



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL REVISION E412 OF 2021**  
**ANNE WANJA .....APPLICANT**  
**VERSUS**  
**REPUBLIC .....RESPONDENT**  
**R U L I N G**

1. The application herein is a **Notice of Motion** dated **6<sup>th</sup> December 2021**, brought under the provisions of **Sections 348, 354, 357 and 362** of the **Criminal procedure Code, Cap 75 Laws of Kenya, Articles 25(c), 49, 50(1) and 159** of the **Constitution of Kenya** and all other enabling provisions of the law.

2. The Applicant is seeking for orders as here below reproduced;

**i. Spent;**

**ii. That the honorable court in exercising its revisionary powers under Sections 362 and 364 of the Criminal Procedure Code do revise the order of withdrawal in Kibera Criminal Case No.970 of 2016 R –vs- Nicholas Kiplangat Koech & 2 Others on 6<sup>th</sup> September, 2021 with a view to satisfying itself as to the correctness, legality, and/or propriety of the said withdrawal of the case;**

**iii. That the Honorable Court be pleased to review, vary, quash and/or set aside the order of withdrawal of Kibera Criminal Case No.970 of 2016 R –vs- Nicholas Kiplangat Koech & 2 Others on 6<sup>th</sup> September, 2021 by Hon M. Maroro (PM) at Kibera;**

**iv. That the court be pleased to issue warrants of arrest against Nicholas Kiplangat Koech, Kiprono Robert Koech and Kennedy Masinde and the surety Joel Kipyegon Mutai;**

**v. That the costs of the application be provided for.**

3. The application is supported by the grounds thereto and affidavit of the even date sworn by the Applicant. The background facts are that **on 16<sup>th</sup> March, 2016, Nicholas Kiplangat Koech, Kiprono Robert Koech and Kennedy Masinde** were charged with **Breaking into a Building and Committing a Felony** contrary to **Section 306(a)** of the **Penal Code**. The three pleaded “NOT GUILTY” and were thereafter released on bond.

4. The hearing commenced **on 23<sup>rd</sup> August, 2017 until 26<sup>th</sup> November, 2019**, with all the three accused persons present. **On 26<sup>th</sup> November, 2019**, the matter was stood over to **6<sup>th</sup> April, 2020**. So far, three prosecution witnesses had testified at this point.

5. However, the same did not proceed on **6<sup>th</sup> April, 2020** as the court was not sitting due to COVID-19 restrictions. The matter was further rescheduled twice, on **3<sup>rd</sup> June, 2020** and **3<sup>rd</sup> July, 2020** respectively since the court was still not sitting. It is important to note that all three accused persons were absent in court from **6<sup>th</sup> May, 2020 to 3<sup>rd</sup> July, 2020**. On **19<sup>th</sup> August, 2020** when the matter was coming up for hearing, the three accused persons were still absent in court. The Hon. Magistrate thus issued a Warrant of Arrest and stood the matter over to **16<sup>th</sup> September, 2020**. On that date, the three accused were still absent in court. The existing warrants were further extended. On **2<sup>nd</sup> November, 2020**, the three accused were still absent in court. The prosecutor applied for summons to issue upon the Investigating Officer and the warrant of arrest to be extended. On the following dates, that is, **23<sup>rd</sup> November, 2020, 25<sup>th</sup> January, 2021, 25<sup>th</sup> February, 2021, 24<sup>th</sup> March, 2021, 5<sup>th</sup> May, 2021, 14<sup>th</sup> May, 2021, 4<sup>th</sup> August, 2021** the three accused persons were still absent in court with their warrants of arrest still in effect.

6. On **6<sup>th</sup> September, 2021**, the three accused persons were still absent in court. **SC Kinuthia** the prosecution counsel made an application to withdraw the case under **Section 87(a)** of the **Criminal Procedure Code**. In withdrawing the case, the following is noted by the court in its proceedings:-

**“Case withdrawn under Section 87 (a) of the CPC. Accused discharged. File closed.”**

7. The Applicant was aggrieved by this order and now seeks a review of the same.

8. The application herein was heard interparties on **17<sup>th</sup> February, 2022**, and basically the Applicant’s advocate, **Mr. Oloo** reiterated the averments in the affidavit sworn by **Anne Wanja** in support of the application. Further, **Mr. Oloo** submitted that the ruling was not formerly written and there were no reasons given for the withdrawal. He thus urged the court to allow the application.

9. The application was opposed by the State through the learned prosecution counsel, **Ms. Akunja**. She submitted that the reason for withdrawal made under **Section 87(a)** of the **Criminal Procedure Code** was informed by the history of non-attendance of court sessions by the accused persons despite the warrants of arrests issued against them. She stated that the withdrawal was not a bar to subsequent prosecution since the warrants of arrests against the accused persons and sureties are still in force pending their arrest.

10. She also submitted that **Article 157(10)** of the **Constitution** permits the **Director of Public Prosecution** to conduct prosecutions without control or direction by any parties. This is affirmed by **Section 6** of the **Office of the Director of Public Prosecution Act**. Further **Section 22** of the **Office of the Director of Public Prosecution Act** delegates prosecutorial powers by the **Director of Public Prosecution P** to the prosecutor which does not need written authorization in withdrawal applications.

11. She thus urged the court to dismiss the application being that there was no illegality, incorrectness, or irregularity on the part of the court in issuing the said orders. Further, M/S Akunja appealed to the Applicant to share any information which can lead to the arrest of the accused persons, with the Investigating Officers.

