



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 101 OF 2019**

**ISSAC NOORO THENDUI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **Isaac Njoro Thendui** is the 3<sup>rd</sup> accused in the Chief Magistrate's Court **Criminal Case No. 690 of 2015**. He has approached this court vide a Notice of Motion dated 24<sup>th</sup> May, 2019 seeking an order of stay or the proceedings herein pending the hearing and determination of the appeal filed herein. The main ground on which the application is brought is that the Applicant is aggrieved by the ruling of the learned trial magistrate Hon. Andayi delivered on 26<sup>th</sup> April, 2019 allowing the discharge of the 1<sup>st</sup> accused, the Engineer of the building that collapsed in Roysambu Kasarani under **Section 87(a) of the Criminal Procedure Code**. The Applicant is aggrieved that the 1<sup>st</sup> accused should not proceed in the trial as a prosecution witness rather, as an accused person. It is his case therefore that if a day of the trial proceedings is not granted, the appeal shall be rendered nugatory. The application is supported by the Applicant's affidavit worn on 24<sup>th</sup> May 2019.

2. The Respondent opposed the application vide Grounds of Opposition dated 26<sup>th</sup> July, 2019. In brief, it is stated that the application is an abuse of the process of court and is intended to delay and defeat ends of justice. That the discharge of the 1<sup>st</sup> accused person does not prejudice the case against the appellant. That the DPP was within the provisions of **Article 157(6)(c) of the Constitution** in applying for the discharge of the 1<sup>st</sup> accused person. That the Applicant failed to demonstrate that **Article 157(1) of the Constitution** was violated by the discharge of the 1<sup>st</sup> accused and that **Section 87(a) of the Criminal Procedure Code** was exercised in the interest of the administration of justice and to avoid abuse of the process.

3. The application was canvassed before me on 30<sup>th</sup> October 2019, with learned Counsel Mrs. Kinyua appearing for the Applicant whilst Mr. Momanyi appeared for the Respondent. According to Mrs. Kinyua, the powers to initiate or discontinue original proceedings rest with the DPP and not the court. That in the instant case through, it is the counsel for the 1<sup>st</sup> accused who initiated the process that culminated into the discharge of the 1<sup>st</sup> accused. That the same was done through a letter requesting the DPP to terminate the proceedings and by a letter dated 14/12/2018, the DPP agreed with the counsel.

4. According to Mrs. Kinyua, the 1<sup>st</sup> accused was the engineer of the building that collapsed and was majorly to blame. She referred to the structural engineering drawing (annexture 5 to supporting Affidavit) which concluded that the building collapsed due to poor materials, poor workmanship employed and lack of adherence to specifications. It is argued that the engineer had the responsibility of confirming that the materials were of good quality and that proper workmanship was employed. Thus, liability squarely lay on him. She argued further that the government engineer confirmed that the building began without approved drawings and that the responsibility of ensuring the drawings were done lay with the engineer. It is thus advanced that with the discharge of the engineer no one else would be held responsible for the collapse of the building.

5. Mrs. Kinyua faulted the learned trial magistrate for consenting to the discharge of the 1<sup>st</sup> accused without first interrogating whether the reasons advanced to the DPP for so doing meet the provisions of **Article 157 of the Constitution**.

6. Counsel argued that a great injustice would be occasioned to the developer as he had contracted an architect and an engineer to oversee the construction. It was thus prejudicial to convert the engineer as a prosecution witness. Furthermore, it is the engineer who introduced the contractor to the building because he knew him. She argued that the fairest way forward was to stay the proceedings pending the hearing and determination of the appeal.

7. Mr. Momanyi in opposing the application submitted that the support for the withdrawal of the case against the 1<sup>st</sup> accused was born in an

affidavit sworn by the investigating officer and the learned magistrate attached reasons in conceding to the withdrawal. He submitted that the Applicant would have an opportunity to interrogate the engineer in cross-examination which case will apply to all other witnesses.

8. Mr. Momanyi submitted that **Article 157 of the Constitution** was properly applied. He argued that the Applicant has failed to demonstrate that he was prejudiced by the withdrawal of the case against the 1<sup>st</sup> accused. He urged the court to dismiss the application.

