and discretion guaranteed under Article 157 of *the Constitution* and the said decision was made with due regard to the law and thus a lawful decision in protecting the minor's best interests.

xvii). Once again on 15th April 2025, the Director of Public Prosecution unequivocally stated on record that they had withdrawn the charges against the subject, that the charge sheet was defective, the offences are alleged to have been committed when the child was below 12 years old, and the interests of justice given the ages of the children involved required rehabilitation.

xviii) . The ODPP requested to carry out more preliminary investigations but the Hon Muiru declined.

xix) the applicants go on to state that as can be seen on Page 7 of the proceedings produced herewith, the DPP emphasized that the minor was "in need of care and protection" and that diversion (not criminal trial) was the first option under the *Children Act*. That too the applicant contends that Hon. Muiru rejected. The applicants maintain that continuing with criminal charges will not be in the interests of justice or serve the best interests of the applicant.

XX). The minor's age and three psychiatric reports were ignored and Hon. Muiru insisted on conducting her own assessment.

xxi) The applicant further contended that the DPP noted that the alleged acts occurred when the 1st applicant was 7 years old, but Hon. Muiru focused only on recent allegations.

> " The acts bringing us to court happened when the child was 13 years old." (Page 9)

Xxii). The DPP applied to withdraw criminal charges, citing the minor's age and the need for care/ protection proceedings under the *Children Act*. According to the applicants Honourable

Muiru ignored this and insisted on continuing with the criminal trial. In her finding the Hon. Magistrate stated;-

> " It is not clear on what basis [DPP] seeks to terminate matter yet the subject pleaded not guilty."

Xxiii). The prosecution pointed out that the voire dire examination (to assess the minor's understanding of right/wrong) was improperly conducted post-plea and without psychiatric evidence. The applicants contend further that the Honourable Magistrate dismissed all that and stated;- .

> " The voire dire conducted was not under Section 19 of Oaths Act or Section 221(2) of *Children Act*... The child had not been called to give his defence."

XXIV). Honourable Muiru reinstated the case after the DPP's withdrawal attempt, claiming the plea of "not guilty" justified continuation. No formal motion was filed. According to the applicants the learned Honorable Magistate stated:-

> " The court deemed it fit to assess the subject... noting the child specialist report availed was not procedurally acquired."

XXV). Notably, the Prosecutor asked the Magistrate to put in writing the representations made by all parties and correct certain errors in her record, which she brushed off.

XXVI). The applicant asserts that unless the prayers sought in the Application are allowed, the applicants, more so the subject minor will be prejudiced as his best interests as protected in *the Constitution* will be at threat given the decision of the learned Magistrate in dismissing the DPP's decision to suspend criminal proceedings and for diversion to ensue.

3. For reasons stated above, it is just and mete that the Application herein be allowed, orders granted, to mitigate the irreparable prejudice visited on the subject minor.
4. The application is strenuously opposed by counsel for the victims. The victims contend that this is not a matter fit for diversion.
5. According to the victims, the offender was of age and knew that what he was doing was wrong at the time of the commission of the offense.
6. The victims hold the view that this matter should be left to the trial court for determination as ordered by the magistrate. Indeed counsel for the victims argued that diversion can even happen after a conviction has been entered.
7. The victims further contend that by entering a plea of not guilty the offender did not appear remorseful for his actions.
8. In the victim's view the DPP by moving to withdraw the charges he was basically engaged in abuse of his discretionary powers under Article 157(6) of *the Constitution*.
9. The applicant and the DPP urged the court to find guidance in the provisions of Section 14 of the Penal Code and find that the move by the DPP was actuated by the unequivocal provisions of the law on criminal culpability in sexual offences.
10. The penal code under Section 14 prescribes the age for criminal culpability of individuals. The section deals with Immature age and provides as hereunder;-

14.

(1) A person under the age of eight years is not criminally responsible for any act or omission.

(2) A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission, he had capacity to know that he ought not to do the act or make the omission.

(3) A male person under the age of twelve years is presumed to be incapable of having carnal knowledge (emphasis added).

11. The prosecution supported the application and submitted that the decision by the learned Hon. Magistrate was erroneous considering the material they placed on record and the reasons advanced for seeking to withdrawal of the matter.

12. According to the prosecution, DPP intended to have the matter diverted. The position of the DPP is that it is in the best interests of the children involved to have the matter diverted. It was on the strength of the submissions above that the applicant and the DPP invited the court to exercise its powers of revision and revise the decision of the trial magistrate on grounds of illegality, incorrectness and impropriety for it went against the spirit and tenor of Section 14 of the Criminal procedure code.

13. The victim's counsel on the other hand insisted that diversion cannot happen since the offender had consistently denied the offense thus, he must go through the process of trial.

