



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 122 OF 2020**

**(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 852 OF 2018 OF THE CHIEF MAGISTRATE'S COURT AT CHUKA)**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT**

**VERSUS**

**JACKSON MURITHI AKWALU.....RESPONDENT**

**R U L I N G**

1. The Office of the Director of Public Prosecution has through a letter dated 14<sup>th</sup> July 2020 invoked the revisionary powers of this court under Section 362 of the Criminal Procedure Code in asking this court to revise and set aside the orders made by the trial court on 8<sup>th</sup> July 2020 in **Chuka Chief Magistrate's Court Criminal Case No.852 of 2018 Republic –v- Jackson Murithi Akwalu.**

2. In that case in the Subordinate Court the Respondent herein was charged with the following counts namely:-

- i) Stealing Contrary to Section 268 as read with Section 275 of the Penal Code and in the alternative.
- ii) Handling Stolen Goods contrary to Section 322 (2) of the Penal Code.
- iii) Assaulting a police officer in execution of duty contrary to Section 103 (a) of the National Police Service Act No. 11 of 2011.
- iv) Resisting Arrest Contrary to Section 253(b) of the Penal Code.

3. The Respondent challenged his prosecution vide Constitutional Petition No.7 of 2019 in this court and this court upon the Respondent's application dated 16<sup>th</sup> July 2017, on 23<sup>rd</sup> July 2019 ordered a stay of proceedings in **Chuka Chief Magistrate's Court Criminal Case No.852 of 2018** pending the hearing and determination of the said Constitution Petition No. 7 of 2019.

4. The Applicant has now come to this court stating on 8<sup>th</sup> July 2020, the trial magistrate on 8<sup>th</sup> July 2020 Suo Moto terminated/withdrew the criminal proceedings against the Respondent contrary to the stay orders issued by this court.

5. The Applicant contends that the proceedings by the learned magistrate on 8<sup>th</sup> July 2020 were illegal, irregular and improper and have moved this court to invoke its powers under **Section 362** of the **Criminal Procedure Code** on the following grounds namely:-

***i) That the trial magistrate withdrew the criminal case under Section 87A of the Criminal Procedure Code. The Director of the Public Prosecution opines that the Section 87A does not exist in Criminal Procedure Code and as such the order by the trial court was irregular, illegal and improper.***

***ii) That this court vide Chuka High Court Constitutional Petition No. 7 of 2019 issued an order on 23<sup>rd</sup> July 2019 and 16<sup>th</sup> October 2019 staying the proceedings in Chuka Chief Magistrate's Court Criminal Case No.852 of 2018 pending the hearing and determination of the Constitutional Petition.***

***iii) That while the order was clear that no proceeding should be undertaken in Chief Magistrate's Court Criminal Case No. 852 of 2018, the trial magistrate suo moto withdrew the charges facing the Respondent under Section 87A of the Criminal procedure Code which in Applicant's view as an affront to the stay orders issued by this court.***

***iv) That even if the trial magistrate intended to proceed under Section 87(a) of the Criminal Procedure Code, such withdrawal can only be done upon the application by the Director of Public Prosecution who must give good reasons as to why proceedings***

*should be terminated and that the cited section does not give room for the trial court to move suo moto.*

The Applicant has cited the following two authorities to support their application.

**i) Tatu City Ltd & 3 others –vs- Stephen Jenmings & 6 others [2016] eKLR**

**ii) Paul Mabaku Makau –vs- Republic [2016] eKLR.**

6. This court invited the Respondent to make his representations on this application and though he expressed opposition to the same, in principle he contends that the criminal case should not have been terminated. And seeks that *status quo* be maintained and the trial magistrate barred from interfering with the proceedings pending in this court.

7. This court has considered this application and the grounds raised. I have also conserved the sentiments from the Respondents.