12. In response, **Mr. Oloo** submitted that the Applicant is likely to suffer irreparable harm in an execution of a decretal sum of about Kshs.6,000,000/= since the accused persons have used the impugned ruling in a pending civil appeal matter **Civil Appeal No.E457 of 2020**.

13. I have carefully considered the application, the affidavit on record and the oral submissions by the parties. It is my view that the main issue for determination is whether the same is merited.

**14. Article 165(6) and (7) of the Constitution** confers upon this Court supervisory jurisdiction over subordinate courts and empowers this Court to make any order or give any direction it considers appropriate to ensure fair administration of justice. The said provisions are couched 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 purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of 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.**

15. As regards the **Criminal Procedure Code, Section 362 thereof** provides as follows:-

**362: 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.**

16. Now, turning to the matter at hand, the duty of this court is thus to satisfy itself as **‘to the correctness, legality, or propriety of any finding, sentence or order recorded or passed’**.

17. Upon perusal of the record of the trial court, I note that the case was withdrawn under **Section 87(a)** of the **Criminal Procedure Code**. The Applicant argued that the prosecutor did not have instructions to withdraw the case against the accused persons as provided for under **Section 87(a)** of the **Criminal Procedure Code**.

**18. Section 87 (a)** of the **Criminal Procedure Act** provides:

**“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney- General\*, at any time before Judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal –**

**a. if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;...”**

**19. Article 157(9)** of the **Constitution** states that, the powers of the **Director of Public Prosecution** may be exercised in person or by subordinate officers acting in accordance with general or special instructions. It is my considered opinion that the prosecutor in the present

case had authority to exercise the power of the **Director of Public Prosecution** and in this case withdraw the case as provided for under **Section 87(a)** of the **Criminal Procedure Code**. Therefore, I find this argument lacks merit.

20. As regards to the consideration as to whether the court may review Hon. Maroro's decision to discharge the accused persons, I find that although the Director of Public Prosecutions is entitled to withdraw a case under **Section 87 (a)** of the **Criminal Procedure Code**, the same is subject to the consent of the court as provided under **Article 157(6)** of the **Constitution**.

21. Additionally, **Article 157(8)** of the **Constitution** provides that, "*the Director of Public Prosecutions may not discontinue a prosecution without the permission of the court*".

22. Also, **Article 157(11)** of the **Constitution** provides that such discretion has to be exercised judiciously while taking into account the facts of each case and in particular whether the application is brought in public interest, the interests of administration of justice and the need to prevent and avoid an abuse of the legal process.

23. In the instant case, the Applicant argues that the decision by the learned Magistrate of discharging the accused persons was not in accordance with the Constitution and the law. It is this decision by the learned Magistrate that this court ought to review and determine whether it complies with legal standards.

24. In the case of **Republic –vs- Fahmi Salim Said [2013]eKLR**, Muya J, asked the question;

**“Was the magistrate’s court supposed to be a rubber stamp? Ought not the magistrate interrogate the reasons given by the DPP as to satisfy himself as to whether they answer to the threshold set by the Constitution and in particular Article 157(11)?”**

25. According to the proceedings of **6<sup>th</sup> September, 2021**, the prosecutor made an application to withdraw the case against the accused persons. No reasons were furnished for withdrawing the case under **Section 87 (a)** of the **Criminal Procedure Code**. However, the learned Magistrate in the short ruling cited above, granted the application.

**26. Article 159(2)** of the **Constitution of Kenya 2010** which provides as follows:-

**“In exercising Judicial authority, the courts and tribunals shall be guided by the following principles:**

- a. justice shall be done to all, irrespective of status;**
- b. justice shall not be delayed;**
- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);**
- d. justice shall be administered without undue regard to procedural technicalities; and**
- e. the purpose and principles of this Constitution shall be protected and promoted.”**

27. In my considered view, the above provisions resonate well with provisions of **Article 157(11)** of the **Constitution** where the Director of Public Prosecutions should have regard to public interest, the interests in the administration of justice and the need to prevent and avoid abuse of the legal process when exercising its powers as provided for under **Section 87 (a)** of the **Criminal Procedure Code**.

28. Therefore, being that the constitution provides that public interest, the interest of justice and abuse of the legal process be protected, it is the duty of the trial court to do so.

29. The record shows that the prosecution's case had commenced. In my view, the Applicant, who was the complainant should have been given reasons when the case was terminated since the criminal charges that were before the learned trial Magistrate, involved both the accused persons and the Applicant who was the victim. Therefore, I agree with **Mr. Oloo's** submissions that the learned Magistrate ought to have sought reasons from the prosecutor as to why they were seeking to withdraw the case instead of rubber stamping the request to terminate the proceedings.

30. In conclusion, I find that the order of withdrawal in **Kibera Criminal Case No.270 of 2016, R -vrs- Nicholas Kiplangat Koech & 2 Others** on **6<sup>th</sup> September, 2021** was not within the provisions of **Article 157(11)** of the **Constitution** and within the other broader principles and values in the administration of justice where justice is open, transparent, responsive and accountable. Hence in exercise of powers donated to this court under **Section 362** of the **Criminal Procedure Code**, I find the order irregular and lacking in propriety and set the same aside.

31. Accordingly, I direct the matter to be mentioned before the Chief Magistrate on **7<sup>th</sup> April, 2022** for directions.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH,2022**

**D. O. CHEPKWONY**

**JUDGE**