



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS APPLICATION NO. 106 OF 2019**

**RAEL KADENYEKA MUSYOKA.....APPLICANT**

**VESRUS**

**REPUBLIC.....RESPONDENT**

**R U L I N G**

1. The applicant herein filed an application dated 12-7-2019 under section 349 of the Criminal Procedure Code seeking the following reliefs namely:

**a) (Spent).**

**b) That this honourable court be pleased to order for stay of any further proceedings in Machakos Chief Magistrate's Court Criminal Case No. 100 of 2018, Republic –VS- Fredrick Mutuku Maweu.**

**c) That this honourable court be pleased to extend time within which to appeal against the ruling delivered by Hon. Kibiru-CM on 6-6-2019.**

**d) That this honourable court be pleased to make such other or further orders as it may deem fit for the interest of justice.**

**e) That the costs of the application be provided for.**

2. The application is supported by grounds on the face thereof as well as the affidavit of the applicant sworn on even date. The Applicant's case inter alia is that she had filed an application dated 22-3-2019 before the Chief Magistrate's court in **Criminal Case No.100 of 2018** wherein she is the complainant seeking to withdraw her complaint against the accused who happens to be her husband. It is her case that the said application was dismissed. She is aggrieved by the said ruling and could not lodge the appeal on time due to illness. She further avers that her appeal has high chances of success as can be seen from the draft petition of appeal. She added that the application has been brought timeously and without any delay. She claims that unless orders of stay are granted the trial court will proceed with the matter thereby rendering the appeal nugatory. She finally averred that the respondent will not be prejudiced if the application is granted. The applicant vide a supplementary affidavit dated 8-8-2019 she averred inter alia, that she has not been ill-advised to withdraw the case against the accused since her decision was informed by goodwill; that the criminal case has become a burden to her since she is being forced to make untrue allegations against her husband; that she and her husband had co-existed well without any grudge in the past before the fire incident in which she was injured.

3. The applicant was directed to serve the accused in the criminal case who is an interested party in these proceedings. The said interested party Fredrick Mutuku Maweu filed a replying affidavit dated 8-8-2019 in which he made several averments inter alia; that the complainant is his wife who has tried on numerous occasions to seek to withdraw the charges against him to no avail; that he has not in any way influenced the applicant's decision to withdraw the case against him; that the applicant should be granted her wish as no undue influence has been applied on her; that he is still innocent until proved guilty by the state.

4. The respondent opposed the application by filing several grounds of opposition inter alia; that the application is misconceived, unprocedural and a wanton abuse of the process of the court; that Article 157 of the Constitution of Kenya grants the office of the Director of Public Prosecution mandate to institute, prosecute and withdraw criminal charges; that Section 204 of the Criminal Procedure Code allows the complainant to withdraw charges against the accused person subject to her satisfying the court that there are sufficient grounds; that withdrawal under 204 of the Criminal Procedure Code is not automatic but subject to certain conditions; that the application has failed to meet the minimum threshold to warrant the orders sought.

5. Parties agreed to canvass the application by way of written submissions. However, it is only the Applicant who filed submissions. Her submissions are a reiteration of the averments in her supporting and supplementary affidavits.

6. I have considered the application together with the affidavits and the grounds of opposition. It is not in dispute that there is an ongoing criminal case before the Chief Magistrate's court at Machakos being **Criminal Case No. 100 of 2018** and in which three witnesses have so far testified. It is also not in dispute that the applicant herein is the victim in that criminal case and who had sought to withdraw the case against the accused who happens to be her husband. It is not in dispute that the trial court rejected the applicant's requested vide the ruling dated 6-6-2019. It is also not in dispute that the applicant is now desirous of lodging an appeal against the said ruling as shown by the draft petition of appeal annexed to her affidavit in support of the application I find the following issues necessary for determination namely:

**a) Whether this court can extend the time within which the applicant can lodge her appeal against the trial court's ruling dated 6-6-2019.**

**b) Whether the Applicant has furnished sufficient reasons to warrant an order of stay of proceedings in the lower court's Cr. Case No. 100 of 2018.**

7. As regards the first issue, Section 349 of the Criminal Procedure Code grants this court the jurisdiction to extend the time for filing an appeal out of time as long as an applicant shows good cause. The Applicant vide paragraph 6 of her affidavit in support of the application has averred that she was unwell and was thus unable to lodge the appeal within time. Even though no medical notes have been furnished by the applicant, I am inclined to believe her. It is her constitutional right to pursue an appeal against the ruling of the trial court dated 6-6-2019. I also note that the applicant has been acting in person and hence the possibility of running into problems while pursuing a copy of the ruling complained of cannot be ruled out. There is a letter dated 3-7-2019 addressed to the Executive Officer Machakos Law Court seeking for a copy of the said ruling. The Applicant was expected to have lodged her appeal within 14 days and hence she is late by about three weeks. I find the said period to be excusable on grounds of the applicant's indisposition and hereby find merit in the request and that the applicant will be given a limited period within which to lodge her appeal.

