

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. E064 OF 2024**

**CONSOLIDATED WITH CRIMINAL APPEAL NO. E057 OF 2024**

**SYLVIA**

**ATAMBA.....APPELLANT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....**

**APPELLANT**

**VERSUS**

**VICTORINE ATEMBA.....**

**RESPONDENT**

**JUDGMENT**

1. This is a consolidated appeal from the ruling of the Principal Magistrate, Hon. A. Odawo, delivered on 4th June 2024 in Criminal Miscellaneous Application No. E035 of 2024. The learned Magistrate granted the respondent, leave to institute private prosecution proceedings against the 1<sup>st</sup> appellant, for the offence of threatening to kill contrary to Section 223(1) of the Penal Code.
2. The background, is that the Respondent reported to the police that on 3rd and 4th August 2022, she received threatening messages from a phone number belonging to the 1<sup>st</sup> appellant. The 2<sup>nd</sup> appellant investigated and confirmed that the 1<sup>st</sup> appellant as the sender. However, instead of prosecuting, the DPP entered into a diversion agreement with the 1<sup>st</sup> appellant on 22<sup>nd</sup> February 2024.
3. The respondent, feeling aggrieved by this decision, filed an application in the lower court seeking leave to commence a private prosecution.

Her primary grievance was that she was not consulted about the diversion and was only informed at the point of signing the agreement. The learned magistrate, in allowing the application, found that the DPP had failed to seek the respondent's views from the onset, thereby locking her out of justice.

4. Being dissatisfied, both the 1<sup>st</sup> appellant and the 2<sup>nd</sup> appellant have lodged the present appeals.
5. The 1<sup>st</sup> appellant contends that the learned magistrate erred in law and fact because the decision to grant leave for a private prosecution subjects her to double jeopardy, as the criminal matter was lawfully concluded through a diversion agreement. She asserts that the Magistrate lacked the jurisdiction to hear the application, as the respondent's true grievance was with the DPP's administrative decision, a matter that should have been challenged through judicial review.
6. She further submits that the mandatory conditions for granting leave under Section 88 of the Criminal Procedure Code were not met and that the magistrate effectively sat as a review court over a constitutionally independent body.
7. The DPP anchors its appeal on the principle of jurisdictional and argues that the learned magistrate usurped the constitutional mandate of the DPP under Article 157 of the Constitution. The DPP maintains that its decision to divert the case was a lawful exercise of its prosecutorial

discretion, aligned with the promotion of Alternative Justice Systems under Article 159 of the Constitution and its own Diversion Policy Guidelines.

8. The DPP further contends that the proper channel for the respondent was to seek a review within the DPP's internal mechanism or file for judicial review, not an application for private prosecution. The DPP also emphasizes that while victim views are considered, it is not bound by them, as per the guidelines.
9. The Respondent supports the magistrate's ruling. She reiterates that she was sidelined in the diversion process, being invited only to sign the final agreement without prior consultation, contrary to **paragraphs 59 and 60 of the DPP's own Diversion Policy Guidelines.**

**“59. Not all crimes involve an identifiable victim. If the victim is the complainant, the victim’s views on diversion, and their reasons for those views, should always be considered before making a final decision on diversion. The victim’s views can also be sought on the conditions available for diversion.**

**60. It is important that the Public Prosecutor informs or keeps the victim updated during the diversion process. A Public Prosecutor may wish to have a discussion with the victim on the proposed diversion conditions. The Public Prosecutor shall carefully explain the advantages of diversion to the victim so**

**they can express an informed view. However, a Public Prosecutor is not bound by the victim's views.**

**61. The Public Prosecutor must evaluate all of the relevant information to decide whether the offender should be prosecuted or offered diversion."**

10. The respondent expresses profound dissatisfaction with the diversion outcome and a feeling that justice has been denied. She raises concerns about her security and mental well-being, stating that these were not factored into the diversion process. She also alleges that the 1<sup>st</sup> appellant, by virtue of being a nominated MCA, possesses undue influence, which she fears could affect the course of justice.

