



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CRIMINAL APPEAL NO. E012 OF 2020**

**BENJAMIN NKAATE KEREMA.....APPELLANT**

**VERSUS**

**REPUBLIC.....1<sup>ST</sup> RESPONDENT**

**EVA WAIRIMU.....2<sup>ND</sup> RESPONDENT**

*(An appeal against the Ruling of the Chief Magistrate's Court at Thika, J. Nangea, CM dated 26<sup>th</sup> November, 2020 Criminal Case NO. 7344 of 2019)*

**JUDGMENT**

1. **BENJAMIN NKAATE KEREMA** (hereinafter Benjamin) was charged before the Thika Chief Magistrate's court with three counts. On the first count, he was charged with the offence of obtaining money by false pretence contrary to **Section 313** of the Penal Code. On the second count he was charged with the offence of forgery contrary to **Section 345** as read with **Section 349** of the Penal Code. On the third count, he was charged with the offence of conspiracy to defraud contrary to **Section 317** of the Penal Code. Benjamin pleaded not guilty to all the three counts.

2. Before the commencement of the trial before the Thika Chief Magistrate's Court, the Director of Public Prosecutions (DPP) applied to withdraw the criminal case against Benjamin under **Section 87(a)** of the Criminal Procedure Code (CPC). DPP sought to withdraw that criminal case on the ground the dispute was civil in nature and that a civil action had been filed by the complainant, in the criminal case, against Benjamin.

3. The DPP's application to withdraw the criminal case against Benjamin was supported by Benjamin but was opposed by the complainant.

4. The learned magistrate, *J.M. Nang'ea, CM*, by his considered Ruling of 26<sup>th</sup> November, 2002 dismissed DPP's application and ordered the criminal trial to proceed to its logical conclusion. Benjamin being aggrieved by that Ruling filed an appeal before this Court.

**ANALYSIS**

5. The appeal by Benjamin, will be determined by two statutory provisions raised by DPP and the complainant, and which Benjamin did not challenge.

6. The complainant opposed the appeal on the ground that it was filed out of time, as provided under **Section 349** of the Criminal Procedure Code. **Section 349** of the CPC provides:-

*“An appeal shall be entered within fourteen days of the date of the order or sentence appealed against:*

*Provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has elapsed, and shall so admit an appeal if it is satisfied that the failure to enter the appeal within that period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor.*

7. The complainant correctly observed that Benjamin should have filed his appeal against the trial court's Ruling of 26<sup>th</sup> November, 2020 by 10<sup>th</sup> December, 2020. The petition of Benjamin's appeal was however filed on 28<sup>th</sup> December, 2020. Benjamin ought to have sought leave of the court to admit the appeal out of time as provided under Section 349 of the CPC. The fact that Benjamin filed his appeal out of time

and failed to seek leave to admit it to be considered out of time makes his appeal incompetent. For that reason the appeal before this Court is struck out.

8. DPP also opposed the appeal by Benjamin on the ground that there is no provision under the Criminal Procedure Code for entertaining interlocutory appeal.

9. Section 347 of the CPC provides that an appeal lies from a conviction of a subordinate court to the High Court. The CPC does not allow appeals where there has not been conviction. This was restated by the Supreme Court in the case of **JOSEPH LENDRIX WASWA VS. REPUBLIC (2002) eKLR** as follows:-

*“86. There is no provision in both the Constitution and the CPC for interlocutory criminal appeals. The Constitution under Article 50 (q) provides that every accused person has the right, ‘if convicted, to appeal to, or apply for review by, a higher Court as prescribed by law.’ Similarly, the CPC under sections 347 and 379 (1) only allows appeals by persons who have been convicted of an offence.”*

10. In that case, **JOSEPH LENDRIX** (supra), the Supreme Court approved the High Court holding by Justice Kimaru in the case **JOHN NJENGA KAMAU VS. REPUBLIC (2014) eKLR** the holding as follows:-

*“The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court’s considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case.”*

11. Benjamin’s appeal hereof is against the trial court’s interlocutory ruling. Since the Constitution and the CPC do not permit an interlocutory appeal in criminal trials, it follows the appeal before court is incompetent and is hereby struck out.

12. The learned counsel for Benjamin did request through his oral submissions that his Court do ‘treat’ the application by Notice of motion dated 11<sup>th</sup> December, 2020 and the appeal be ‘treated’ as Revision. That prayer was not opposed by the complainant and was supported by Mr. Stephen Kasyoka, prosecution counsel for DPP I will therefore proceed to consider the application as a Revision under **Section 362 and 364** of the CPC. **Section 362** of the CPC provides:-

*“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”*

13. It is clear that there was an agreement between Benjamin and the complainant together with others which agreement involved the complainant giving some money to Benjamin. This is evident from what the parties termed as a loan agreement dated 4<sup>th</sup> October, 2019. In that agreement, there seems to be acknowledgment of Benjamin receiving from the complainant and others in the year 2016 sums of money to facilitate Benjamin to lease land and carry out wheat farming in Narok. In that loan agreement, Benjamin acknowledged owing the complainant and others those sums of money.

