

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ISIOLO
CRIMINAL PETITION NO. E015OF 2025

FATUMA ABDI OKOTU
..... PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS1ST
RESPONDENT

BISHAR MOHAMED.....2ND
RESPONDENT

JUDGMENT

1. What is coming up for determination is the Petitioner's Petition and the Supporting Affidavit dated 26th September 2025. It is premised on Articles 48, 50, 157, and 165 of the Constitution and Section 348A of the Criminal Procedure Code (Cap 75).
2. The Petition seeks for the following orders:
 - a) *That this Honourable Court be pleased to grant leave to the Petitioner to lodge and prosecute an appeal against the acquittal of the accused in Criminal Case No. E916 of 2021.*
 - b) *In the alternative, that an order of mandamus be issued compelling the Director of Public Prosecutions to lodge an appeal against the said acquittal.*
 - c) *Any other orders the court may deem just and fit in the interest of justice.*
3. The record of the trial court shows that the Petitioner was the complainant in Criminal Case No. E916 of 2021, wherein the 2nd Respondent was

- charged with Assault causing actual bodily harm contrary to Section 251 of the Penal Code. The particulars of the charge were that on 27th October 2021, the 2nd Respondent unlawfully assaulted the Petitioner, occasioning her actual bodily harm.
4. After a full trial, the trial court delivered its judgment acquitting the 2nd Respondent on the grounds of lack of sufficient evidence. Dissatisfied, the Petitioner requested the 1st Respondent to lodge an appeal, but the 1st Respondent declined, prompting her to file this petition.
 5. She argues that the 1st Respondent refusal to appeal violates her right to access to justice under Article 48 and a fair hearing under Article 50 of the Constitution. She further submits that under Article 165, this court has supervisory jurisdiction to intervene where the ends of justice is at risk. She contends that the trial court's decision was erroneous in law and fact and occasioned a miscarriage of justice
 6. The Petition is opposed by the 1st Respondent via a Replying Affidavit sworn by the Prosecution Counsel and filed on 25th November 2025. The Respondent states that upon the Petitioner's request, the office obtained a certified copy of the judgment and assigned two prosecution counsels to independently analyze it. Their analysis concluded that the evidence presented in court had enormous contradictions and lacked corroboration.
 7. The 1st Respondent further contends that under Article 157(10), the DPP does not require the

consent of any person for the commencement of proceedings and is not under the direction or control of any authority.

8. It is further the 1st respondent's case that an order of mandamus cannot issue as it has discharged its constitutional mandate. Finally, the Respondent opines that the intended appeal is driven by a personal vendetta, noting that the Petitioner and 2nd Respondent were formerly husband and wife.

Determination

9. The only issue for determination is whether a private citizen can be granted leave to appeal an acquittal in a matter prosecuted by the State, or whether the 1st Respondent can be compelled to appeal.
10. The right of appeal against an acquittal is governed by Section 348A (1) of the Criminal Procedure Code, which provides:
"When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law".
11. The Petitioner herein seeks to lodge a private appeal. However, the above section of the criminal procedure code, explicitly grants the right of appeal against an acquittal to DPP not the

victim or the complainant. Criminal prosecutions are brought in the name of the Republic to vindicate a public wrong, and the victim remains a witness for the State.

12. On the prayer for mandamus, it is a settled principle that the court will not interfere with the 1st Respondent's discretion unless it is shown to be arbitrary, capricious, or a gross abuse of power. The powers of the 1st Respondent are set out under Article 157(10) of the Constitution. The Article provides as follows:

"The Director of public prosecution shall not require the consent of any person or Authority for the commencement of any criminal proceedings and in the exercise of his or her power of functions, shall not be under the direction or control of any person or Authority"

(11) 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."

13. The supreme court while interpreting Article 157(11) of the constitution had this to say in the case of **Jirongo v Soy Developers Ltd & 9 others [2021] KESC 32 (KLR)** : *"Although the DPP is thus not bound by any directions, control or recommendations made by any institution or body, being an independent public office, where it is shown that the expectations of article 157(11) have not been met, then the High Court under article 165(3)(d)(ii) can properly interrogate any*

question arising therefrom and make appropriate orders”.

13. To the extent that the decision to prosecute is independent of any direction from anyone , it follows that the decision to Appeal against a court’s decision is equally independent and free from any directive or compulsion, from any quarter.
14. Thus, pursuant to Article 157(10) and (11) ,the petitioner herein ought to demonstrate that the DPP’S failure to appeal offended the provisions of Article 157(11). The petitioner has simply stated that failure to appeal led to a miscarriage of justice. However, she has not expounded on this assertion. On the other hand , the 1st respondent has stated that their analysis of the judgment showed that that the evidence presented in court had enormous contradictions and lacked corroboration.
15. I have perused the judgment of the trial court and the evidence on record. The trial court found that the prosecution's evidence was marred with inconsistencies that has adverse effect to their case. The Petitioner (PW1) testified that the 2nd Respondent was not armed and that he used hands to hit her, yet the medical evidence from the Clinical Officer (PW4) and the P3 form indicated that a sharp and blunt object were used to occasion the said injuries. The trial court concluded that empty hands could not have caused a cut wound and that there were glaring gaps thus doubt which the court must resolve in favour of the accused.

16. The court accepts the explanation of the 1st respondent, as buttressed by the findings of the trial court. In accepting the court's verdict, I don't see any violation of Article 157(11) by the 1st respondent to warrant interference with its exclusive constitutional mandate bestowed on the office of DPP by Article 157(10).
17. Further an order of mandamus does only issue where it is demonstrated that the duty bearer has failed to carry out a statutory duty. The respondent herein is constitutionally mandated to prosecute wrong offenders on behalf of the public, but there is no mandatory requirement for DPP as far as appeal are concerned.
18. The victim's protection Act has elaborate provisions on the rights of the victim during trial of an Accused person but at appellate stage, save to give the victim the right to give information on Appeal or on the question of whether to Appeal or not, the Act is silent on any other rights(see **Section 20(1) (a) of the victim protection Act**). The court has no basis upon which it can infer that the victim's rights during trial equally apply on Appeal.
19. Where the law has vested the right to appeal in the 1st Respondent, granting the Petitioner leave to appeal would be an infringement of Article 157(10) of the constitution and create a procedural hybrid unknown to our criminal justice system.
20. The Petition is unmerited, it is hereby dismissed .

Dated , signed and delivered this 19th day of March 2026.

S. Chirchir

Judge .

In the presence of :

ORIGINAL