11. In **SELLE and Another vs Associated Motor Boat Company Ltd & Others [1968] 1. E.A 123** it was stated as follows:

***"...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."***

**Analysis**

12. The contention that the trial court lacked jurisdiction is a threshold issue. In **Words and Phrases Legally Defined Vol. 3, John Beecroft Saunders** defines jurisdiction as follows:

**“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”**

13. On the source of a Court’s jurisdiction, the Supreme Court of Kenya in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows:

***“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written***

***law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”***

14. The power to institute and undertake criminal proceedings is vested exclusively in the ODPP under Article 157(6) of the Constitution. This power includes the discretion to discontinue proceedings at any stage. The DPP's decision to divert a case is an administrative function within this constitutional mandate.

**“6) 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;”**

15. The Diversion Policy Guidelines, provide a framework for this process. Paragraph 104 of these guidelines stipulates that an aggrieved party may seek a review of a diversion decision through a mechanism internal to the DPP:

**“104. The supervisor or DPP will reconsider the matter. If s/he is satisfied that the matter is suitable for diversion the DPP or supervisor will direct that diversion be explored. The offender and the victim will be advised of that decision. A written record confirming that this advice has been given shall be placed on the prosecutor’s file”**

Furthermore, a challenge to the decision itself, on the grounds of illegality, irrationality, or procedural impropriety, properly falls within the realm of judicial review.

16. The learned magistrate's ruling, scrutinized and set aside the DPP's decision to divert. By finding that the DPP locked out the applicant from being heard in court, the magistrate ventured into reviewing the merits of an administrative action, a function reserved for the judicial review. This was an error. The proper course for the respondent was to first exhaust the internal review mechanism and, if

still aggrieved, file for judicial review. The magistrate therefore erred in assuming jurisdiction.

17. Even if the court had jurisdiction, the grant of leave was flawed. The legal framework for private prosecution is set out in Section 88 of the Criminal Procedure Code. The applicant must demonstrate, inter alia, that the public prosecutor has refused or neglected to prosecute and that the intended prosecution is not frivolous or an abuse of court process.

18. In this case, the DPP did not refuse to prosecute but actively made a decision to pursue an alternative path of diversion as permitted by law and the constitution's promotion of alternative dispute resolution under **Article 159(2)(c) of the Constitution of Kenya 2010**.

**“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles:**

**(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);”**

19. Furthermore, allowing a private prosecution after a lawful diversion agreement has been executed creates a risk of double jeopardy, as argued by the 1<sup>st</sup> appellant. It subjects an accused person who has fulfilled the conditions of a state-sanctioned alternative



process to the ordeal of a full trial, which is oppressive and an abuse of court process.

20. The independence of the DPP is a cornerstone of the Kenyan criminal justice system, protected under Article 157(10) of the Constitution. The judiciary must be cautious not to interfere with the exercise of prosecutorial discretion unless such discretion is exercised in clear breach of constitutional and statutory provisions. In **Republic v Grace Wangari Bunyi (Sued as the Administrator of the Estate of the Late Obadiah Kuira Bunyi) & 7 others Ex parte Moses Kirruti & 28 others [2018] eKLR** it was stated that:

***“ It is important to note that the discretion given to the Director of Public Prosecutions to undertake investigation and prosecute criminal offences is not to be taken for granted or lightly interfered with and must be properly exercised. In the same respect, the court ought not to usurp the constitutional and statutory mandate of the Director of Public Prosecutions...”***

### **Conclusion**

21. In light of the foregoing analysis, this court finds that the appeals are merited.
22. The Learned Magistrate erred in law by:
- a. Assuming jurisdiction over a matter that properly called for judicial review.

- b. Failing to find that the respondent had not exhausted the alternative remedies available under the diversion policy.
- c. Granting leave for a private prosecution in circumstances that would lead to an abuse of the court process and violate the principle against double jeopardy.

### **Orders**

- 23. The appeals filed by Sylvia Atamba and the Director of Public Prosecutions are hereby allowed.
- 24. The ruling delivered on 4th June 2024 in Criminal Miscellaneous Application No. E035 of 2024 is hereby set aside in its entirety.
- 25. Each party shall bear its own costs of these appeals.
- 26. File is closed.
- 27. Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS  
1<sup>st</sup> DAY OF DECEMBER, 2025.**

**S.MBUNGI**

**JUDGE**

**In the presence of:-**

**CA:** Angong'a

Mr Injahau for the respondent present.

Mr . Mbetera for the Appellant present online.