14. The victim's counsel however admitted that some of the offences appearing on the charge sheet were committed when the offender was under 12 years.

Analysis And Determination

15. This revision application revolves around the question of criminal culpability of a person under Section 14 of the Penal Code and the application of Diversion in our justice system in matters involving children.

16. It is trite law that in every decision undertaken concerning a child, the best interests of a child should be taken into account. This position is clearly captured in the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

17. The same has also been captured under Article 53 (2) of *the Constitution* of Kenya as follows: 'a child's best interests are of paramount importance in every matter concerning the child'.

18. In this matter quite clearly the what matters to this court is the best interest of the minors for there is no denial by both parties that the offender and the victims are all minors.

19. In the case of MAA v ABS [2018] eKLR, where it was held as follows:-

> .... While considering this matter, this Court is alert to the welfare of the children herein who are of tender years. The matter is not about the applicant/appellant and the respondent; and their interests are secondary to those of the child. The foregoing provisions require this Court to treat the interests of the child as the first and paramount consideration and must do everything to inter alia safeguard, conserve and promote the rights and welfare of the child herein. Acting in the best interest of the children in question.

20. The above cited decision lays out the law that the court must adhere to whenever called upon to adjudicate on a matter that involves children. The interests of parents will at times clash with those of

the children and that is when the court must rise to the occasion and pronounce itself on the matter taking into account what appears to be the best interests of the child.

21. Underscoring the constitutional position in dealing with matters involving children, the Hon. Justice Martha K. Koome, EGH Chief Justice and President of the Supreme Court of Kenya in her address during the world children day dialogue with children on 19th November, 2025 stated;-

> " Allow me to reaffirm the unwavering commitment of the Judiciary to protect the rights and dignity of every child in Kenya. This commitment is anchored firmly in *the Constitution*, the *Children Act* of 2022, and the international obligations our country has undertaken. Central to this framework is the principle that the best interest of the child is the primary consideration in every matter concerning children. This is not only a legal requirement but also a moral responsibility that guides our daily work."

22. The statement by the Hon Chief Justice emphasized the need for all justice actors to bear in mind the best interests of children whenever decisions are to be taken. The Hon Chief Justice went on to state;- "As justice actors, we must prioritize diversion programmes that redirect children away from the formal justice system and towards restorative, rehabilitative processes that avoid stigma and disruption to their education."

23. The policy direction is drawn from *the Constitution* and in accordance with Article 3 of *the Constitution* all persons are under an obligation to respect, uphold and defend *the constitution*. Article 53(20) must therefore be respected by everyone who makes a decision on a matter involving children.

24. The Director of Public Prosecution made it clear to the learned Honorable magistrate what he intended to do with the matter. The request for withdrawal of the case for diversion to be undertaken was not made without reason. The age of the offender as well as the ages of the victims are matter that the learned Honorable magistrate should have paid close attention to in arriving at the decision to reject the DPP's request.

25. The Hon Chief Justice further state the intended goal of the NCAJ on matters affecting children. The Hon. Chief Justice stated "The NCAJ Standing Committee on the Administration of and Access to Justice for Children is working closely with the National Steering Committee on Alternative Justice Systems to expand AJS for eligible children's matters. These pathways provide child-friendly environments where issues can be resolved with compassion and an emphasis on restoration rather than punishment."

26. It thus clear, to every actor in the justice system that there has to be paradigm shift from the traditional adversarial system of justice that prioritizes punishment to a more humane and child friendly justice system that seeks to advance the welfare of the child.

27. The offender in this matter was said to have been below the age of criminal culpability for sexual offenses. Although the victims dispute it, this court notes that the duty to prove any of the ingredients of a criminal case rests with the prosecution. If the prosecution from the evidence they have are of the considered opinion that the offender at the time of the commission of the offence had not attained capacity, it makes no sense why the trial court should insist on having the offender tried under the circumstances. The victims may hold very strong views on the matter but *the Constitution*, the Penal Code and the Children's Act support the path taken by the DPP.

28. The court in Whoolmington vs DPP {1935} UKHL1 underscored the presumption of innocence and held that the burden of proof in criminal cases is beyond a reasonable doubt thus any iota of doubt in a criminal case should go the accused(offender). If the age of the offender is in issue and the DPP has

taken the position that the offender was below 12 years at the time of the commission of the offence, it would be pointless to insist on having the offender tried.

29. The objectives of diversion include;-

   (a) deal with a child outside the formal criminal justice system in appropriate cases;

   (b) encourage the child to be accountable for the harm caused by him or her; (c) meet the particular needs of the individual child;

   (d) promote the reintegration of the child into his or her family and community;

   (e) provide an opportunity to those affected by the harm to express their views on its impact on them;

   (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;

   (g) promote reconciliation between the child and the person or community affected by the harm caused by the child;

   (h) prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system;

   (i) reduce the potential for re-offending;

   (j) prevent the child from having a criminal record; and

   (k) promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.

