



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL REVISION NO. 118 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH MITHIKA GITEME.....PARTY

RULING ON REVISION

1. The power to discontinue and/or terminate any criminal proceeding is vested in the Director of Public Prosecution under **Article 157(6) of the Constitution**. That power may be exercised in person or by subordinate officers acting in accordance with general or specific instructions under **sub-article 9 of Article 159 of the Constitution**.

2. The substantive law for the exercise of this power is **sections 82 and 87 of the Criminal Procedure Code**. In his book, **Essentials of Criminal Procedure in Kenya, Law Africa, 2010** explains that, the Director of Public Prosecution may decide to discontinue or terminate the proceedings for many reasons. According to the writer, those reasons may range from the insufficiency or inadmissibility of evidence to support the conviction of the accused, plea negotiations up to the necessity of sentencing out trivial cases.

3. Previously, the Director of Public Prosecution (then under the attorney General) would discontinue and terminate proceedings without the leave of the court. However, **Article 157 (8) of the constitution** now provides that the Director of Public Prosecution may not discontinue a prosecution without the permission of the court. The high court also has supervisory jurisdiction to ascertain whether the Director of Public Prosecution's power and/or discretion is being properly exercised.

4. As early as 2004 before the 2010 Constitution 2010 was promulgated, the courts were alive to the fact that the aforesaid powers of the DPP could be abused. In **Alielo v Republic [2004] 2 KLR 333 Onyancha J** held:-

“In my view, the Attorney General enjoys, both constitutional and statutory discretion in the prosecution of criminal cases. No other person nationally controls his said powers. However, like any other discretion, such discretion is not to be arbitrarily exercised. This is because the Attorney General's power in the prosecution of criminal cases will almost without exception, involve or touch on the rights and freedoms of the individual.

While such power is necessary for the protection of the common good of society ie. to punish wrongs against society, the exercise of the same must be carried out with caution to ensure that the Attorney General does not put the said individual freedoms and rights in jeopardy. Hence this Court's inherent supervisory jurisdiction to halt the state's power from being exercised in a manner or to the extent where such exercise will jeopardise the individual rights and freedoms. In a case, therefore, where this Court is of the view that any criminal prosecution or the termination thereof, is an abuse of the process of the Court and/or is oppressive or vexatious, that is to say, it has no foundation or is brought recklessly and for extraneous purpose, the Court will interfere with it....”

5. In this case, **Joseph Mithika Giteme** was on 15th April, 2016 charged with the offence of giving false information to a person employed in the public service contrary to **section 129 (a) of the Penal Code**. He pleaded not guilty whereby the matter was to proceed for hearing.

6. On 10th January, 2017, the prosecution applied to withdraw the case under **section 87 (a) of the CPC**. The complainant who seems to have been in court strenuously objected to that application. By a reasoned ruling made on 23rd March, 2017, **J. W. Wang'ang'a, RM**, dismissed the application on the basis that the prosecution had not proffered any grounds to withdraw the case.

7. Subsequently, the Magistrate hearing the matter recused himself and the matter came up before another magistrate on 22nd November, 2018. On that day, the prosecution once again made an attempt to withdraw the case. By a ruling made 5th December, 2018, the new trial court referred the matter to this court for review of the earlier orders by **Mr. Wang'ang'a RM**.

8. I have considered the record. In his reasoned ruling of 23rd March, 2017, **Wang'ang'a RM** had observed:-

“If the Prosecution believed that there were reasonable grounds to charge the accused persons and indeed arrested and charged him I do not then see any point to discontinue the matter. That action would be an abuse of the court process, oppressive and unfair if no justified reasons are given like the case here. You cannot make a decision then insist it is fair and in good faith when you do not give enough and sufficient reasons that meet constitutional threshold. The victims’ rights and views are as important as those of the accused person and must be taken into account. I say so because if the letter by Mr. Ondari is what provoked this application, then the same did not consider the views of the complainant. It is only the court seized with the matter which can determine parties’ rights conclusively and that is why perhaps the complainant is concerned.....”

9. The prosecution had indicated that it was to appeal against that decision but it seems that it abandoned that route. That well reasoned ruling gave reasons why the prosecution could not be allowed to withdraw the case. It was not an irregular order or proceeding that is amenable to this court’s powers of review under **section 362 of the CPC**.

10. The powers of this court under that section are limited to ascertaining the regularity or otherwise of an order or proceeding. Since the trial court had properly delivered itself on the issue, there can be no review of that ruling.

11. In view of the foregoing, I find that the subsequent application for withdrawal amounted to an appeal against the earlier order refusing the withdrawal. There can be no better abuse of both the power to withdraw as well as abuse of the court process than this. The DPP should proceed and prosecute the matter in accordance with law.

12. Accordingly, I direct that the matter be mentioned before the trial court for expedited hearing.

DATED and DELIVERED at Meru this 25th day of June, 2019

A. MABEYA

JUDGE