



**Simuong Group Company Limited v Republic; Kiasa & 16 others
(Interested Parties) (Miscellaneous Criminal Revision E1523 of 2024)
[2024] KEHC 13183 (KLR) (Crim) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL REVISION E1523 OF 2024
CJ KENDAGOR, J
OCTOBER 30, 2024**

BETWEEN

SIMUONG GROUP COMPANY LIMITED APPLICANT

AND

REPUBLIC RESPONDENT

AND

**JARED KIASA & 16 OTHERS & 16 OTHERS & 16 OTHERS & 16 OTHERS &
16 OTHERS & 16 OTHERS INTERESTED PARTY**

RULING

1. This Revision Application arises from the Ruling and orders of Hon. L.O. Onyina, Chief Magistrate, delivered on 27th September, 2024 in Milimani Criminal Case No. 844 of 2019, Republic vs Jared Kiasa Otieno and 16 Others. The decision allowed the withdrawal of the charges therein under Section 87 (a) of the *Criminal Procedure Code* and subsequently discharged the accused persons. The trial Court also dismissed an application by the complainant's counsel for leave to institute private prosecution against the accused persons.
2. The accused persons were charged on 21st May 2019, and they all entered a plea of not guilty. The trial proceeded with three witnesses testifying before the Director of Public Prosecutions applied to withdraw the charges.
3. The Applicant is the complainant in the criminal case before the Magistrate's Court. Aggrieved by the trial Court's decision, they filed the criminal revision application dated 1st October, 2024 which is the subject of this Ruling. The hearing of the revision application involved the Applicant, the Office of the



Director of Public Prosecutions (ODPP) as the Respondent, and the accused persons in the criminal case as Interested Parties.

4. The review application seeks the following orders;
 1. That this application be certified urgent and heard on priority basis.
 2. That pending the hearing and determination of this application, the bail, bond and other security deposited by the accused persons be preserved and release of the said bail, bond and security to the accused persons be stayed.
 3. That this Honourable Court does set aside the order of withdrawal of the charges herein under section 87 (a) of the *Criminal Procedure Code* passed by the Hon. L.O. Onyina (Chief Magistrate) on 27th September, 2024 and thereafter substitute it with an order of reinstatement directing the said Criminal Case Number 844 of 2019 *Republic v. Jared Kiasa Otieno and Philip Nashon Nguru Aroko and 14 Others* (Safe File) at the Chief Magistrate's Court at Milimani Law Courts at Nairobi to proceed to trial before the trial court or another court of competent jurisdiction.
 4. That in the alternative, the Honourable Court does set aside the order of denial of leave to institute private criminal prosecution passed by the Hon. L.O. Onyina (Chief Magistrate) on 27th September, 2024 and thereafter substitute it with an order granting the complainant leave to institute private criminal prosecution against the accused persons in Criminal Case Number 844 of 2019 *Republic v. Jared Kiasa Otieno and Philip Nashon Nguru Aroko and 14 Others* (Safe File) at the Chief Magistrate's Court at Milimani Law Courts at Nairobi and to take over prosecution of the said case from the DPP and to continue with the prosecution of the said case before the trial court or another court of competent jurisdiction.
5. The ODPP and the Accused persons oppose the prayers sought in the revision application. The ODPP filed a Replying Affidavit through Prosecution Counsel and asked the court to dismiss the same.
6. The Applicant, the ODPP, and the 5th Accused person filed written submissions. The Applicant invited the court to also consider its submissions dated 16th July, 2024 filed in the CM Criminal case. I have considered the submissions alongside the statements presented before the Court and the cited authorities.
7. The Applicant argues That the reason provided by the ODPP for needing further investigations does not justify discontinuing an ongoing criminal trial, especially considering how long the trial has already lasted. The Applicant argued That the trial Court did not take into account how the withdrawal would affect the rights of the victim and That the oversight makes the decision irregular, as it disregards both the public interest and the interests of justice. Further, That the trial Court based its decision on the burden of proof, an issue That was not addressed before the court.
8. The ODPP argued That the Applicant was attempting to pursue civil proceedings through the criminal process, which constituted an abuse of the Court process. They stated That they acted objectively and within the law when applying to withdraw the charges. On the application for private prosecution, the ODPP submitted That it was premature and unmerited as the Applicant had not met the threshold needed to commence the private prosecution.
9. The 5th Accused argued That the reasons given by the ODPP for further investigations are not arbitrary but essential to the administration of justice. Further, That the complainant will not suffer any prejudice, as the ODPP retains the authority to re-initiate charges against the accused following the conclusion of the necessary investigations. The 5th Accused submitted That this determination will be



based on the information and evidence obtained, ensuring That any subsequent action aligns with the principles of justice and the rule of law.

