



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: R. MWONGO, J.

HIGH COURT CRIMINAL REVISION NO. 18 OF 2019

REPUBLIC.....APPLICANT

VERSUS

ARNOLD AGUVASU.....RESPONDENT

JUDGMENT

1. By a motion filed on 8th May 2019, the applicant prays that:

“this court be pleased to revise , vary and/or set aside the orders given on 29th April, 2019 by Hon. J. Karanja, SPM in Chief Magistrate’s court criminal case no. 125 of 2016, so as to accord fair administration of justice”

2. The motion being one for revision, this court called up the trial court file and perused the proceedings. It noted that the exchange leading to the orders given by the trial court which are impugned is as recorded in the proceedings as follows:

“Prosecutor: the file has not been availed to court. We had a last adjournment. In the circumstances, I pray to withdraw the matter under section 87(a) Criminal Procedure Code.

Mr. Kiplagat: The accused lost his job over this and he has been coming to court. He wishes to get back his job and if the case is withdrawn under Section 87 (a) of the Criminal Procedure Code, the file will still not be fully closed and there will a yoke over his head. He will not be able to continue with his life.

Court: Sentiments of the defence are noted. The matter had been heard up to PW4. Withdrawing the charge at this point will be.....to the accused as pointed out by Counsel. If the prosecution is unable to proceed at this point, they should close their case.

Prosecutor: I maintain my application to have the matter withdrawn. As it has been declined, I leave it to court.

Court: In the circumstances, the prosecution’s case shall stand marked as closed. Ruling on 24th May, 2019.”

3. The application is supported by the affidavits of the 3 witnesses who were yet to testify, namely, Sergeant Joseph Waweru, Joram Nganga and Inspector Vincent Chelongo. Essentially, the affidavits are to the effect that the witnesses had all arrived and sat in court No 1 before 9.00am, which, according to the prosecution, is where the case had always been held. They were with one Sgt Joseph Waweru who is attached to Banking Fraud Investigation Unit, and he handed over the police file to the prosecutor in that court. He was later informed that the matter had not been called out in that court. When they checked in the only other court sitting – court no 3 – the matter had been called out there and that court had ruled on the case as already set out aforesaid. The prosecution now seeks the review of the closure orders and the re-opening of the said case.

4. The applicant relies on **Article 165(6) and (7)** of the constitution together with **Section 362, 364 and 365** of the **Criminal Procedure Code** which give the High court supervisory jurisdiction to call for and examine the record of any criminal proceedings before any subordinate court, and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

5. The applicant also argues states that the trial court denied them the right to withdraw the matter to allow them to follow up on why the witnesses were not present in court on the hearing date. It submitted that the respondent is not in custody and does not, in any event, face much prejudice if the prosecution is allowed to call the remaining witnesses.

6. The application is opposed by the Respondent through a replying affidavit dated 20th May 2019.

7. The Respondent submitted that the applicant did not request to adjourn the matter but immediately opted to withdraw the case; and that the application for withdrawal was dismissed after the defence gave compelling reasons why the matter should not be withdrawn. Some of the reasons include the fact that the respondent works in the service industry and the case has prevented him from getting further employment since he is unable to get a certificate of good conduct since the police treat a withdrawn matter as incomplete.

8. Further, the defence states that the Respondent wishes to seek his terminal dues from the previous employer and the same would be greatly hampered by this case if the same was not concluded, a submission which was not made to the trial court.

Issues

9. Only two issues arise for determination:

1. Whether the right to withdraw suit by DPP should have been granted
2. Whether the prosecution case can be re-opened.

Analysis and determination

Withdrawal of a case under Section 87(a) CPC

10. Both parties filed their written submissions which I have carefully considered.

11. The application by the prosecutor was under **Section 87(a)** of the **CPC** which provides as follows:

“In a trial before a subordinate court a public prosecutor may with the consent of the court or on the instruction or the Attorney General 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.”

12. The above section shows that the DPP is allowed to withdraw a prosecution at any time before judgment. **Section 87** must, however, be read together with **Article 157(6), (7) and (8)** of the **Constitution**. Article 157 (6) entitles the DPP to discontinue criminal proceeding at any stage before judgment. **Article 157(7)** obliges the court to acquit the accused if the withdrawal is after the prosecution has closed its case.

13. **Article 157(8)** of the Constitution provides that:

“The Director of Public Prosecutions may not discontinue a prosecution without the consent of the court.” (Underlining added)

14. Thus, the DPP must have the consent of the court to effect the withdrawal. The grant of such consent is a constitutional discretionary power vested in the court and will thus be granted on a case by case basis. The court, in determining whether or not to grant such consent, must do so upon an application of judicious principles. These will include fairness or balancing the rights of the parties, a consideration of the prejudice that any of the parties may suffer, a consideration of the nature of the offence, and the public interest elements, and the peculiar circumstances pertaining to the case.

15. The court should also have in mind the question whether the prosecutor, in seeking the discontinuance of the case, is acting in accord with **Article 159** of the **Constitution** and had:

“ ...regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”

16. When a prosecutor exercises his powers, he is deemed to be doing so for and on behalf of the Director of Public Prosecutions, acting in accordance with general or special instructions of the DPP pursuant to **Article 157(9)** of the Constitution.

