



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION CASE NO. 198 OF 2019

STEPHEN NDAMBUKI.....1ST APPLICANT

ERIC MUTINDA MUTISYA.....2ND APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicants approached this court through a Notice of motion dated 3rd July 2019 seeking the following orders;-

a. That the instant Motion be certified urgent and heard on priority basis

b. That pending hearing and determination of this motion, the Honourable court be pleased to stay the proceedings in Nairobi Chief Magistrates Court Criminal Case Number 2021 of 2015 between Republic v Stephen Ndambuki Muli and Erick Mutinda Mutisya set for hearing on 18th September 2019 and or any other subsequent dates.

c. That the honorable court be pleased to revise the orders of the Nairobi Chief Magistrates court Criminal Case Number 2021 of 2015 between Republic v Stephen Ndambuki Muli and Erick Mutinda Mutisya issued on 26th day of February 2019

d. That upon issuance of the above order, the honorable court be pleased to substitute the orders of 26th February 2019 with an order permitting the withdrawal of Milimani Chief Magistrates Court Criminal Case Number 2021 of 2015 under section 204 of the Criminal Procedure Code.

e. That any other order this honorable court may deem fit and expedite to grant.

2. The application is based on grounds that:- the Applicants are accused persons in Milimani Chief Magistrate's Court Criminal Case Number 2012 of 2015 where Ukamba Agricultural Institute was the complainant; On the 28th March, 2018, the complainant sought to withdraw the case under section 204 of the Criminal Procedure Code (CPC) an application that was disallowed; the applicants are dissatisfied with the ruling of 26th February, 2019 and believe that the trial court erred in fact and law in finding that the complainant was the State contrary to settled law on the subject; and unless this court intervenes, the Applicants stand to suffer irreparable harm by undergoing an unnecessary trial with high prospects of termination through revision.

3. The applicants swore a joint affidavit in support of the application dated 3rd July 2019, where they deposed that:- Through a motion dated 28th March, 2018, Ukamba Agricultural Institute (UKAI) applied for a withdrawal of the criminal case under section 204 of the criminal Procedure code which was denied by a ruling rendered on 26th February 2019; the charges they were facing were neither capital offences nor sexual offences and therefore the trial court erred in law and fact for failing to allow the application for withdrawal; on matters of corporate complaints, the court should be satisfied that individuals lodging the complaint have full capacity and authorization to withdraw.

4. That the court erred by failing to appreciate the submissions on the ulterior motives to pile pressure on the Applicants to settle a civil dispute relating to land belonging to the Complainant company; the entire trial at the magistrate's court was a flagrant abuse of the criminal justice system and that they should not be made to suffer by having a criminal trial hanging over their heads; and, that the prosecution was opposed to the application for withdrawal was not sufficient basis to disallow the same.

5. Further, they deposed that pursuant to a meeting held, the directors of UKAI resolved to withdraw its complaint against the accused persons, therefore, the application for withdrawal was proper and merited within the ambit of section 204 of the Criminal Procedure Code and that courts should encourage alternative dispute resolution which in this case is permissible.

6. The Respondent filed grounds of opposition stating that:- Powers of prosecution are vested in the Director of Public Prosecutions(DPP) who has the mandate to discontinue any criminal proceedings against anyone with the permission of the court; the Republic, the Complainant in all criminal cases undertakes prosecution through the DPP on behalf of the public and in the interest of justice; where an intended withdrawal is against the administration of criminal justice, the court is enjoined and obligated to ensure justice is done; the objection raised was well founded as the DPP was bound to consider sufficiency of evidence and public interest when exercising State powers of prosecution and that the magistrate exercised absolute discretion in denying the the application for withdrawal.

7. The application was canvassed by way of oral submissions. Mr. Adere, counsel for the Applicants urged that the Complainant, identified as UKAI was authorized by law to have the case withdrawn where it could show sufficient grounds to the court which must be considered. That charges were raised by Onesmus Kauma Mwati who was neither an official of the company nor its member. He called upon the court to consider applying its discretion in accordance to Article 159(2)(c) of the constitution in regard to alternative dispute resolution. That the decision of Directors to withdraw the case was ratified by membership of the company. He faulted the DPP of being used to settle the companies wrangles yet the Companies Act has provisions to settle such disputes. That under section 204 of the CPC, the role of the DPP should not be considered.