10. This Court has been asked to exercise its revisionary jurisdiction and grant the orders sought in the revision application. The jurisdiction of the High Court with regard to Revision is supervisory and is provided under the *Constitution* in Article 165 (6) and (7) in the following terms:

“(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 of justice.”

11. Section 362 of the *Criminal Procedure Code*, provides as follows:

“Revision

362. Power of High Court to call for records

The High Court may call for and examine 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.”

12. There is no mandatory procedure for moving the Court for a revision, which also applies to how responses can be presented. The parties have the flexibility to present their claims based on the directions given during the hearing of the revision applications. The ODPP's affidavit is within the context. The Court gave directions for corresponding leave to parties to file supplementary responses.

13. The issues for determination in this revision are;

- I. Whether the decision to allow the withdrawal of the charges against the accused persons under Section 87 (a) of the *Criminal Procedure Code* was proper;
- II. Whether the application for proceeding with private prosecution was merited.

14. Nyakundi J, in *Prosecutor v Stephen Lesinko* [2018] eKLR outlined the principles That should guide a Court in exercising its revisionary jurisdiction as follows:

- a) Where the decision is grossly erroneous;
- b) Where there is no compliance with the provisions of the law;
- c) Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
- d) Where the material evidence on the parties is not considered; and
- e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.



Withdrawal of charges

15. Article 157 of the [Constitution](#) provides for the discontinuation of criminal proceedings by the ODPP;

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—

.....

(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted. [Constitution](#) of Kenya, 2010 94

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the Court.

16. The trial Court, in considering the application for withdrawal, held as follows;

“While the prosecution have a right to seek discontinuation of criminal proceedings at any stage before conclusion of the case, That discontinuation is subject to permission of the court; and the court has a duty to exercise its discretion judiciously whenever such discontinuation is sought.”

17. The Court relied on the decision of Nyakundi J. in [Republic v Leonard Date Sekento](#) [2019] eKLR, where the Judge held as follows;

“The consideration to initiate or discontinue a criminal proceeding is only to be weighed against the broader doctrine of justice for the public.

An important element of the power to initiate, undertake or withdraw any criminal proceedings by the prosecution is to ensure justice is not only seen to be done but That justice is done in the matter.....

In my view a trial court exercising discretion under section 87(a) or (b) of the *criminal code* whether in the trial construing of the provisions the prosecutor has acted beyond his constitutional powers. If the application passes the test set by the legislature, then it would not be of the business of the court to control the prosecutor acting in accordance with his constitutional role and enabling provisions of the code.

The essential character of the office of the Director of Public Prosecution under Article 157 of the *constitution* is That in exercise of its power the principle of independence is guaranteed and availed to the office. In fact, the Article reads That in exercise of his powers or functions the Director of Public Prosecution is not under the direction or control of any person or authority. So in deciding the operation of Section 87 (a) (b) of the Criminal Procedure Code and its propriety in a particular case one has had to be concerned whether the reasons selected is in conflict with the Constitution.

However, there are exceptional circumstances on the courts ability to regulate the Director of Public Prosecution jurisdiction. In other words, when he acts improperly, not for the interest of justice, acts beyond the powers vested by the constitution or carrying out some arbitrary objective under the guise of discharging the functions of the office of prosecution.”