17. In their submissions, the prosecution relied on the criminal revision case of **Republic v Leonard Date Sekento, [2019] eKLR** where the trial court declined to consent to a withdrawal application and Judge Nyakundi, J was, however, in agreement with the prosecution in that the right to withdraw under **Section 87(a)** of the **Criminal Procedure Code** should not be withheld in a manner that stifles the powers conferred to the DPP under **Articles 157** of the Constitution. In particular, I agree with the learned Judge when he stated that:

“The act of a likelihood to re-open the case against the 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 (sic) fair trial rights until final judgment is pronounced by the court”

18. That argument of the likelihood of the prosecution later re-opening the case was the key argument used by the defence in the trial court, in addition to the argument on delay given the age of the case.

19. The prosecution also relied on the criminal revision case of **Republic v Paul Mutuku Magado [2019] eKLR**, which dealt with factors to be considered when making a decision on adjournment, and held:

“The above provisions leave no room for doubt that an adjournment is granted at the discretion of the court. It must however be exercised fairly and justly upon reasonable grounds being advanced. It must not be forgotten that the purpose of a trial is to give parties a fair level playing field where each will be given an opportunity to present its case. The said court process should however not be subjected to abuse. In making reference to the civil jurisdiction, it has been said time and again that the court has a duty to sustain a suit by giving parties a full opportunity to prosecute or defend their cases. In drawing an analogy between the civil jurisdiction and criminal jurisdiction, a trial court hearing a criminal case has the duty to do justice to the parties that go before it by giving a reasonable opportunity to the complainant to present his/her case and for the accused person to do likewise.” (Underlining added)

20. I note from the proceedings of the lower court that the learned trial magistrate did not consider the option of reserving his decision on withdrawal and granting an adjournment on strict conditions on the ground that the prosecution had twice failed to avail the police file in court. Further, no consideration was given to the fact that the accused had also played a role in delaying the proceedings in September 2017 and in July 2018. Additionally, no consideration was given to the fact that the offence with which the accused is charged is serious, a felony – two counts of stealing by servant of a bank – with liability of imprisonment for seven years, and the effect on the interests of the complainant bank.

21. Finally, I also note from the record that upon the prosecutor making his application and the defence objecting, the trial court immediately made its views known and recorded them even before giving the prosecution an opportunity to reply to the objection by the defence. This could give the perception of unfair treatment or that the court had already made up its mind before allowing the parties to fully ventilate their positions. In this regard, the proceedings show that after the objection, the court stated that it had noted:

“the sentiments of the defence ...” that *“withdrawing the charge at this point will be [unfair] to the accused”* and that *“if the prosecution is unable to proceed at this point they should close their case”*

Thus, the prosecution then resignedly stated:

“I maintain my application to have the matter withdrawn. As it has been declined, I leave it to court” (Underlining added).

22. In light of the foregoing, I think that the decision of the trial court was improper. It appears to have been influenced only by the facts of delay and the likelihood of unfairness to the accused. The trial court did not take into account other relevant circumstances – such as prior delays occasioned by the defence side, the nature of the offence, the fact that the hearing had been transferred from court 1 then to court 6 later renamed court 3 leading to a measure of confusion. In addition to these missteps is the fact that there was an element of procedural impropriety in the trial magistrate giving and recording his opinion before giving the prosecution a chance to respond to the objection, which could give the perception of prejudice.

23. In light of the foregoing, I would therefore revise the trial court’s decision and allow the prosecution to withdraw the case under **Section 87(a)** of the **Criminal Procedure Code**.

Whether in the prosecution case be re-opened

24. The applicant has also sought that the case be re-opened. I understand this request to emanate from the fact that at the time the prosecution sought to discontinue the case, the prosecutor was not aware that their witnesses were in fact in another court awaiting the hearing.

25. However, since no request has or was made to the trial court concerning a request to re-open, and thus no decision was made by the trial court on re-opening the case, this is not a proper matter for revision by this court. It is a premature issue. This court has concluded the revision by determining that the trial court improperly declined withdrawal under **Section 87(a)** of the **Criminal Procedure Code**. That is the only matter on which the revision is applicable.

Disposition

26. In conclusion, I hereby revise the trial court’s decision by setting aside the order declining the withdrawal under **Section 87(a)** of the **Criminal Procedure Code** and do hereby allow the said withdrawal.

27. For the avoidance of doubt, no decision is made herein with regard to re-opening the case in the trial court as this is a revision matter. I need only make two comments in that respect: First, that the constitutional and statutory prerogative to re-open a withdrawn case is retained under **Section 87(a)** of the **Criminal Procedure Code** by the prosecution. Second, the case in the lower court is a 2016 matter and should be concluded expeditiously.

28. Orders accordingly.

Dated and Delivered at Naivasha this 31st Day of October, 2019

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Maingi for the Applicant
2. Kiplangat for the Respondent
3. Arnold Aguvasu - Respondent - present
4. Court Clerk - Quinter Ogutu