14. Benjamin’s submissions are that the complainant has ‘converted’ that loan agreement into a criminal offence and hence the charges before the trial court. Benjamin supports the DPP’s withdrawal of criminal charges against him on the ground that the criminal charges were an abuse by the complainant of the court process and that they were brought to enforce the loan agreement, a civil claim.

15. DPP submitted in support of the Revision that under Section 87(a) of the CPC, DPP may withdraw a criminal case any time before judgment. That the court in entertaining application to withdraw a criminal case the court need only confirm whether the “threshold” under **Section 87(a)(b)** has been met. That the court ought to consider whether the prosecution has acted beyond his Constitutional powers in seeking withdrawal.

16. DPP reiterated that the withdrawal of the criminal case was necessary because the dispute has civil ‘elements’ which needed to be reviewed.

17. The complainant relied on her submissions filed before the trial court. By those submissions, the complainant submitted that the consideration of an application under **Section 87(a)** CPC required the court to consider the rights of the parties involved in order to serve the best interest of the public and the accused. Complainant further submitted that the fact that she had filed civil claim against Benjamin was not a basis to seek to withdraw the criminal case.

18. I have considered the authorities cited by the parties in this case.

19. **Article 157(1)** of the constitution makes it evidently clear that DPP does not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the directions or control of any person or authority. The caveat placed to cap the DPP’s powers is under **Article 157 (11)** which provides that in exercising the powers conferred on the office of DPP, DPP shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

20. In the present case the DPP motivation for withdrawing of the criminal case was because the dispute, the basis of the criminal case, has

“civil element”.

21. It needs to be stated that **Section 93A** of the CPC allows concurrent litigation of civil and criminal cases arising from the same facts. The high court when discussing the ramification of that Section in the case of **KURIA 7 3 OTHERS VS. ATTORNEY GENERAL (2002) eKLR** 69 held:-

***“...it does not mean that a civil suit and a criminal case cannot co-exist at any one particular time. This is because the section envisages the re-prosecution of a criminal case substantially dealt with either in fact or law, a case in which issues have been laid to rest. There is no mention in the section that the simultaneous existence of a civil and criminal cases is constituting double jeopardy...”***

***It is not enough to simply state that because there is an existence of a civil dispute or suit, the entire criminal proceedings commenced based on the same set of facts are an abuse of the court process. There is a need to show how the process of the court is being abused or misused and a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution. In absence of concrete grounds for supposing that a criminal prosecution is an “abuse of process”, is a “manipulation”, “amounts to selective prosecution” or such other processes, or even supposing that the applicants might not get a fair trial as protected in the Constitution, it is not mechanical enough that the existence of a civil suit precludes the institution of criminal proceedings based on the same facts”***

22. The above cited case is the jurisprudence when a criminal case is pursued based on the same facts as a civil case. DPP was obligated and also Benjamin to show that there is abuse of the process in proceeding with the criminal case. It was not enough for the DPP to say, ‘because there exists a civil case, we wish to withdraw the criminal case’. DPP in making that submission wholly failed to state how such serious allegations on forgery and conspiracy bore relationship to the civil case. Had DPP shown to this Court that proceeding with the criminal trial against Benjamin constituted an abuse of the process of the court, this Court would not have hesitated to stop such abuse. I am unable to state that in bringing the criminal charges against Benjamin was intended to achieve collateral purpose.

23. DPP’s office has the power to conduct criminal prosecutions without being directed or controlled by any person. The Constitution under **Article 157(8)** required DPP to obtain permission of the court before discontinuing a criminal case. The court in considering the application for withdrawal of a criminal case needs to be assured that DPP is acting in the public interest that such withdrawal will be in the interest of the administration of justice and that such withdrawal would be to prevent and avoid abuse of legal process. DPP failed to surmount the above tests. The trial court, in my view, cannot be faulted for having denied DPP the application to withdraw the criminal case.

#### **DISPOSITION**

24. For the above reasons, I am satisfied that the learned magistrate, by the ruling of 26<sup>th</sup> November, 2020 proceeded correctly and within the law and there is therefore, no basis to revise his Ruling. The application for Revision and the appeal are therefore hereby dismissed.

25. The order of this Court of 6<sup>th</sup> January, 2021, which order stayed the **Thika Chief Magistrate Criminal Case No. 7344 of 2020 REPUBLIC VS. BENJAMIN NKAATE KEREMA** is hereby set aside and vacated.

**JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 24<sup>TH</sup> DAY OF JUNE 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Ndege

Appellant: Mr. Ochieng’ Oginga

For the 1<sup>st</sup> Respondent : Mr. Kasyoka

For the 2<sup>nd</sup> respondent : Ms. Njoroge H/B for Mr. Kamau

**COURT**

Judgment delivered virtually.

**MARY KASANGO**

**JUDGE**