



**Republic v Harrison (Criminal Miscellaneous Application E185 of 2024) [2025] KEHC 601 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 601 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL MISCELLANEOUS APPLICATION E185 OF 2024**

**DR KAVEDZA, J  
JANUARY 30, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**JAMES MWANGI HARRISON ..... RESPONDENT**

**RULING**

1. The Director of Public Prosecutions (DPP) has filed an application dated 14<sup>th</sup> November 2024 seeking the revision of the orders issued by the trial court on 6<sup>th</sup> November 2024. The application is premised on the grounds on the face thereof and supported by an affidavit sworn by Robert Mutuma, Prosecution Counsel.
2. The DPP avers that on 21<sup>st</sup> August 2024, their office received a letter of even date from the complainant’s family requesting to have the matter before the lower court withdrawn and upon thorough interrogation they came to the realization that the allegations against the accused person may have been a set up and the facts vis-à-vis the evidence cannot sustain a conviction.
3. On 4<sup>th</sup> November 2024, the prosecution made an application to withdraw and discontinue the prosecution of the Respondent before the trial court under Article 156(6)(c) of the Constitution and section 87(a) of the Criminal Procedure Code.
4. In a ruling delivered on 6<sup>th</sup> November 2024, the trial Magistrate declined the said application for the reason that the prosecution had not adduced sufficient reason to warrant the withdrawal. The court further noted that the subject matter involved an eleven (11) year old and that arising from the incident, the minor was suicidal.
5. Through a Supplementary Affidavit sworn on 18<sup>th</sup> December 2024 by the Prosecution Counsel, the State has annexed a report by Eric Gachoka, a Children Officer which states in pertinent part, “the minor RWM, 14 years old states that the alleged defilement incident never took place and regrets the



testimony she gave in court which is untrue. She continues to say that she has never had any suicidal tendencies and she is focused on her studies.”

6. The Respondent has filed a Replying Affidavit dated 17<sup>th</sup> December 2024 in support of the application.
7. I have considered the application and the response filed herein. The only issue for determination is whether the applicant should be granted the revisionary orders sought.

#### **Analysis and determination.**

8. The power of this court in its revisionary jurisdiction is founded under Section 362 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy 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.

9. Article 165(6) of the *Constitution* provides that:

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.

10. Consequently, this court has jurisdiction to entertain the application before me. In the instant application, the applicant seeks to set aside the ruling by the subordinate court declining the withdrawal of the charges against the respondent herein.

11. Article 157 (6) of the *Constitution* spells out the powers and responsibilities of the office of Director of Public Prosecutions. The same provides;

“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;
- b. To take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority; and
- c. Subject to clause (7) and (8) discontinue at any stage before judgement is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

12. Article 157(8) on the other hand provides that;

“The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.”



13. Further, section 40 of the *Sexual Offences Act*, 2006 provides that;

“The decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be discontinued shall rest with the Director of Public Prosecutions.”
14. It is discernible from the foregoing that in seeking to discontinue a criminal case, the Director of Public Prosecutions must seek and obtain the permission of the court. The Director of Public Prosecution must show to court tangible reasons for the discontinuation that he seeks of the relevant case. The converse being that should the Director of Public Prosecutions fail to give such reasons as would justify the intended discontinuation, then the court retains the discretion to decline the application to discontinue the case or proceedings.
15. In the instant case, I note that save for the letter dated 21<sup>st</sup> August 2024 by the complainant’s parents which was received in court on 28<sup>th</sup> August 2024, nothing more was produced before the trial court as a basis for the orders sought to have the matter withdrawn. The prosecution only indicated that they had reviewed the decision to charge hence the application for withdrawal under section 87(a) of the *Criminal Procedure Code*.
16. I have perused the lower court record and note that on 29<sup>th</sup> August 2022, the trial court conducted a voir dire on the minor (complainant) and was satisfied that she possessed sufficient intelligence to give sworn testimony. Further, the Children Officer’s report dated annexed to the applicant’s Supplementary Affidavit states that the minor is now about 14years of age.
17. To my mind, the complainant ought to have sworn an Affidavit to corroborate the averments stated in her parents’ letter addressed to the court as well as the Children Officer’s report. It would be remiss if the court were to allow the complainant to recant her evidence, given on oath through a revision application and, further, on the strength of the letter addressed to the court by her parents.
18. I note that the applicant has produced before court evidence in the form of a Children Officer’s whereof after careful examination, the complainant gives a different version of testimony to the one on record before the trial court. At the risk of repetition, the minor states that the alleged defilement never took place and that she regrets the evidence she gave before court which was untrue.
19. Suffice to note, this evidence was never availed before the trial court at the time the impugned ruling was made.
20. It is my considered view that in view of the significant shift in the evidence given by the complainant at the trial court and the compelling evidence adduced before this court, it would be in the interest of justice that the trial court is given an opportunity to weigh the said evidence in considering the application for withdrawal.
21. I say so because section 364(1)(b) of the *Criminal Procedure Code* grants this court the powers to alter or reverse orders of a subordinate court.
22. In the foregoing and noting that the prosecution has not yet closed its case at the trial court, I make the following orders:
  - i. The complainant shall be escorted to the investigating officer to record a fresh statement in the presence of her parents and the children officer and not later than 15<sup>th</sup> February 2025.



- ii. Upon compliance with order (i) above, the lower court file shall be mentioned before the trial court on 18<sup>th</sup> February 2025 for purposes of taking directions on recalling the complainant to take her evidence afresh.
- iii. The Director of Public Prosecution shall thereafter be at liberty to make a fresh application for withdrawal of the matter.

Orders accordingly.

**RULING DATED AND DELIVERED IN THE ABSENCE OF PARTIES BUT SHARED THROUGH EMAIL THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Mr. Mutuma for the respondent

Ms. Maina for the appellant

Achode- court assistant

