



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL REVISION NO. 1 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

LEONARD DATE SEKENTO.....RESPONDENT

(Being a Revision from the decision of Hon. Chesang (RM) in Criminal Case No. 925 of 2016 dated 6/12/2017 declining to consent the withdrawal application under section 87(a) of the Criminal Procedure Code)

RULING

Background

Leonard Date Sekento, hereinafter referred as the Respondent was charged and being prosecuted of the following offences.

Count 1 – obtaining money by false pretenses contrary to section 313 of the Penal Code.

Count 2 – on diverse dates between the month of January, 2013 and 10th June, 2016 at unknown place within the Republic of Kenya, with intent to defraud, forged a false document namely a title deed purporting it to be the genuine title deed of land parcel number Kajiado/METO/590.

Count 3 – on diverse dates between the month of January, 2014 and 10th June 2016 at Kajiado township of Kajiado Central Sub-County, with intent to defraud, uttered a false document namely a title deed purporting it to be the genuine title deed of land parcel number Kajiado/METO/590 by presenting it for use by DOROTHY JEMATOR KIMENGECH.

The respondent pleaded not guilty on all the counts; pursuant to the statement of charges filed in court. The applicant was under a duty to summon witnesses to prove the case against the respondents. From the record no such witnesses has testified but on diverse date indicative of 30/6/2016, 6/4/2017, 22/5/2017, the prosecution sought to withdraw the statement of charges under section 87(a) of the Criminal Procedure Code.

The record directly reflects that in all those applications the motion of state to withdraw was objected to and declined by the trial magistrates Hon. Mbungi and Hon. Kasera. The set charges were ordered to proceed for trial unless by order of the court for good cause shown from the side of the prosecution.

On 17/8/2017 the prosecution through Mr. Igonga applied under section 87(a) of the Criminal Code for permission to withdraw the charges against respondent. The respondent objected and pleaded to the court not to consent to the application for withdrawal. The Resident Magistrate gave her ruling on 6/12/2017 dismissing the application against the state and ordered the case to proceed to full hearing.

Mr. Igonga, Senior Principal Prosecution Counsel approached the High Court under a letter dated 2/2/2018 to exercise its powers of revision and quash the order of dismissing the application with a direction to commence the trial and hear the case.

In the memorandum of revision Mr. Igonga not only referred to the ruling dated 6/12/2017 but likewise to previous decision by Hon. Mbungi (RM) dated 26/10/2016. The main grounds of revision attached in Mr. Igonga's letter were that:

(a) The court has discretion either to allow or refuse to give its consent to such withdrawal

(b) Only in exceptional cases that such consent should be withheld since the prosecution in a court of law should be left to the prosecutor

(c) No fundamental rights and/or freedom of the respondent herein were infringed or threatened by the prosecution

(d) Confrontations between the prosecutor and the court in cases where the prosecutor wishes to withdraw should be discouraged

(e) The law does not prescribe the grounds the court should consider before determining an application for withdrawal under section 87(a) of the Criminal Procedure Code, Cap 75 Laws of Kenya

(f) The Hon. Magistrate did not give sufficient cause and/or reasons in declining the application by the prosecution to withdraw the case.

On the basis of the above grounds, the state submitted that as of necessity with respect to section 87(a) of the Criminal Procedure Code, the right to withdraw should not be withheld in a manner that stifles the powers conferred to the Director of Public Prosecutions under article 157 of the Constitution.

Discussion

The issue for determination is whether the trial courts presided over by Hon. Mbungi (RM) and Hon. Chesang was vested with the authority to restrict and consent to the withdrawal of the charges under section 87(a) of the Criminal Procedure Code.

The Law

With regard to the powers of the Director of Public Prosecution he constitution under Article 157 (6), (7), (8), (10) and (11) vested him with express powers to prosecute all criminal cases on behalf of the state. The broad language of the Director of Public Prosecution to initiate, take down, continue or choose to discontinue any criminal prosecution before a court of law.

The constitutional and statutory responsibility to discharge any of these functions squarely rests with the Director of Public Prosecution. The consideration to initiate or discontinue a criminal proceeding is only to be weighed against the broader doctrine of justice for the public.

An important element of the power to initiate, undertake or withdraw any criminal proceedings by the prosecution is to ensure justice is not only seen to be done but that justice is done in the matter.

In this context section 87(a) of the Criminal Procedure Code which is relevant to this application permits the prosecutor to apply before the court seized of the case to withdraw the charge or charges facing an accused person at any time before final Judgement. This power is deemed to be exercised in the interest of the administration of justice and to avoid abuse of the process.