8. I have pursuant to the provisions of **Section 362 of Criminal Procedure Code** called for the lower court file in respect of ***Chuka Chief Magistrate’s Criminal Case No. 852 of 2018***. I have perused through the impugned proceedings of 8<sup>th</sup> July 2020 when the orders complained of were made. The proceedings show that the prosecution indicated to the trial court that the Constitutional petition where the stay orders had been issued, was slated for hearing on 16<sup>th</sup> July 2020 and this appears to have exasperated the trial court having mentioned the matter severally to find out the progress of the Constitutional Petition. It is perhaps on that basis that the trial magistrates decided *SUO MOTO* to terminate or withdraw the criminal proceedings against the Respondent herein under **Section 87A** to forestall “***the continued pendency of the case and creating unnecessary backlog***”. The trial court further reasoned that the Respondent could be re-arrested depending on the outcome of the Constitutional Petition.

9. The trial court’s action has been faulted as observed above on two grounds;

**a) That Section 87A does not exist in Criminal Procedure Code.**

**b) That the order to terminate proceedings went against the order of stay of proceedings issued by this court.**

10. It is true that **Section 87A** of the **Criminal Procedure Code** does not currently exist because the same was amended in 2012. Currently we have **Section 87** which provides as follows:-

***“ In a trial before the Subordinate Court, a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecution, at any time before Judgment is pronounced withdraw from the prosecution of any person.....”***

11. The trial court, in the light of the above could only by law give consent to an intention by the Director of Public Prosecution to terminate the criminal proceedings before it. I agree with the applicant herein that the cited Section does not give latitude to the trial court to move on its own motion to terminate the proceedings. It must be prompted and must be satisfied that cogent reasons for termination obtains before giving such consent. The decision cited in the case of ***Paul Makau –vs- Republic [2016] eKLR*** is clear that a trial court cannot proceed *suo moto* under **Section 87 (a)** of the **Criminal Procedure Code**.

12. Secondly there is no dispute of the fact that this court vide Constitutional Petition No.7 of 2019 stayed the criminal proceedings in ***Chuka Chief Magistrate’s Court Criminal Case No. 852 of 2018*** on 23<sup>rd</sup> July 2019 and 16<sup>th</sup> October 2019 pending the hearing and determination of the Constitutional Petition by the Respondent herein. The implications of the stay orders meant that the trial court could not proceed substantively in the criminal trial in that matter in anyway. This court is persuaded by the decision cited by the applicant in the case of ***Tatu City Ltd & 3 others –vs- Stephen Jenmings & 6 others [2016] eKLR*** where the court defined what “***proceedings***” entailed and *inter alia* held as follows: -

***“.....A proceeding is therefore a process of an activity prescribed by law or procedure which seeks to invoke the power of court or a tribunal as the case may be, to enforce a law or obtain legal remedies pursuant to a law. The withdrawal of the suit was therefore a step or process defined under the phrase proceedings.”***

13. This court finds that the trial court’s hands were tied by the orders of this court staying the proceedings and the only way it could handle that matter pending before it was through mentions just to check on the progress of the Constitutional Petition and whether this court would have rendered itself on the question of terminating the said proceedings. As a matter of fact termination of the said proceedings at the Chief Magistrate’s court is one of the issues for determination in the pending Constitutional Petition. It was therefore wrong, improper and irregular for the Subordinate Court to proceed to terminate the criminal proceedings as doing so in my view is tantamount to insurping the powers and indeed jurisdiction of this court to determine whether or not there is basis to terminate the said proceedings. To that extent this court finds that the termination of proceedings by the trial court was illegal as it went against the stay orders issued.

In the premises this court finds merit in this application. This is a clear case for this court to invoke its powers under **Section 362** of the **Criminal Procedure Code** which I hereby do by setting aside the orders made on 8<sup>th</sup> July 2020 by the trial court to terminate the criminal proceedings in ***Chuka Chief Magistrate’s Court Criminal Case No.852 of 2018***. That order to terminate the criminal proceedings under **Section 87 A** was illegal and irregular. The same is set aside in its place I direct that the matter be fixed for a mention on any date convenient to parties and as per the court’s diary in the lower court in order to find out about the progress and outcome of the petition. The file shall be mentioned before court on duty for further orders.

**Dated, signed and delivered at Chuka this 29<sup>th</sup> day of July 2020.**

**R.K. LIMO**

**JUDGE**

**29/7/2020**

Ruling signed, dated and delivered in the presence of Momanyi for Applicant  
and Respondent in person.

**R.K. LIMO**

**JUDGE**

**29/7/2020**