



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEALS NO. 60, 61, 62, 63, 64, 65, 66 OF 2017

REPUBLIC.....APPELLANT

VERSUS

NATHIF JAMA ADAN & 6 OTHERS.....RESPONDENTS

(Being an appeal from the orders and ruling of Chief Magistrate HON. Cosmas Maundu dated 8/11/2017 in Garissa ACC No. 1 of 2016 Republic vs Nathif Jama & 6 others)

JUDGEMENT

Introduction

1. The Respondents herein were each arraigned in court on 2nd June, 2016 and charged under the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The offences ranged from abuse of office, failure to comply with the law relating to management of public resources, failure to comply with procurement law and engaging in a project without prior planning all relating to a contract for provision of ambulance services between County Government of Garissa and Red Cross E-plus dated 19th March, 2015 and valued at Kshs 62, 400, 000/=

2. . They pleaded not guilty and the matter proceeded to hearing where the prosecution called a total of eleven witnesses and as per their position were yet to call four more. However on 16th October, 2017 the prosecution made an application seeking to withdraw the charges facing the Respondents under section 87(a) of the Criminal Procedure Code, this was pursuant to a Court of Appeal decision in Engineer Michael Sistu Kamau vs Ethics & Anti-Corruption & 4 others Civil Appeal No. 102 of 2016 where it was held that the decision to prefer charges by improperly constituted commission was tainted with illegalities.

3. The application for withdrawal under section 87(a) of the Criminal Procedure Code was opposed by the Respondents and the trial court vide its ruling delivered on 8th November, 2017 declined the prosecution request and went ahead and acquitted the Respondents under section 210 of the Criminal Procedure Code. The Prosecution was dissatisfied with the trial court decision and filed the **Instant appeal on the following grounds: -**

I. The Learned Magistrate misdirected himself in several matters of law and fact and indeed gravely erred in law by failing to appreciate or apply his mind to the provisions of section of 87(a) of the Criminal Procedure Code.

II. The Learned magistrate gravely misdirected himself in law and indeed usurped the Constitutional powers of the prosecution by prematurely closing the prosecution case and proceeding to acquit the Respondent under section 210 of the Criminal Procedure Code.

III. The Learned magistrate gravely erred in law and fact by failing to appreciate the nature of, the circumstances of and the entire justification for the application made by the prosecution when seeking to withdraw EACC NO. 1 of 2016 under section 87(a) of the Criminal Procedure Code.

IV. The learned trial magistrate gravely erred in law and in fact by failing to appreciate that the decision by the court of appeal in Civil Appeal No. 102 of 2016 which informed the decision of the Director of Public Prosecution to seek to terminate the proceedings in the subordinate court under section 87(a) of the Criminal Procedure Code did not in itself gag the Constitutional powers of the Director of Public Prosecution.

4. They sought the following prayers, that this court: -

a) Review and re-evaluate the application made and the justification tendered by the prosecution for the termination of the proceedings of the sub-ordinate court with a view to reverse the entire ruling and quash the order of acquittal of the Respondents under section 210 of the Criminal Procedure Code.

b) Be pleased to make a finding and/or an order that there was sufficient justification to warrant the learned magistrate to terminate the sub-ordinate court's proceedings under section 87(a) of the Criminal Procedure Code.

c) Do order that the proceedings of the subordinate court in Garissa Chief Magistrate Court EACC No. 1 of 2016 stand terminated under section 87(a) of the Criminal Procedure Code.

Submissions

5. The appeal was disposed by way of written submissions. Both parties filed their respective submissions. The appellants' submissions are dated 20th July, 2020 and the Respondents submissions are dated 18th September, 2020 and filed by the firm Issa & Company Advocates, who are on record for the Respondents.

