



**REPUBLIC OF KENYA**

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

**(CORAM: CHERERE-J)**

**CRIMINAL REVISION NO. 68 OF 2019**

**(From order in Criminal Case No. 745 of 2018 in Chief Magistrate's Court at Kisumu by Hon. S. Telewa (SRM) on 07.03.19)**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**HADIJA RAMADHAN.....ACCUSED**

**RULING**

1. On 27<sup>th</sup> February, 2019, the State made an application to withdraw the assault case in Criminal Case No. 745 of 2018 in Chief Magistrate's Court at Kisumu against the Accused under Section 87 (a) of the Criminal Procedure Code on account of failure to trace witnesses. The trial court disallowed the application and directed that a letter from the DCIO directing that the case be withdrawn be availed in court on 12<sup>th</sup> March, 2019. When the matter came up for mention on 12<sup>th</sup> March, 2019, the state did not present the DCIO's letter and reiterated that the state was liberty to withdraw a case under section 87(a) of the CPC which was for the second time rejected by the trial court which insisted on being presented with a letter of consent from the DCIO.

**Applicant's case**

2. This revision is brought by way of a letter dated 25<sup>th</sup> April, 2019 filed on 28<sup>th</sup> May, 2019. The Applicant holds the view that the trial court erred in not finding that the DPP has power to terminate criminal proceedings under the provisions of Article Section 157 of the Constitution.

3. The powers of the High court in revision cases are contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75). Section 362 specifically provides as follows: -

***“362. 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”.***

4. Article 157 (6) (c) of the Constitution gives powers to the Director of Public Prosecutions to discontinue, at any stage before judgment is delivered, any criminal proceedings instituted by the Director of Public Prosecutions or taken over. Sub-Article 9 provides that the powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

5. From the foregoing, it is apparent that the State Counsel in making an application to terminate the proceedings against the Accused acted lawfully. The requirement for a letter of consent by the DCIO goes against the spirit of Article 157 sub-Article 10 which provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and shall in the exercise of his or her powers or functions not be under the direction or control of any person or authority.

6. Applicant has demonstrated that there exists an irregularity in the *proceedings, finding and order passed by the subordinate court to warrant a revision.*

7. Consequently, the application for revision is considered and found to have merit and it is allowed on the following terms:

**i. The trial court's orders made on 27<sup>th</sup> February and 12<sup>th</sup> March, 2019 declining the application to withdraw Kisumu Chief**

**Magistrate's Court Criminal Case No. 745 of 2018 against the Accused under section 87 (a) of the Criminal Procedure Code are set aside**

**ii. Accused shall appear before the trial court on 02<sup>nd</sup> July, 2019 for formal withdrawal of Kisumu Chief Magistrate's Court Criminal Case No. 745 of 2018.**

**DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF JUNE 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

For the State - Mr. Kakoi

Respondent - Present in person