#### **Determination**

9. The Applicant was charged alongside three others with six counts of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code. He is the 3<sup>rd</sup> accused in the trial. The court has already set out the brief background to the case. In brief through, the charges arise from deaths of victims of a building that collapsed in Roysambu Area in Kasarani sub-county within Nairobi County owned by the Applicant on the 2<sup>nd</sup> April, 2015. He is charged in his capacity as the propriety of the building. His dissatisfaction is with a ruling delivered by Hon. Andayi on the 26<sup>th</sup> April, 2019 in which the court allowed the withdrawal of the case against the 1<sup>st</sup> accused Julius Karachi Wagai under **Section 87(a) of Criminal Procedure Code**.

10. His dissatisfaction arises by the fact that the 1<sup>st</sup> accused bore a greater proportion of responsibility having sanctioned the construction of the ill-fated building in his capacity as the contracted engineer. The Applicant argues that in the absence of the 1<sup>st</sup> accused in the trial there will be no one else amongst the accused persons who would bear the responsibility for occasioning the deaths of the victims arising from a poorly structurally constructed building. His argument is that it is the 1<sup>st</sup> accused person who sanctioned the use of poor materials and brought in the contractor who built the building without approved plans.

11. On the part of the Respondent, the DPP properly exercised his powers under **Article 157 of the Constitution** in allowing the request to have the matter withdrawn under **Section 87(a)**

12. It behooves this court to duplicate **Section 87(a) of 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 instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal***

***(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge or an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts.***

13. The DPP exercises his powers over prosecutions pursuant to **Article 157 of the Constitution**. Under **sub-article (6)** the DPP shall exercise state powers of prosecution and may:

***(a) institute and undertake criminal proceedings against any person before any court (other than a Court Martial) in respect of any offence alleged to have been committed;***

***(b) take over and continue any proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and***

***(c) subject to clause (7) and (8) discontinue at any state before judgment is delivered any criminal proceedings instituted by the director of Public Prosecutions under paragraph (b).***

14. Learned State Counsel Mr. Momanyi had regard to **sub-article (6)(c)** in his submission that the DPP exercised his constitutional powers judiciously in conceding to the withdrawal of the case against the 1<sup>st</sup> accused under **Section 87(a) of the Criminal Procedure Code**. It must be borne in mind however that the powers of the DPP outlined above are not absolute because under Sub article (11) ***“in exercising the powers conferred by this article, the Director of Public prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”***. In this case therefore, the court ought to interrogate, *prima facie*, whether in conceding to the withdrawal of the case against the 1<sup>st</sup> accused the DPP had regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

15. I have used the word ‘*prima facie*’ because this application has been instituted as a precautionary measure seeking a stay of the trial court proceedings pending the hearing and determination of the appeal in the parent file. In my view therefore, it is in the pending appeal filed by the Applicant that the court shall holistically analyze and evaluate the manner in which the DPP should exercise his powers in allowing a withdrawal of the case under **Section 87(a) of the Constitution**.

16. However, the court cannot do justice to this application if I did not have regard to the scope under which the DPP ought to judiciously exercise his powers of allowing a withdrawal of a case under Section 87(a). In the case of **Diamond Hasham Lalji and anor vs Attorney General and Four others [2018] eKLR**, the court considered in detail the applicable law and circumstances under which a court can interfere with the discretion of the DPP in exercise of his prosecutorial powers. The Court referred to the **ODPP’s Act NO. 2 of 2013**, more so Section 4 and the policy document referred to as **National Prosecution Policy 2015** formulated by the DPP pursuant to **Section 5 (1)(c) of the ODPP’s Act**.

17. The court observed that ***“the policy among other things, stipulates the factors to be taken into account before a decision to prosecute or not to prosecute is taken including the application of evidential test and public interests and also the factors to be considered before a review of the decision to prosecute or not to prosecute is made.”***

18. Thereafter, the court dissected the concept of the decision to charge to constitute two principles namely; that the evidence available is permissible and sufficient and that public interests requires a prosecution to be conducted. In the present case, and without delving into the merit of the pending appeal, the Applicant advances a case that the strength of the ill-fated building was fully premised on the advice of the engineer who is the 1<sup>st</sup> accused. And that therefore, if he had taken due diligence in advising on the proper materials to be used, and not to allow the building to be constructed without a structural building plan, the building would not have collapsed. To this end, a government structural engineers report attested to this fact and is marked as annexure 5 to the supporting affidavit in the application.

