



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 97 OF 2019

ALFRED ONGIRI NYANDIEKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The revision application herein was brought by way of a letter dated 22<sup>nd</sup> March, 2019 by the law firm of Nyandieka and Associates Advocates. It was signed by Alfred Nyandieka Advocates. The main relief sought is that the court calls for the original record of the Milimani Cr. Case No. 875 of 2017 and revise by setting aside the order of the learned trial magistrate, Hon. F. Andayi made on 12<sup>th</sup> March, 2019 ordering the termination of the trial under **Section 89(5) of the Criminal Procedure Code**. The application is brought under Section 364 of the Criminal Procedure Code.

2. The powers of this court in exercising revisionary jurisdiction are set out under **Section 362 of the Criminal Procedure Code** which provides that 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, or as to the regularity of any proceedings of any such subordinate court. Section 364 on the other hand provides for the various orders that the court can issue upon exercising its powers under Section 362.

3. In the present case, the main contestation was that the learned trial magistrate Hon. F. Andayi terminated the trial court proceedings pursuant to **Section 89(5) of the Criminal Procedure Code** whereas clearly, the proceedings had earlier been terminated in a **High Court Constitutional Petition No. 223 of 2017** by Hon. W. A. Okwany, J on 24<sup>th</sup> January, 2019. Learned counsel for the Applicant Mr. Olonga and Mr. Oginga argued that a termination of the case under **Section 89(5)** would enable the prosecution to cause the re-arresting of the Applicant and have him charged afresh. In their view, the learned trial magistrate failed to take into account that the entire court proceedings had been quashed and therefore, a termination under **Section 89(5)** was tantamount to reopening the proceedings in future. It was the argument of the counsel therefore that the order of the learned magistrate would open a Pandora's box for abuse of the court process and a visit of malice against the Applicant.

4. Both counsel for the Applicant underpinned the object of a revision application which was to cure a manifest irregularity and give proper directions in criminal proceedings. That the question in this application was whether substantial injustice was done to the Applicant in ordering a termination of the proceedings under **Section 89(5)** consequent which the court ought to interfere with it. It was the argument of the counsel that the order of the learned magistrate denied the Applicant justice by opening an avenue for continued prosecution. That is to say that if a future prosecution was initiated, he would be denied the fruits of justice accorded to him in **Petition No. 223 of 2017**. Counsel urged the court to exercise its discretion by setting aside the order of the learned trial magistrate thereby according the Applicant access to equal protection of the law pursuant to **Article 27(1) of the Constitution**.

5. Learned State Counsel Mr. Momanyi for the Respondent conceded to the application. He added that a ruling in **H. C. Misc. Cr. App. No. 809 of 2019 - DPP VS Kundip Mandan Sign** underscored that **Section 89(5)** of the Criminal Procedure Code had been misconstrued by courts as giving lower courts powers to refuse formal charges presented by the prosecutors whereas the refusal of formal charges was spelt out elsewhere in the statutes.

6. I have accordingly considered the respective submissions and I take the following view of the application. What is paramount for consideration is which order preceded the other, which then would guide this court on the issue(s) for determination. The judgment in **H. C. Petition No. 223 of 2017** was delivered on 24<sup>th</sup> January, 2019 whereas the orders of the learned magistrate were issued on 12<sup>th</sup> March, 2019. That would drive me then to consider what the High Court in the Petition said. The final orders were in the following words:

*a) A declaration is hereby issued that the initiation, maintenance and prosecution of the Criminal Case No. 875 of 2017 Republic vs Alfred Ongiri Nyandieka at Milimani against the Petitioner herein is an abuse of the Criminal justice system and a*

*contravention of the Petitioner's constitutional rights to freedom and security of the person, right to freedom of movement and right to secure protection of the law.*

*b) A declaration that the institution, maintenance and prosecution of Criminal Case no. 875 of 2017 Republic vs Alfred Ongiri Nyandieka at Milimani herein is oppressive, malicious and an abuse of the court process.*

*c) An order prohibiting continuance of Criminal Case No. 875 of 2017 at Milimani Magistrates Court against the Petitioners herein.*

*d) I make no orders as to costs.*

7. Order (c) above is in no terms clear that the Petition prohibited the continuation of **Cr. Case No. 875 of 2017** at Milimani Magistrate's Court against the Petitioner. The Petitioner was the accused in the forestated case where he faced three counts of conspiracy to commit a felony contrary to **Section 393 of the Penal Code** and two counts of forgery contrary to **Section 345** as read with **Section 249 of the Penal Code** respectively. On the date that the learned magistrate issued the orders, in attendance was learned prosecutor Ms. Kirimi and counsel for the accused Mr. Kariuki. Mr. Kariuki submitted before the court that the criminal proceedings had been stopped by the High Court. In response Ms. Kirimi stated as follows:

*“That is the position, I confirm the order and the matter should be terminated.”*

8. The court then delivered itself as follows:

*“The charges are rejected under Section 89(5) Criminal Procedure Code”*

9. From the above excerpts, it is clear that the court was informed of the termination of the criminal proceedings. It however went against the information and instead introduced extraneous matters in the order it made on rejecting the charges under **Section 89(5)**.

10. This court has previously delivered itself that formal charges as drafted in the current prosecutorial dispensation ought not to be rejected under **Section 89 (5) of the Criminal Procedure Act**. See **High Court Misc. Cr. Application No. 809 of 2018** (Supra). Instead, a rejection of the formal charges ought to accrue pursuant to **Sections 134 to 137 of the Criminal Procedure Code**.

11. This court is however aware that this position has not been settled as the ruling was appealed in the Court of Appeal. Be that as it may, in the present case, there was already in the knowledge of the trial court of the existence of the termination of the criminal proceedings by the High Court in the aforesated Constitutional Petition. Therefore, the learned trial magistrate only ought to have pronounced himself in the terms of the orders of the Constitutional Petition. In introducing **Section 89(5)**, he opened a Pandora's box in that the prosecution was at liberty to re-institute the charges against the Applicant. That was not the letter and spirit of the orders of the learned judge in the Petition. Until the judgment in the Petition is appealed, no further charges can be instituted against the Applicant.

12. Needless to state therefore is that the learned trial magistrate was in error in making the order that he made. The said order manifested an impropriety, illegality and incorrectness which this court pursuant to **Section 364 of the Criminal Procedure Code** is called upon to correct.

13. In the result, I find the instant application with merit. I set aside the order of the learned trial magistrate, Hon. Andayi issued on 12<sup>th</sup> March, 2019 rejecting the charges under **Section 89(5) of the Criminal Procedure Code** and substitute it with an order that **Cr. Case No. 875 of 2017 – Republic vs Alfred Ongiri Nyandieka** be and is hereby terminated pursuant to the orders of the Learned Judge, Hon. Justice W. A. Okwany issued on 24<sup>th</sup> January, 2019 in **Constitutional Petition No. 223 of 2017**. It is so ordered.

**Dated and Delivered at Nairobi This 28<sup>th</sup> day of November, 2019.**

**G.W.NGENYE-MACHARIA**

**JUDGE.**

**In the presence of:**

1. *Mr. Oronga for the Applicant*

2. *Mr. Nyandieka for the Respondent*