Appellant's submissions

6. The appellant submitted on their four grounds of appeal. In respect to ground No. 1, they submitted that the trial court failed to appreciate the provisions of section 87(a) of the Criminal Procedure Code and relied in the case of **Republic vs Leonard Sekento(2019)Eklr**, where the court held that in Considering an application under section 87(a) of the CPC subject to Article 157(6)(7)(8) and (10) of the Constitution, the court should advance the objects and principles of right to fair trial and that a prosecutor should not be denied the right to withdraw a case merely on ground of prejudice on the part of the accused and that the likelihood to reopen the case should not be bar to the same.

7. In regard to ground 2 of appeal, the appellant submitted that the trial court action in acquitting the Respondents under section 210 of the Criminal Procedure Code thus prematurely closing the prosecution case amounted to usurpation of the Constitutional powers of the Prosecution. They relied in the case of **Director of Public Prosecutions vs Perry Mansukh Kansagara and 8 Others (2020)Eklr**.

8. In respect ground 3 of appeal, they submitted that the trial court failed to appreciate the nature of and the circumstances and entire justification for the application to withdraw the charges, which was due to the Court of Appeal decision in **Engineer Michael Sistu Kamau vs Ethics & Anti-Corruption & 4 others Civil Appeal No. 102 of 2016**, which rendered the case untenable as the case could not proceed to its logical conclusion as they had to await a report on whether the EACC was properly constituted when it recommended the prosecution of the Respondents.

9. Finally, they submitted in respect to ground 4 where they argued that the trial court failed to appreciate that the decision in **Engineer Michael Sistu Kamau vs Ethics & Anti-Corruption & 4 others Civil Appeal No. 102 of 2016** in which the application was made provided for an opportunity to bypass the challenge of a constituted EACC before proceeding with the case. Therefore, implying that acquittal of the Respondents was not the only option available to the court and that the trial court ought to have allowed the application by the appellant to withdraw the case under section 87(a) of the CPC which would give them a room to further consider other options.

10. In sum, they urged the court to allow the instant appeal and order that the proceedings in Garissa Chief Magistrate Court EACC No. 1 of 2016 stand terminated under section 87(a) of the Criminal Procedure Code.

Respondents' Submissions

11. The respondents in their submission classified the appellant's grounds into two and addressed the same. The first is ground 1, 3 and 4 of their petition of appeal, where the appellant contend that the trial magistrate erred and failed to appreciate the provisions of section 87(a) of the Criminal Procedure Code. In this regard they submitted that the trial court in denying the appellant to withdraw the case under section 87(a) of the CPC exercised its discretion judiciously and therefore this court ought not to interfere. They relied in the cases of **Sally Tuwei vs Republic (2019)Eklr and Republic vs Baraka Masudi & 2 others(2018)eklr**.

12. Additionally, they submitted that the trial court rightly held that withdrawing the case under Section 87(a) of the CPC would infringe the respondents right to fair hearing, and specifically Article 50(2)(e) of the Constitution which provides that an accused person has a right to have trial begin and conclude without unreasonable delay. They rely in the case of **Republic vs George Kariuki Gichuki & 2 others (2015) eKLR**.

13. Further, the appellants submitted that if the trial court had allowed the appellant to withdraw the case under section 87(a) of the CPC, the same would have violated the tenets of justice as enshrined under Article 157(11) of the Constitution, which provides that the Prosecution shall have regard to public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.

14. In this regard they submit that since most of the prosecution witnesses had testified and cross-examined and line of defense known, it would be unfair to give the prosecution another chance to arraign and charge the respondents based on the same facts. They relied in the following cases **Mary Wangari Mwangi vs Attorney General(2010) eKLR, Kennedy vs Kennedy Onsarigo Sebe & 3 others(2019) eKLR and Titus Koome Kubai & 2 others vs Director of Public Prosecution(2015) eKLR**.

15. The second and final issue addressed by the Respondents is ground 2 of the appellants grounds of appeal, which is on the acquittal of the respondents under section 210 of the Criminal Procedure Code. In this regard they submitted that the appellants were not ready to proceed with their case and therefore the learned trial magistrate rightly exercised his discretion in acquitting the Respondents under section 210 of the Criminal Procedure Code, which was after finding that the evidence on record was weak and could not even sustain the charges before the court. In sum, they urged the court to dismiss the appeal.