30. The goal of diversion are noble and are worthy of pursuit. The criminal trial cannot happen without the evidence of the child victims. The matter therefore must be addressed wholistically because the minors who are victims are all vulnerable and require to be shielded from the traumatic experience of a criminal trial.

31. The Director of Public Prosecutions and the trial court bear the responsibility under the Children's Act to ensure that the victims as well as the offender get justice that is satisfactory to all.

32. Section 8 of Children's Act 2022 Kenya provides that ;-

   (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies—

      (a) the best interests of the child shall be the primary consideration;

      (b) the best interests of the child shall include, but shall not be limited to the considerations set out in the First Schedule.

   (2) All judicial and administrative institutions, and all persons acting in the name of such institutions, when exercising any powers conferred under this Act or any other written law, shall treat the interests of the child as the first and paramount consideration to the extent that this is consistent with adopting a course of action calculated to—

      (a) safeguard and promote the rights and welfare of the child;

      (b) conserve and promote the welfare of the child; and

(c) secure for the child such guidance and correction as is necessary for the welfare of the child, and in the public interest. (emphasis added)

(3) In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child's age and degree of maturity.

(4) The Cabinet Secretary shall issue guidelines to give effect to this section.

33. Section 8 of the Children's Act makes it mandatory for any one exercising executive or judicial authority to ensure that the welfare of children is promoted. It cannot be possibly be argued that by prosecuting a minor in the present circumstances would be in the best interests of the minor.

34. Similarly, it is important to note that putting children of tender age through the trauma of giving evidence does not amount to acting in the best interests of the child.

35. The section makes reference to matters concerning children and does not specify whether the interests of the child whose matter is under consideration is an offender or victim.

36. A literal interpretation of the provision leads me to the conclusion that a court must consider the welfare of all the children in a matter.

37. Section 22 of Children's Act 2022 on the other hand outlaws the abuse of children. The section provides;-

(1) No person shall subject a child to—

(a) psychological abuse; or

(b) child abuse.

(2) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding two million shillings, or to both.

38. The prosecution of a child who had not attained the age of 12 years at the time of the commission of the offense would in this court's view amount to psychological abuse. The prosecution in the spirit of Article 157(11) of *the Constitution* must never allow a prosecution of a child who at the time of the commission of the offense had not attained the age of 12 years as prescribed by the law.

39. To allow such a prosecution would amount to dereliction of duty on the part of the prosecution. It is thus not surprising to this court that the prosecution has supported the application hereof which ideally ought to have been made by the prosecutor after the trial court declined to grant the application for withdrawal.

40. The supervisory jurisdiction of the High Court can be invoked by any party aggrieved by the decision of the trial court. If a party has issues on legality, propriety or correctness of a decision, they should be at liberty to raise the matter and the High Court will certainly intervene.

41. The application is therefore properly before this court and the prosecution by supporting the same are well within the provisions of Section 5 of the Office of Director of Public Prosecutions as read together with the provisions of Article 157 (11) Constitution.

42. In Simiyu v Nyakongo & another (Criminal Appeal 34 of 2020) [2023] KECA 66 (KLR) (3 February 2023) (Judgment) Mativo, J. (as he then was) in the persuasive authority in the case of Rana Auto

Selections Ltd & 2 others v Kenya Revenue Authority & another (Judicial Review Application 9 of 2020) [2021] KEHC 323 (KLR) had this to say about the purpose and application of supervisory jurisdiction of the High Court:-

> "Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs. This power of superintendence is conferred by article 165 (6) of *the Constitution*. As was pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. v Sukumar Mukherjee 1953 SC 58, this power is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and agrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there is grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under article 165 (6) of *the Constitution* to interfere. (emphasis mine)

43. Undoubtedly, the High Court's power of revision under the provisions of sections 362 and 364 of the CPC, and indeed under the entire spectrum of sections 362 to 367 of the CPC, are limited to a finding, sentence or order recorded or passed by a subordinate court, other than an order of acquittal.

44. The provisions are clear that the High Court in exercise of the power of revision, may call for the record which has been reported for orders, or which otherwise comes to its knowledge. The High Court's attention could be drawn through any medium including social media. That means that in the exercise of the power of revision, the High Court could also act suo muto. The offender and his guardian therefore were within the law to have moved this court for redress.

45. It is safe to say that no formal mode of approaching the Court or of drawing the Court's attention is required or is necessary before the revision process can be invoked. The notice of Motion filed in this matter was therefore sufficient for purposes of triggering the revision.