According to section 87(a) of our code the public prosecutor may with the consent of the court at any time before judgment withdraw from the prosecution of any person and upon withdrawal:

(a) If it's 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 the exercise of judicial discretion in determining between the two parameters is to ascertain that the derived power on both ways is reasonable and rationale to the objective sought to be achieved.

A central principle to be borne by the trial court is whether the threshold has been met before either of the decision in (a) or (b) is reached to discharge or acquit the accused person.

In my view a trial court exercising discretion under section 87(a) or (b) of the criminal code whether in the trial construing of the provisions the prosecutor has acted beyond his constitutional powers. If the application passes the test set by the legislature, then it would not be of the business of the court to control the prosecutor acting in accordance with his constitutional role and enabling provisions of the code.

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.

Placing reliance on the above provisions and the powers of this court on revision under section 362, of the Criminal Procedure Code and supervisory jurisdiction under Article 165 (6) and (7) of the constitution, I make the following observations:

This is a case where the respondent had been investigated and found to be culpable for serious offences as pointed out in the charge sheet. The role of the court is clearly defined under Article 50(1) of the constitution solely to decide fairly and independently on the cases brought

and filed by respective parties including the state. The jurisdiction of subordinate courts is well defined in the respective statutes and must therefore act within the bounds of that authority.

As regards the ambit of section 87(a) (b) of the Criminal Procedure Code the trial magistrates in both situations lost sight on the provisions to grant relief by the prosecution. The Learned Magistrates delved into the wrong interpretation of the law in order to withdraw consent to permit the prosecutor to withdraw the charges.

My reading of section 87(a) and (b) of the Criminal Procedure Code in its language is meant to advance the administration of criminal justice and not to frustrate it. It is apparent from the two impugned orders in this case the approach taken by the Learned Magistrates was a stringent interpretation denying both parties right to a fair hearing.

In the case at hand there is no ambiguity to the applications sought to be considered by the court in respect to the language of section 87(a) of the Criminal Procedure Code. To consider the application, the trial court was under a duty to appraise the provisions of section 87(a) subject to Article 157 (6), (7), (8) and (10) of the constitution, on the power conferred upon the Director of Public Prosecution to commence, continue or discontinue any proceedings pending before a court of law. That the spirit and tenor of judicial discretion is to advance the objects and principles of a right to a fair trial under Article 50 of the constitution. The fact that Article 157 empowers the Director of Public Prosecution to prosecute all criminal cases, the trial court on receiving the request under section 87(a) (b) has the power to judiciously consider the elements of the provisions and proceed to give effect in the manner stated in the code.

Very rightly the Learned Magistrates were bound to set the machinery under section 87 in motion and not to rigidly decline consent. The importance of the right for the prosecutor to be allowed to withdraw the charge at any stage of the proceedings before final judgment should not be denied merely on grounds of prejudice on the part of the accused.

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 provisions of Article 50 engraves fair trial rights until final Judgement 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.

It is in the interest of justice and proper working of a criminal justice system that the Director of Public Prosecution should be accorded the discretion to discontinue or withdraw charges at any time before Judgment.

Having stated these principles in the present case there is an error on the face of the record. Subject to powers of this court under Article 165 (7) and (8) of the constitution and section 362 of the Criminal Procedure Code requiring intervention to preserve the integrity and fair administration of justice in the matter this is a clear case for the writ of certiorari to quash the impugned order. The statutory right requiring the sanction of the court under section 87 (a) of the Criminal Procedure Code when an accused person is already charged with the offence is to me a formal way to inform the court and seek consent to take further directions on the case.

It may be that new facts or evidence has emerged which was not available at the time of arrest and investigations of he accused. Further, the initial decision to prosecute the accused person on the evidence collected is no longer desirable or tenable.

The fairness of the decision by the Learned Trial Magistrates is therefore in question whereas cognizance of the offence remains unresolved. Clearly, the jurisdiction exercised to decide to withdraw consent lays bare the fact that the Learned Magistrate misconstrued the code and acted on no prima facie evidence occasioning an error manifest on the face of the record. Leaving the order to stand will be at best occasion prejudice and a failure of justice to the prosecution and the victims who alleged that their rights had been infringed by the unlawful act of the accused person.

In the result, the applicant's revision succeeds and its hereby allowed by quashing the trial courts' findings and orders dated 26/10/2016 and 6/10/2017 in respect of Criminal Case No. 925 of 2016. It is so ordered.

Dated, delivered and signed in open court at Kajiado this 28th March 2019.

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R. NYAKUNDI

JUDGE

Representation

Mr. Leonard Sekento for the Respondent

Mr. Meroka for Director of Public Prosecutions