



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ACEC REVISION CASE NO. E011 OF 2021

PETER NGANGA MBURU.....1ST APPLICANT

CAROLINE NABALAYO KITUYI.....2ND APPLICANT

GLADYS MWIKALI MUYANGA3RD APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

MILIMANI ANTI-CORRUPTION

CHIEF MAGISTRATES COURT..... 2ND RESPONDENT

RULING

This matter now comes up before the court for the application of the 3 applicants, **PETER NG'ANG'A MBURU, CAROLINE NABALAYO KITUYI AND GLADYS MWIKALI MUYANGA**, dated 23.8.2021. The application has been brought under Article 165(6) of the Constitution, and sections 362 and 364 of the Criminal Procedure Code. the main prayer therein is prayer (4) that;

“THAT this Honourable court be pleased to examine, revise and set aside the ruling and order made on 20.8.2021 by the Hon. L. N. Mugambi in Milimani Chief Magistrate’s Anti-Corruption case no. 33 of 2018, and replace it with an order allowing the 1st Respondent’s application dated 12.8.2021.”

The application is supported the an affidavit of 1st applicant sworn on 23.8.2021. in the same, the 1st applicant has deponed that on 13.8.2021, the 1st Respondent had applied for withdrawal of the charges against the applicants (accused 9, 10,11) under section 87(a) of the Criminal Procedure Code. that is the ruling of the court read out on 20.8.2021, the said prosecution application which had not been objected to by the applicants, the Honourable trial magistrate, dismissed the said application on the basis that the prosecution side had not given any reason for the change of heart. The applicants have claimed that the said ruling has prejudiced their rights and aims at subjecting them to a needless and unnecessary criminal trial that the DPP does not wish to pursue.

The state, through learned counsel, Mr. Nyamache, supported this application. Counsel relied on the case of **Republic Versus Simon Okoth(2017)eKLR**, that gave the following underpinning principles.

- a) The rule of law underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority.***
- b) The need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution.***
- c) The need to ensure that the criminal process of the court is not abused to further or defeat private interests which are, or should by, the subject of civil proceedings, or for other improper purposes.***
- d) The public interest in either the continuation or discontinuation of the criminal prosecution including consideration of whether criminal prosecution is a proportionate response to the facts at hand.***
- e) Wider interest of administration of justice including considerations of the impact of the prosecution on the community and the precedential effects of the decision to continue or discontinue the prosecution.***

As I understand it, this application is in regard to the powers of the Director of Public Prosecutions, under Article 157 of the constitution. The independence of the office of Director of Public Prosecutions is enshrined under Article 157(10) of the constitution, that;

“The Director of Public Prosecution shall 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 direction or control of any person or authority.”

The constitution, however at sub-article 11, gives directions on how the Director of Public Prosecutions shall exercise his or her constitutional powers. Same states:

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of Justice, and the need to prevent and avoid abuse of the legal process.”

These are the 3 requirements and standards that the DPP is obligated to satisfy while discharging his functions (see *Republic Versus Kennedy Onsarigo Sebe and 3 others (2019)eKLR*, quoted) by the Honourable chief magistrate. Also the case of *Republic Versus Sekento (2019)eKLR*. See also this court’s decision in *Republic Versus Ahmed Rashid Jibril, HCCR Rev. E027/2020(NAI)*.

The constitution, by placing the 3 standards on the DPP, clearly means that the powers of the Director of Public Prosecutions are not absolute. The same must be exercised in such a manner that each action the DPP undertakes, must be in furtherance of the cause of Justice. It follows in my view, that it is incumbent upon the prosecution side to convince the court that the intended withdrawal is in pursuit or furtherance of the cause of Justice, and not an abuse of the process.

From the proceedings before the lower court, the application of the prosecution for withdrawal was based on the fact that the DPP had received new information regarding the matter before the court. No details of the nature of the new information were declared to the court for consideration. No such details have so far been declared.

A number of factors this case would require consideration on whether or not the prosecution application passed the test laid down in the constitution. First and foremost, in the serious nature of the charge, being a charge under the Anti-Corruption and Economic Crimes Act. Second is the fact that the trial had progressed with several witnesses giving evidence. And third, the 3 applicants are amongst a total of 17 persons charged before the court. The record shows that when asked to comment on the application by the DPP, counsel for accused 1 expressed the concern that the court ought to seek clarification from the prosecution on the information received by the DPP, counsel for the 12th accused also expressed the same position.

The fact that the prosecution has failed to declare or disclose the specific nature of the new information leaves many probable questions unanswered. Does the intended withdrawal mean the applicants, upon the withdrawal of their cases, would turn into prosecution witnesses, a fear expressed by accused 1 and 2? Is the intended withdrawal in the interest of Justice to the applicants and also the other accused? Is it in public interest and administration of Justice? Or God forbid, would it be an abuse of the legal process?

The trial court grappled with these issues and expressed its frustrations by asking itself the questions, stating,

“For how will the court tell if the DPP’s reason for withdrawal is consistent with the parameters set if it is not disclosed to the court which is considering the withdrawal application”.

This court has poised the same questions above. I am therefore in total agreement with the learned chief magistrate that the prosecution was under a duty to make full disclosure of the new information in support of the application for withdrawal of the cases against the applicants.

This is an application for revision under section 362 of the Criminal Procedure Code, which reads:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to regularity of any proceedings of any such subordinate court.”

I have carefully considered the finding of the trial magistrate dated 20.8.2021. I do not find any irregularity, error or impropriety in the same. I therefore find no merit in this application of the applicants dated 23.8.2021. I dismiss the same wholly. Orders accordingly.

D. O. OGEMBO

JUDGE

19.10.2021

Court:

Ruling read out in court (on-line) in presence of Nyamache and Mr. Kinyanjui for the Respondent and Mr. Orange for Mr. Ng’ang’a for the applicants.

D. O. OGEMBO

JUDGE

14.10.2021

Mr. Nyamache:

We pray for copy of the ruling for the record.

Court:

Certified copies of the ruling to be supplied to the parties as prayed.

D. O. OGEMBO

JUDGE

14.10.2021