18. I have reviewed the trial Court's ruling and the proceedings That took place. The decision was based on the facts presented to the Court; the trial Court did not take into account any unrelated factors. The trial Court examined the issue raised by the ODPP regarding the necessity for further investigations and That the decision to charge was made prematurely.
19. The trial Court concluded That the ODPP bears the responsibility for both the evidential burden and the duty to establish the elements of the offences with which the accused persons were charged. In rendering its decision, the court evaluated the implications of this responsibility in relation to the consideration of rejecting the proposed withdrawal. This evaluation was particularly relevant, given That the prosecution's indication That they needed to conduct further investigations could be seen as an expression of its inability to adequately fulfil its obligations with the available evidence.
20. The Court acknowledged the inconvenience caused by the time (3 years) the case has been in Court. It noted That the three witnesses who testified were readily available when they were recalled for further cross-examination, following the directions taken under Section 200 (3) of the *Criminal Procedure Code* after a new magistrate took over from the predecessor. Furthermore, the Court stated That the accused persons had attended the trial since 2019 without missing bail and were therefore not considered a flight risk.
21. While the ODPP has the authority to apply for a withdrawal, it is not exclusively within the prosecution's domain to have the withdrawal, which is why the Court's permission must be sought. The Courts aim for a fair and equitable administration of justice, ensuring That all parties receive equal benefits and protections under the law. The ruling indicates That the trial Court considered the perspectives of the prosecution, the complainant's counsel and the accused's counsel. The parties had a fair and equitable legal process before the trial Court.
22. The trial Court concluded That the prosecution's rationale for further investigations was aligned with the broader interests of justice. Consequently, this informed the Court's determination to permit the withdrawal of the charges.
23. Under Article 157 (11) of the *Constitution*, the ODPP, in exercising its powers, should have regard to the public interest, the interests of justice, and the necessity of preventing and avoiding any abuse of the legal process. There is no evidence to suggest That the ODPP acted subjectively or outside the law in the application to withdraw charges against the accused persons.
24. The Applicant cannot relate and peg the issue of identity or any expected challenges in the civil case to the conduct of the criminal trial, as doing so would constitute an abuse of the court process. Investigative agencies have measures in law within which to take action if they suspect That the accused or any other potentially culpable party might try to hide or flee. This includes approaching the court. However, under the current circumstances, there is no valid reason for the Court to retain the securities That have been deposited in the CM Criminal case where the charges have been withdrawn.

Leave for private prosecution

25. In the case of *Rufus RiddleBarger v Brian John Robinson* [1959] EA 8 the court opined That;

“...a private prosecution can only be given legitimacy and allowed by the court to be instituted or maintained if it serves as a remedy against a culpable inertia or partiality on the part of the public prosecuting authority”
26. The complainant's counsel applied for leave to proceed with private prosecution simultaneously while the withdrawal of charges was being considered. The DPP had initiated and was overseeing the



prosecution of the case in the lower Court and had applied to withdraw the case; the application for withdrawal under Section 87 (a) of the Criminal Procedure Code, which allows for fresh charges upon conclusion of the investigations, cannot be termed as a refusal to prosecute unless there is clear evidence That the Director of Public Prosecutions has breached their duty as outlined in Article 157 (11) of the Constitution or acted with partiality. The evidence does not support That claim.

27. The order for private prosecution was not merited at That stage. This does not preclude the Applicant from approaching the Courts with a similar application should there be a belief That the Director of Public Prosecutions is either unable or unwilling to initiate the prosecution of culpable parties upon the completion of investigations. If there is any delay in starting or continuing the investigations as the trial Court was informed, the Applicant may take appropriate action, provided the necessary threshold is met.
 28. The parties received a fair hearing before the trial Court. The trial Court exercised its discretion judiciously, and the orders issued on 27th September, 2024 are legally sound.
 29. The Revision Application is without merit and is accordingly dismissed with no order as to costs.
 30. The interim orders prohibiting the release of the securities in the CM criminal case are hereby vacated.
- It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 30TH DAY OF OCTOBER, 2024.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Ngumbi, Advocate for the Applicant

Ms. Rugut, Ag. ADPP for the Respondent

Mr. Omari Advocate}

Mr. Okello Advocate and} for 1st Interested Party

Mr. Mabeya Advocate}

Mr. Omari Advocate holding brief for Kangai Advocate for 3rd to 17th Interested Parties & holding brief for Khaemba Advocate for 5th Interested Party