8. Ms. Akunja, learned counsel for the State, acknowledged UKAI as the complainant, but, urged that being a criminal matter, it was a witness as the State was the complainant. That the Institute lost a substantial amount of money, and in considering to charge the Applicants with the offence of obtaining money by false pretences, it considered it a public interest matter. Further, she argued that the court reached a correct decision as section 204 Of the CPC is not couched in mandatory terms.

9. In determining the application I must consider the trial court's decision. The learned magistrate in his ruling dated 26th February, 2019 stated that one faction was seeking prosecution of the accused persons while the other one is seeking withdrawal of the charges against the accused persons.

10. The learned magistrate further stated that a complainant is only a witness in any given case and whenever the case is to be withdrawn the prosecution's views have to be taken into account and in this case, the prosecution opposed the application to withdraw the case.

11. The learned magistrate further stated that the issues arising herein have arisen in other similar cases such as **Republic V Mohan Galot & Others (2017)** where **Kimaru J.** stated thus: -

“...The learned Chief Magistrate acted without jurisdiction when he allowed the application by some of the protagonists in these protracted disputes to be considered first as complainants and subsequently thereafter allowed them to withdraw the charges under Section 204 of the Criminal Procedure Code. This court holds that the learned Chief Magistrate having found that there is dispute regarding the directorship of the companies, and having conceded that the issue can only be determined by the High Court which has the requisite jurisdiction, he could not make orders that in actual fact had the implication that he had already determined who the legitimate directors of the companies were.

In the premises therefore, the application made by the Director of Public Prosecutions has merit. The learned Chief Magistrate erred when he allowed persons, who for intent and purposes, were not recognized as complainants in the criminal cases, to withdraw the complaints under Section 204 of the Criminal Procedure Code. He did this despite legitimate protests by the Director of Public Prosecutions that he could not so without his concurrence.....”

12. And he emphasized the fact that the court is required to be satisfied that there are sufficient reasons to terminate the proceedings.

13. Issues for determination are therefore:-

- a. **Whether this matter can be withdrawn under Section 204 of the CPC.**
- b. **Whether this matter falls within that ambit.**
- c. **Whether there should be alternative dispute resolution in this matter.**

14. Section 204 of the CPC provides as follows; -

“If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.”

15. In the case of **Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another [2018] eKLR**, **Muriithi J.** listed the Principles that determine the termination of criminal proceedings as;

- a. **where criminal charges are terminated by operation of the law where upon death of an accused there is no person to be tried, convicted and sentenced in a trial, there are three ways upon which a criminal charge may be terminated by act of the parties, and it is opportune in this case to discuss the principles involved. A criminal case may be terminated by act of the**

parties, by reconciliation under section 176 of the Criminal Procedure Code (CPC); withdrawal or discontinuance of the charge by the complainant (S. 204 of the CPC) or the prosecutor (Art. 157 (6) (c) of the Constitution and s. 87 of the CPC); and alternative dispute resolution agreement pursuant to Article 159 (2) (c) of the Constitution. A criminal case may also terminate partly by act of complainant and by operation of the law under section 202 of the CPC, where the complainant fails to attend.

b. Reconciliation in personal or private cases. In cases of common assault, or any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, section 176 of the CPC allows the Court to promote reconciliation, encourage and facilitate the settlement, in an amicable way, of proceedings, on terms of payment of compensation or other terms approved by the Court. See Medardo v. R (2004) 2 KLR 433 and Shen Zhangua v R, High Court at Nairobi Miscellaneous Criminal Application 396 of 2006.

c. Withdrawal of Charge. In accordance with section 204 of the CPC, a complainant may withdraw the complaint before the court makes a fier in the matter and the court has discretion as to whether to allow or reject the withdrawal when satisfied of existence or otherwise of sufficient grounds for permitting such a withdrawal. See R v Malek Abdulla Mohamed, High Court at Kisumu No.113 of 1978.