19. The court has had a glance at the report that was forwarded to the Nairobi Division Criminal Investigation Officer, Kasarani vide a letter dated 18<sup>th</sup> May, 2015 by Engineer M. Kimani, Chief Engineer (structural) on behalf of the Principal Secretary Ministry of Land, Housing and Urban Development. The said report is confirmed by Engineer John Gikuru Grade I Engineer, Public Works. The conclusion of it was that the building collapsed due to poor quality of concrete used, use of poor materials, poor workmanship employed and lack of/no adherence to specification.

20. The case for the Applicant is that he personally engaged the 3<sup>rd</sup> accused who in turn brought the contractor. By extension therefore, he is the person who oversaw the nature of the materials; concrete and workmanship employed and used and that therefore it was prejudicial to have the case withdrawn against him yet he bore the greatest responsibility.

21. I do agree that under **Article 157(10)**, the DPP shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his/her powers or functions, under the directions of any person or authority. However that discretion is fettered by **sub-article (11)** because he is required in exercising his powers to have regard to public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process.

22. In rubber stamping **sub-article (11)** the DPP ought to apply **clause (5) of the National Prosecution Policy** where he must have regard to the available evidence and its sufficiency and the public interest. Needless to state, the collapse of the building at Roysambu was a concern of the public notoriety. Further, in his own words, the Applicant states that he engaged the 1<sup>st</sup> accused to oversee the engineering work of the building. A government engineer's report did confirm that the collapse of the building was due to poor engineering workmanship. I would in my mind from the opinion that there is evidence *prima facie* demonstrating the culpability of the 1<sup>st</sup> accused.

23. According to the Respondent, the process of the withdrawal of the case was initiated by the investigating officer one, Corporal Wilson Nzioka. He swore an affidavit on the 27<sup>th</sup> February, 2019 which was filed in court on 28<sup>th</sup> February, 2019 in persuading the court to allow the withdrawal. It annexes the same government engineering report cited by the Applicant outlining the course of the collapse of the ill-fated building. It also annexes a comprehensive statement of the 1<sup>st</sup> accused in which he proposes to rely on the structural engineering drawing he gave to the developer for use during the construction of the building. It clearly outlined the nominal mix ratio of the cement to sand. Unfortunately, from the government engineers report, this was not adhered to. Thus, the engineer had not control over what the developer and the contractor did after he made his professional advice.

24. It is also clear that he made a drawing of a building with four floors whereas at the time of the collapse, the building had six floors. Definitely, the developer and the contractor were in control of the size of the building. In as much as proper drawing and professional structural specifications of the strength of the materials to be used were given by the 1<sup>st</sup> accused, other parties who played key roles in the construction violated this professional advice. It is trite therefore, even if the prosecution of the 1<sup>st</sup> accused proceeded, *prima facie* the DPP may not have sufficient evidence to warrant a conviction. At this stage and once again warning myself that I should not be seen to be delving into the merit of the appeal, it is my view that the DPP did not err in consenting to the proposal by the investigating officer to have the case withdrawn against the 1<sup>st</sup> accused under **Section 87(a) of the Criminal Procedure Code**.

25. There is the argument that the process of the withdrawal of the case was initiated by the investigating officer as opposed to the DPP himself. It must be borne in mind that the 'eye' of the DPP in the investigation process is the investigating officer. The investigating officer also works hand in hand with the prosecutor directing the prosecutions in court. The advice of the investigating officer having been consented to by the DPP through Senior Assistant Director of Public Prosecutions implies that the advice to terminate the proceedings against the 1<sup>st</sup> accused solely were directed by the DPP. Hence, I have no doubt in my mind that the application herein is without merit. It does not however fetter the Applicant's right to pursue the appeal, reasons wherefore this court has avoided a detailed analysis of the case law relied on in the application or analysis of the Grounds of Appeal raised in the appeal.

26. In the result, I decline to stay the criminal proceedings pending the hearing and determination of the appeal because in my view the DPP did not abuse his power. I am also of the view that the learned trial magistrate did not misdirect himself in allowing the withdrawal of the case against the 1<sup>st</sup> accused under **Section 87(a) of the Criminal Procedure Code**. I accordingly dismiss the application.

**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. Kinyua for the Appellant/Applicant.
2. Ms. Kimaru h/b for M/s Nyauncho for the Respondent.