Determination

16. I have duly considered the evidence on record and the grounds of appeal and equally considered the submissions by all the parties and the authorities cited. It is clear that all the respondents herein were acquitted on all the counts under section 210 Criminal Procedure Code. I find that the main issue for determination in this appeal is whether the trial magistrate erred in denying the Prosecution/appellant to withdraw the case under section 87(a) of the Criminal Procedure Code and instead acquitting the Respondents pursuant to section 210 of the Criminal Procedure Code.

17. The genesis of this appeal can be traced to the Court of Appeal decision in **Engineer Michael Sistu Kamau vs Ethics & Anti-Corruption & 4 others Civil Appeal No. 102 of 2016**, where the court found that any investigation and recommendation for prosecution by EACC during the period in which it was not properly constituted was tainted with illegality. From the decision, the period the EACC was not properly constituted in respect to the Engineer Kamau case herein is 12th May 2015-22nd January 2016. The new Commissioners were sworn in on 23rd January 2016. It is not disputed that investigations in this case were undertaken during the period herein and therefore affected by the above Court of Appeal finding.

18. Having found that the Instant case fell within the Court of appeal finding in Engineer Kamau case above as supported by the appellant submission, the next question is whether the Trial court acted within the law in denying the prosecution application to withdraw the case pursuant to section 87(a) of the Criminal Procedure Code.

19. Section 87(a) of the Criminal Procedure Code gives subordinate court the discretion to accept or refuse an application by the prosecution to withdraw a case. Section 87(a) of the Criminal Procedure Code provides as follows:

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

(b) if is made after the accused person is called upon to make his defence he shall be acquitted”

20. Article 157 of the Constitution which spells out the functions of the Director of Public Prosecutions has been relied on by the appellant. The relevant provisions herein are Article 157 (1), (6), (8) and (11) which provides:-

(1) There is established the office of Director of Public Prosecutions.

(6) The Director of Public Prosecutions 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) 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; and

c) Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(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, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

21. Additionally, the court should take cognizance of Article 50(1) (e) which grant an accused person the right to a fair trial including expeditious disposal of the case.

22. From the above provision, the following criteria for withdrawal is clear: First, is that the right to withdraw is exercisable by the prosecutor; second is that such right of withdrawal must have the consent of the court – to be exercised at its discretion – for it to be of any effect; third is that withdrawal can be made at any time before judgment is pronounced. And from the same provision, the consequences of withdrawal depend on the stage at which the hearing has reached, if it is before the accused has made his defence, the discharge of the accused will not be a bar to subsequent proceedings, and if the withdrawal is after the accused has been called upon to enter his defence, the withdrawal acts as an acquittal.

23. In **Republic v Leonard Date Sekento [2019] eKLR**, a case cited by the appellant herein, Nyakundi, J. in revising a trial court’s refusal to consent to withdrawal under section 87(a) of the CPC held:

“The essential character of the office of the Director of Public Prosecution under Article 157 of the constitution is that in exercise of its power the principle of independence is guaranteed and availed to the office. In fact, the Article reads that in exercise of his powers or functions the Director of Public Prosecution is not under the direction or control of any person or authority. So in deciding the operation of section 87(a) (b) of the Criminal Procedure Code and its propriety in a particular case one has had to be concerned whether the reasons selected is in conflict with the constitution.

However, there are exceptional circumstances on the courts ability to regulate the Director of Public Prosecution jurisdiction. In other words, when he acts improperly, not for the interest of justice, acts beyond the powers vested by the constitution or carrying out some arbitrary objective under the guise of discharging the functions of the office of prosecution...