d. Alternative Dispute Resolution. The court is aware of the persuasive High Court decisions in R v. Abdow Mohamed (R. Korir, J.) and R v. Juliana Mwikali Kiteme (Dulu, J) where the courts have permitted the termination of serious charges of murder on the grounds that the families of accused and the victim had reconciled. While the Court, respectfully, takes the view that each case shall depend on its circumstances, a general principle may be laid down flowing from constitutional criteria for the prosecution, the withdrawal or termination of criminal cases in terms of Article 157 (11) of the Constitution by which the DPP is obliged to consider “public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”

e. It must be demonstrated by the accused or the prosecutor who seeks the withdrawal or termination of a criminal case that, in the wording of the Constitution, the discontinuance (read settlement, withdrawal or termination of the criminal case) is justifiable under the parameters of the considerations of public interest, interests of justice and need to prevent abuse of the legal process. Indeed, in Juliana Mwikali Kiteme and Abdow Mohamed cases, supra, it was the DPP who made the application for settlement of the cases pursuant to alternative dispute resolution mechanism. See also Republic v. Faith Wangoi, Kajiado HC Criminal Misc. Application No. 1 of 2015.

16. From the foregoing principles stated herein, it goes to show how much thought has to be put and things to be considered before a criminal case is withdrawn from court. The trial court’s ruling that the Applicants want reviewed was not favorable to them. The court declined to allow the withdrawal of the case on grounds that the prosecution’s view had to be taken into account and in this case the State was opposed to the application.

17. The Applicants’ claim that the learned magistrate erred in fact and law and also on the other hand claim to have reconciled and do not see the reasons why the court declined their application yet they are the complainants and not the State so the State’s view should not be taken into consideration in matters of withdrawal. On the issue that the complainant is not the State, I find that the complainant in criminal matters is always the State and that the person who made the complaint to the police is also a complainant but the State takes over on their behalf.

18. In the case of Republic VS. Mwaura 1979 KLR 209 It was held that a complainant included the public prosecutor.

19. Further, in Ruhi VS. Republic 1985 KLR 373 It was held as follows: -

“We must state at the onset that we are satisfied that the term complainant in Section 208(1) of the Criminal Procedure Code includes; the prosecution as well as the person so described in the particulars of the charge.”

20. The matter herein could be withdrawn pursuant to the provisions of section 204 of the CPC as it is not categorized as a capital offence, however, there seems to be two factions who can’t agree on the same. Also, it is not mandatory that the court adhere to an application of withdrawal when made. The court has the discretion to decide as it sees fit.

21. The State (ODPP) stated that money was lost and it is reason enough for the withdrawal of the matter to be declined by the court as there are no clear resolutions. Looking at the charge sheet, the sum alleged to have been obtained is approximately 44 million, which is a substantial sum and needless to add that the complainant in the last count is not UKAI, but a public officer. I also note that there is pressure from the two factions in the company and that goes to show that the issue has not been resolved. I therefore find that this matter could be resolved out of court, but, if only it were agreeable to all members and not when it suits a certain group only.

22. On the issue as to whether this matter falls within the ambit of matters that can be resolved out of court, I find that yes, though complex, this matter falls squarely within the ambit as it is not a capital offence. But, we must consider the principles that govern Alternative Dispute Resolution, the court takes cognisance of the fact that this can only be done on a case to case basis. The court has to be convinced that this is the best decision and that it is happening in good faith as well. In this particular matter, there seems to be strings being pulled from all directions and it would be unfair for other members if the court would blankly decide that they should go for ADR and probably there are not in that frame of mind. The principle attached to ADR is from a point of both reconciliation and fairness. I am not sure whether that would be achieved in this case.

23. From the foregoing, I find the Application lacking merit, therefore, I decline to grant an order for revision of the orders of the trial court declining to allow withdrawal of the case. Accordingly, the application is dismissed.

24. It is so ordered.

Dated, Signed and delivered at Nairobi virtually this 24th day of February, 2021

L .N .MUTENDE

JUDGE