



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. APPLICATION NO.439 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**ABDI HAMID.....1<sup>ST</sup> RESPONDENT**

**MOHAMMED ABDI MIRE.....2<sup>ND</sup> RESPONDENT**

**RULING**

The Respondents were charged with the offence of **obtaining money by false pretences** contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on diverse dates between 13<sup>th</sup> and 27<sup>th</sup> July 2016 at Nairobi CBD in Nairobi County, the Respondents, with the intent to defraud, obtained the sum of Kshs.1,000,000/- from Hussein Mohammed by falsely pretending that they were in a position to sell to him six smart modern kiosks, a fact the Respondents knew to be false. When they were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. They were each released on a cash bail of Kshs.200,000/-. They deposited the cash bail in court. Plea was taken on 27<sup>th</sup> February 2017.

On 10<sup>th</sup> April 2018, Mr. Ondieki the Advocate for the Respondents informed the court that the parties had been reconciled and wished to have the case withdrawn under **Article 159(2)(c)** of the **Constitution**. He informed the court that the complainant was in court and wished to address the court on his willingness to withdraw the case. The complainant, Mohammed Hussein took to the stand and informed the court that he had been reconciled with the Respondents on consideration that he be paid the sum of Kshs.400,000/- that had been deposited in court by the Respondents as cash bail. The Respondents did not have objection to the said sum being released to the complainant. Mr. Charles Mwita, the investigating officer told the court that he had no objection to the complainant withdrawing the complaint, the parties having been reconciled. Ms. Tum for the State opposed the application. Her sole ground for opposing the application was that the case could not be withdrawn in the absence of the 1<sup>st</sup> Respondent who was not in court at the time. Mr. Ondieki for the Respondents told the court that he had the full authority of the Respondents to record the consent withdrawing the complaint against them.

The trial court after considering the objection by the prosecution, dismissed the same and granted the complainant's application to have the charge withdrawn under **Section 204** of the **Criminal Procedure Code**. The court noted that it was promoting reconciliation between the parties in light of the provisions of **Article 159(2)(c)** of the **Constitution**. The court further ordered that the cash bail deposited by the Respondents to the sum of Kshs.400,000/- be released to the complainant's bank account in accordance with the agreement reached by the parties. The trial court noted thus:

**“Even though he (1<sup>st</sup> Respondent) is not present in court today, his advocate is. Substantial justice would not dictate that this court declines a move to reconcile the parties merely because one of the accused persons is not present in court. What he would have told the court if he were present has been stated by his counsel whose instructions to represent have not been disputed by the prosecution.”**

This Ruling provoked the present application wherein the prosecution reiterated that the trial court could not have withdrawn the charge in the absence of the 1<sup>st</sup> Respondent who had not been given dispensation not to attend court on the particular day. Ms. Sigei for the State stated that in view of the serious nature of the offence that the Respondents were facing, the Director of Public Prosecutions ought to have been included in the consent pursuant of **Article 157** of the **Constitution**. She insisted that it was unprocedural for the trial court to mark the matter as settled by reconciliation yet one of the parties was not present in court. Mr. Ondieki for the Respondents reiterated what he had stated before the trial court. He stated that it was not necessary for the 1<sup>st</sup> Respondent to be present in court when he had been there to represent him. He further noted that since the complainant and the investigating officer were in court, no one was prejudiced by the order issued by the trial magistrate. He therefore urged the court to dismiss the application.

This court has carefully considered the rival arguments made by the parties to this application. The issue for determination by this court is not whether the trial court had jurisdiction to issue an order under **Section 204** of the **Criminal Procedure Code** withdrawing the charge against the accused where the court was informed that the parties have been reconciled. The prosecution's complaint is that the trial court could not make such an order in the absence of one of the accused persons. **Section 204** of the **Criminal Procedure Code** provides thus:

**“If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.”**

**Article 159(2)(c)** of the **Constitution** provides thus:

**“In exercising judicial discretion, the court and tribunals shall be guided by the following principles –**

**a. ...**

**b. ...**

**c. Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3);”**

Clause 3 of **Article 159** is not relevant to this application as it relates to traditional dispute resolution mechanisms. Courts are therefore under constitutional direction to promote reconciliation where it forms the opinion that the ends of justice will be met. This court agrees with the prosecution that a complainant cannot withdraw a complaint without their concurrence as provided **under Article 157(6) and (10)** of the **Constitution** which grants the Director of Public Prosecutions power to discontinue proceedings at any stage before judgment is delivered and also to exercise his powers to prosecute or not to prosecute without consent or authority from any person.

In the present application, it was clear to this court that the presence in person of the accused persons was not required where their advocate indicated to the court that he had their authority to compromise the case by reconciliation. Taking into consideration the nature of the charges that had been preferred against the Respondents, this court cannot fault the trial magistrate for overruling the prosecution and allowing the complainant to withdraw the complaint. This court therefore, finds that the prosecution's objection to the withdrawal of the charge had no legal basis. The prosecution was also under constitutional obligation to promote reconciliation where the interests of justice and public interest were not in issue.

The upshot of the above reasons is that the Applicant's application lacks merit and is hereby dismissed. It is so ordered.

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF OCTOBER 2019.**

**L. KIMARU**

**JUDGE**