



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL REVISION NO. 168 OF 2020

RICHARD LELU MATHEKA1ST APPLICANT

JOHN MBILI MATHEKA.....2ND APPLICANT

HARDLEY MAKUMI WAMBUA.....3RD APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. This application has been filed by **Richard Lelu Matheka, John Mbili Matheka and Hardley Makumi Wambua** who are the complainants in SPM Kilungu Criminal Case No. 25 of 2016 (*Republic –vs- Muthiani Mailu and 2 Others*). The application is brought under section 363 and 364 of the Criminal Procedure Code seeking the following prayers:

- This court to call for and examine the record of proceedings before the lower court in Criminal Case No. 25 of 2016 at Kilungu Law Courts before Honourable C. A Mayamba made on 3rd January 2018.
- The order of withdrawal made on 3rd January 2018 be set aside for the defence case to proceed and bond terms be reinstated.

2. The application is supported by the joint affidavit of the Applicants. They have deponed that the accused in the said case were placed on their defence but the charges were withdrawn without any reasons being given. They were also not informed of the withdrawal.

3. In his oral submissions Mr. Tamata for the Applicants urged the court to examine the record and issue an order for the defence case to proceed.

4. Mr. James Kihara for the Respondent supported the application. He argued that there was no reason given for the prosecution being given audience when the accused persons had been placed on their defence.

5. Section 362 of the Criminal Procedure Code provides:

Section 362 CPR: *“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.”*

As mandated by the law I called for the lower court record which I have perused. The accused in the said criminal case were charged with the offence of interfering with demarcated boundary contrary to section 33(1) of the Land Adjudication Act cap 284 of the Laws of Kenya.

6. The matter was heard and the prosecution closed its case on 25th September 2017. The accused were later placed on their defence by Honourable P. Wambugu – Senior Resident Magistrate who was later transferred before taking the defence case.

7. On 1st March 2018 directions under section 200 (3) Criminal Procedure Code on how to proceed were taken with the defence electing to proceed from where the matter had reached and the accused were ready to proceed. It’s at that point that the prosecutor – Wangia made an application for withdrawal of the case under Article 157(7) of the Constitution as read with section 87(a) of the Criminal Procedure Code.

8. **Article 157(7)** provides:

(7) If the discontinuance of any proceedings under clause (6)© takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The director of public prosecutions may not discontinue a prosecution without the permission of the court.

(11) In exercising the powers conferred by this Article, the director of public prosecutions shall have regard to the public interest, interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

9. Further section 87(a) and (b) Criminal Procedure Code provides as follows:

Section 87: in a trial before a subordinate court a public prosecutor may with the consent of the court or on the instructions of the Director of public prosecutions at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal –

a) If it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

b) If it is made after the accused person is called upon to make his defence, he shall be acquitted.

10. From the record I do note that the matter having proceeded upto defence hearing, the prosecution could not apply for withdrawal under section 87(a) Criminal Procedure Code. The proper application should have been under section 87(b) Criminal Procedure Code and Article 157(7) of the constitution.

11. Secondly the accused persons having been placed on their defence, the prosecution no longer had control of the prosecution case unless it was with the participation and consent of the complainant or complainants.

12. In the instant case the Applicants have averred that they were never informed about the withdrawal or even the intention to withdraw. Under Article 157(8) of the Constitution and section 87 Criminal Procedure Code any withdrawal must be with the consent of the court. Before the court gives its consent it is expected to be satisfied of the need to have the matter withdrawn. It can only be satisfied upon being given reasons.(*emphasis mine*)

13. Article 157(11) sets out the considerations to be made before the prosecution thinks of withdrawing a matter. These considerations include:

- Public interest
- Interests of the administration of justice.
- Need to prevent and avoid abuse of the legal process.

14. The record of the trial court of 1st March 2018 does not adhere to these requirements at all. The prosecutor never supported his application and neither did the court ask him or her to give any reasons in support of the said application.

15. Learned counsel for the Respondent Mr. James Kihara supports the application saying the procedure adopted in the lower court was erroneous.

16. After considering the record, the application and the submissions I find merit in the said application. I hereby expunge from the record the application for withdrawal of the case on 1st March 2018. The order allowing the withdrawal is hereby set aside.

17. I remit back the file (*SPM Kilungu Criminal Case No. 25 of 2016*) to Kilungu Law Courts for hearing before any Magistrate other than Hon. C. A Mayamba. The Law must be adhered to in the event of any need to withdrawal of the charge.

18. Matter to be mentioned before the SPM's court Kilungu on 5th October 2020.

(ii) The accused persons:

- Bernard Muthiani Mailu
- Mutiso Mailu
- Mulei Mailu Kimai to be served with summons by the investigating officer for court attendance on 5th October 2020.

(iii) The defence counsel Mr. Onyancha to be served with a copy of this ruling for his necessary action.

(iv) The said accused persons to be given fresh bond terms.

Orders accordingly.

Delivered, signed & dated this 22nd day of September 2020, in open court at Makeni.

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H. I. Ong'udi

Judge