More importantly, where either of the sub-sections under sections 87(a) and (b) of the code are invoked an aggrieved party has sufficient avenues to further his rights under the bill of rights. The act of a likelihood to re-open the case against an accused person should not be a bar to decide to withhold consent under section 87 (a) of the Criminal Procedure Code. The constitutional provision of Article 50 engraves fair trial rights until final Judgment is pronounce by the court. It's therefore immaterial for the court under section 87(a) of the Criminal Procedure Code to prohibit withdrawal on grounds that the accused would suffer prejudice if fresh charges are to be filed by the state."

24. Therefore, in view of the foregoing the court can decline to consent to a withdrawal under **Section 87(a)** of the **Criminal Procedure Code** where there are clear and cogent reasons and that the fact that the accused would be prejudiced with the likelihood of fresh charges is immaterial. The court ought to restrain from acts which would amount to the curtailment of the DPP's constitutional power of withdrawal under **Article 157 (6) (c) and (7) of the Constitution**. However, the court ought to carefully consider each circumstance in the interest of justice.

25. Additionally, it is trite law that the Director of Public Prosecutions in exercise of its powers under Article 157 (11) above shall have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process and that the court must also exercise its discretion under Section 87 (a) and Article 157 (6) and (8) judiciously.

26. Coming to the instant case, the trial magistrate in disallowing the appellant application to withdraw the case under section 87(a) of the Criminal Procedure Code noted as follows: -

"Secondly, I note that this case is at an advanced stage. The court has heard a total of 11 witnesses. The court observed that the witnesses contradicted each other. To say the least the quality of evidence presented so far is very weak and most likely the case would have ended at no case to answer. In my humble view it would be very unfair to the accused persons if they were to be rearrested and charged afresh on basis of the same evidence"

27. The Court went ahead and acquitted the Respondents pursuant to section 210 of the Criminal Procedure Code which provides for the **"Acquittal of accused person when no case to answer"** as follows:

"If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

28. In view of the above, it is clear to me that the issue before this court narrows down to a determination as to whether the trial magistrate exercised his discretion judiciously. The New Zealand Supreme Court in the case of **Kacem v. Bashir (2010) NZSC 112; (2011) 2 NZLR 1 (Kacem)** in this regard held at [paragraph 32] that:

"In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong."

29. Further, it is trite that the Court sitting as an appellate court should not interfere with the exercise of the discretion of another court unless it is satisfied that the court in exercising its discretion has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of its discretion and that as a result there has been injustice as was held in **Mbogo v Shah [1968]EA 93**.

30. In this case, it is clear to me that the trial magistrate in disallowing the appellant application to withdraw the case under section 87(a) of the Criminal Procedure Code exercised his discretion injudiciously. The trial court did not consider whether the prosecution acted improperly, not for the interest of justice, acted beyond the powers vested by the constitution or was carrying out some arbitrary objective under the guise of discharging the functions of the office of prosecution...

31. Nor did trial court note more importantly, that when either of the sub-sections under sections 87(a) and (b) of the code are invoked an aggrieved party has sufficient avenues to further his rights under the bill of rights. The act of a likelihood to re-open the case against an accused person should not be a bar to decide to withhold consent under section 87 (a) of the Criminal Procedure Code.

32. The constitutional provision of Article 50 engraves fair trial rights until final Judgment is pronounce by the court. It's therefore immaterial for the court under section 87(a) of the Criminal Procedure Code to prohibit withdrawal on grounds that the accused would suffer prejudice if fresh charges are to be filed by the state.

Conclusion

33. I have considered the entire record herein and carefully considered the trial court ruling and in my view there was nothing to warrant the trial magistrate to disallow the withdrawal of the charges under section 87 (a) of the Criminal Procedure Code. I therefore find the instant appeal meritorious.

34. Thus, court makes the following orders;

(i) **The order of acquittal by the trial court under section orders 210 of the CPC is set aside and the court orders that the charges in subordinate court are withdrawn under Section 87 (a) CPC and the respondents stand discharged.**

DATED, DELIVERED AND SIGNED AT GARISSA THIS 28TH DAY OF OCTOBER, 2020.

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C. KARIUKI

JUDGE