8. As regards the second issue, it is noted that the Applicant has suggested that her appeal will be rendered nugatory if an order of stay of proceedings in the trial court is not granted. The Applicant's grouse with the trial court is that it had declined her request to withdraw her complaint against the accused who apparently is her husband. Her stand point is that as she is the complainant in the case then the prosecution should not stand in her way when she has already made up her mind to forgive the accused. The state has vehemently opposed her demands. The word "**complainant**" appears to be captioned in several sections of the Criminal Procedure Code namely sections 202, 204, 208 and 176. A summary of the said provisions is as follows:

**S. 202- Non-appearance of the complainant at hearing may lead to acquittal of an accused.**

**S. 208- Upon a plea of not guilty entered the court shall proceed to hear the complainant and his witnesses and other evidence (if any).**

**S. 204- Withdrawal of complaint by a complainant upon sufficient reasons given to court lead to acquittal of accused.**

**S. 176- Promotion of reconciliation by the court regarding minor offences of a personal nature and which do not amount to felony or aggregated in degree on such terms of compensation as appropriate and which lead to the staying or termination of the proceedings.**

From the view point of the applicant, she seeks to be recognized as the complainant in the case and that the trial court should proceed to allow her request under section 204 as well as 176 of the Criminal Procedure Code. However, it is a matter of notoriety that all criminal proceedings are always commenced and initiated by the Republic against a particular person or authority or legal entity. Under the Constitution of Kenya 2010 the mandate to initiate and mount criminal prosecution is entirely vested in the office of the Director of Public Prosecution. Article 157 (1) of the Constitution creates the office of the Director of Public Prosecution. Under Article 157 (6) the Director of Public Prosecution shall exercise state powers of prosecution and may:

**a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.**

**b) To take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority with the permission of the person or authority.**

**c) Discontinue at any stage before judgment is delivered any criminal proceedings instituted by the DPP or taken over by the DPP.**

Under Article 157 (10) of the Constitution the Director of Public Prosecution shall not require the consent of any other 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. It is instructive to note that upon receipt of the complaint lodged by the applicant the same was investigated and a decision was made by the DPP to prefer charges against the applicant's husband. The applicant did not raise any objection with the DPP until after three witnesses had testified when she made the move that was subsequently rejected by the trial court. The constitution vide Article 157 (11) enjoins the DPP in the exercises of his or her powers to 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. Hence the DPP is the custodian of the public interest. That being the position, I find that the interests of any person who had lodged a complaint with the police are adequately catered for by the DPP and thus it is improper for any such complainant to purport to seek to withdraw a complaint without first going through the DPP. In the case of **Republic – VS- Mwaura [1979] KLR 209** it was held that a complainant includes the public prosecutor. Again in the case of **Ruhi- VS- Republic [1985] KLR 373** the court had this to say:

**“We must state at the outset 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”.**

The Court of Appeal in the case of **Roy Richard Elmina & Another –VS- Republic CRA No. 67 of 2002** while considering Section 202 of the Criminal Procedure Code dealt with the issue of a complainant as follows:

**“...The complainant in this context has been interpreted to mean the “Republic” in whose name all criminal prosecutions are brought and not the victim of the crime who is merely the chief witness on behalf of the Republic”.**

9. Being guided by the above authorities and the provisions of Article 157 of the Constitution, I have no doubt in my mind that a complainant wishing to withdraw a complaint against an accused person is under obligation to involve the office of Director of Public Prosecution who must consider several aspects such as the public interest, interest of administration of justice and the need to prevent and avoid abuse of the legal process. Hence the applicant cannot act as a lone ranger by seeking to have the court address her demands without the input of the office of the DPP. The applicant has hinged her claims under Section 204 and 176 of the Criminal Procedure Code which provide as follows:

S. 204 CPC:

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

S. 176 CPC:

**“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree on terms of payment of compensation or other terms approved by the court and may thereupon order proceedings to be stayed or terminated”.**

The applicant’s request before the trial court seems to have been rejected on the ground that she had not furnished sufficient grounds and further bypassed the office of the DPP. It is noted that the crime committed herein is not only against the applicant but also against the society. These offences are usually initiated and prosecuted by the state with the sole aim of protecting rights of citizens. In any event criminal prosecution is always a matter of public interest and thus the applicant cannot purport to act as a guardian of the public interest. Suffice to add that the applicant’s sole aim is to get her husband off the hook and cares little for the public interest. It has transpired that the applicant’s children are currently under the care and custody of her parents and who are now subject of supervision of the department of children. This state of affairs leaves no doubt that the circumstances herein ought to be handled in the public interest which can only be secured by the DPP who is constitutionally mandated under Article 157 (11) of the constitution. The consent of the DPP towards the applicant’s request cannot be wished away.

Before I pen off, I need to point out the fact that the applicant’s averment that the prosecution is out to force her to give a different version of events against the accused is not convincing for the simple reason that she has already tendered her evidence and has not been declared as a hostile witness. The applicant’s evidence on what she knows about the incident has not been infringed in any way. She is at liberty to tell the trial court the facts of the case to the best of her knowledge, information and belief. No evidence has been shown that the prosecution has gagged her mouth from stating what she knows and it will then be up to the trial court to determine the merits and demerits of the entire evidence and come to a conclusion.

10. The applicant is under a duty to establish that the intended appeal has high chance of success in order to warrant for an order of stay of proceedings pending in the lower court. Without going into the merits or demerits of the intended appeal and in view of the foregoing observations, the appeal appears to have less chances of success as the trial court was exercising its inherent discretion as permitted by section 204 and 176 of the Criminal Procedure Code. I am of the considered view that staying the proceedings in the lower court will prejudiced the public interest. I find the applicant has not given sufficient reasons to warrant an order of stay of proceedings in the **Machakos Chief Magistrate’s Criminal Case No. 100 of 2018**.

11. In the result the applicant’s application dated 12-7-2019 succeeds only in terms of prayer (c) thereof to the extent that she is granted fourteen (14) days to file and serve her Petition of Appeal. The other prayers stand dismissed. There shall be no order as to costs.

Orders accordingly.

**Dated and delivered at Machakos this 27<sup>th</sup> day of April, 2020.**

**D.K. Kemei**

**Judge**