46. The power of revision is limited to examination of 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.

47. Turning to the supervisory powers of the High Court as provided under *the Constitution*: The powers granted to the High Court under article 165(7) flow from, and have to be read in conjunction with the provisions of article 165(6). The two sub articles provide as follows:

> "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration.

48. The revisionary power of the High Court is not limited to the High Court 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, but in addition to the powers under the CPC, *the Constitution* has expanded the scope of the High Court's power to make any order, or give any direction it considers appropriate to ensure the fair administration of justice.

49. So that if the High Court in the exercise of its supervisory jurisdiction calls for a record and finds that there was a unfairness in the administration of justice by the subordinate court, body or tribunal the High Court may intervene even if there may be no other challenge to the proceedings, order or sentence, whichever is the case.

50. In the instant matter the DPP made it clear to the Court that they had evidence that the offender committed the offence while he was below 12 years. It does not make sense to this court why then a court would insist on trying a matter against the minor in the face of that expression of the DPP.

51. It should be remembered that the proof of age is mandatory in all sexual offence cases. The question that arises in my mind is how then the trial court expect the DPP to present evidence in support of their case in the circumstances.

52. In SNN v Republic (Criminal Revision 104 of 2018) [2019] KEHC 10748 (KLR) (25 January 2019) (Ruling) Unlike in some other jurisdictions where a distinction is made between sexual activity among children of various ages and sexual activities between adults and children, our *Sexual Offences Act* does not clarify the former, despite the clear recognition that a child is as defined in the *Children Act*.

53. The position of the law in this country on sexual offenses punishment regime makes it even more critical for courts to address their minds to the issue of age of both the offender and victim very well. Whenever the issue of age is raised the court must pay special attention to it for it does not only affect criminal liability of the offender but also the possible sentence that may be imposed.

54. The legislative intent in enacting the *Sexual Offences Act* were great, to protect everyone from sexual violence and in particular the vulnerable members of society who include children. However, it appears to have been overlooked that children would involve themselves in various forms of sexual activity at different developmental stages, and that there was need to provide for that.

55. The offences which the 2003 Act created are expressed in very broad terms. They do not recognize that there could be circumstances in which mutual sexual activity may take place between children of the same or the opposite sex. The law is dynamic and it is time in this court's view, that parliament needs to intervene and introduce necessary reforms to the law to protect children from each other.

56. Public prosecutors face serious dilemma in pressing charges when children are involved, especially where those children are not too distant apart in terms of age difference. The circumstances of this case mirror such a dilemma especially where it is alleged that the acts may have commenced when the offender was below 12 years. These are real life issues and we cannot ignore them.

57. The ODPP in its letter to the Inspector General of Police whivh forms part of the record stated "We have reviewed the file, keenly analysing the circumstances of the case and the antecedent facts presented in both the witness statements and the Children Officer's report. In our analysis, we established that

the subject has long been a child in need of care and protection, as most of the inappropriate acts he is alleged to have committed occurred when he was below the age of 12 years, with some occurring as early as when he was 7 years old. These acts were well within the knowledge of the adults entrusted with his care, including his own parents, who did nothing to assist the boy.

> We have thus established that the subject, who is now 13 years old, is a child in need of care and protection, and that pursuing criminal proceedings against him may not serve his best interests or the interests of justice. It is our position that the criminal case against the child be terminated, a diversion to ensue, and a protection and care file be opened. Through this protection and care file, the child will be subjected to supervision and counselling, including family group counselling to enable the parents to actively participate. We also recommend a separate protection and care file for the victims to ensure they also receive counselling."

58. It is the view of this court that the DPP in moving to terminate the matter was not motivated by any ulterior motive or was not in any way seeking to shield the offender from the cause of justice. The reasons advanced on record in seeking to terminate the case were in tandem with the excerpt above. The leave contemplated under Article 157(8) of *the Constitution* ought to have been granted and the denial of the same by the magistrate was not informed by the law or facts.

59. The court has perused the record and the finding that this court has come to is that the application is merited and the ruling by the Hon Magistrate declining to allow withdrawal of the case to allow diversion is hereby quashed.

60. The decision to divert the case is in the best interests of all the children concerned and is in accordance with *the Constitution*, the Children's Act and the policy of the court as espoused by the Hon Chief Justice in the speech captured above.

61. It is so ordered.

DATED, SIGNED AND **DELIVERED VIRTUALLY** AT **NAIROBI** THIS **25TH DAY** OF **NOVEMBER 2025.**

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Habiba

Ms Gitonga for ODPP

Ms Nyamu h/b Waigwa for Aapplicant

Ms Ogega for Respondent

Abenga for Interested Party