



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL REVISION NO. 10 OF 2019**

**GEORGE OTOLO AKETCH.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

(Being a review of the ruling by Hon. E. Muiru Senior Resident Magistrate in Kilungu Principal Magistrate's Court Criminal Case No. 205 of 2019.)

**RULING ON REVISION**

1. **George Aketch Otolu** the Applicant is an accused in Kilungu Principal Magistrate's Court Criminal Case No. 205 of 2019, where he is charged with the offence of "*Trafficking in Narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.*"

The particulars being that the Applicant on the 8<sup>th</sup> day of July 2018 at Kathonzweni township within Makueni county jointly with others before court were found trafficking cannabis (bhang) to wit 321 kilograms and 1806 brooms (bundles) 92 kilograms with a street value of Kshs.2000,000/= in a motor vehicle registration no. KCL 750B make Toyota Wish black in color which was not in medical preparation.

2. The Applicant denied the charge and the matter proceeded to hearing. The prosecution closed its case after calling three (3) witnesses. In its ruling dated 12<sup>th</sup> June 2019 the trial court placed the Applicant on his defence and fixed the case for defence hearing on 16<sup>th</sup> July 2019.

3. On the 16<sup>th</sup> July, 2019, the matter could not proceed as the prosecution applied for an adjournment on the ground that the DPP's office was relooking at the matter. This is what the prosecuting counsel told the court:

*"We are not ready to proceed because this matter has raised a lot of complaints and legal issues in our office as DPP Kilungu. It is a matter that my immediate supervisor Monicah Owenga has requested for a legal brief on our part and we intend to avail it this Friday at Wote. On that basis we pray for adjournment and a date to be able to get exclusive and strict directions"*

4. The court allowed the adjournment and fixed the matter for defence hearing on 30<sup>th</sup> August, 2019.

5. Come, 30<sup>th</sup> August 2019, the defence requested for an adjournment to enable them sort out a few issues in terms of documentation. The prosecution did not oppose the application. The prosecuting counsel proceeded to address the court by stating thus:

*“We will not object. However, we had indicated we needed to seek directions from our superiors which we have received. After immense consultation, we are inclined to review our decision to prosecute this matter further and humbly pray to have it withdrawn under Article 157(6)(c) of constitution as read with section 87A of the Criminal Procedure Code.*

*Our application is premised on firstly (sic) we have been able to get in our possession new evidence, evidence that had we had on accused been (sic) arraigned, we would not have registered the charge. The evidence includes a car hire agreement, M-pesa statements and receipts issued to the 3<sup>rd</sup> parties as regards payments for car hire. We also contend that the investigation officer herein for one reason or another suppressed or did not avail to us the said crucial evidentiary documentation. Hence we find that there are no sound legal principles to enable us to continue to act and (sic)it is an affront to the sense of justice in the society.”*

6. The defence had no objection save that the discontinuation of proceedings should be under section 87(b) and not section 87(a) Criminal Procedure Code.

7. The trial court then ruled and disallowed the application on the following grounds:

*i. That the trial had substantially proceeded.*

*ii. That the investigating officer who was being accused by the prosecution had not been availed a chance to counter the accusations.*

*iii. That the DPP ought to have prepared a substantial brief from its superiors for the court to establish the actual basis for the withdrawal.*

*iv. It was not clear how the new information alluded to had been obtained or came to the attention of the police.*

8. It is on the basis of the above ruling that the Applicant through his counsel’s letter dated 17<sup>th</sup> September, 2019 sought for revision of the said orders by this court.

9. Upon receipt of the said letter, this court called for Kilungu Principal Magistrate’s Court Criminal Case No. 205 of 2019 on the basis of the following provisions of the Law:

**(i) Section 362 Criminal Procedure Code which provides:**

***“The High court may call for and examine the records of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, proceedings of any such subordinate court.”***

**(ii) Section 364 (1)**

***“In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –***

***a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance the sentence;***

***b) in the case of any other order other than an order of acquittal, alter or reverse the order.***

***c) in proceedings under section 203 or 296(2) of the Penal Code, the Prevention of terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the proceeds of Crime and Anti Money***

*Laundering Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court shall be stayed for a period not exceeding fourteen days pending the filing of the application for revision”.*

*(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.*

*Provided that, this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*

10. Both counsel appearing made their submissions when they appeared before this court on 2<sup>nd</sup> December, 2019.

Mr. Nyaberi sought two orders namely:

*i. Reversal of the learned Magistrate’s orders of 11<sup>th</sup> June, 2019.*

*ii. Release of the Applicant’s motor vehicle registration no. KCL 750B.*

11. The application was opposed by the Respondent through learned counsel Mr. Kihara who submitted that this court should allow the trial court to hear the case to conclusion since the application to discontinue the case had been rejected.

12. Having considered the record, and the submissions by both counsel, the issue I find falling for determination is whether the trial court erred in disallowing the Respondent’s application to discontinue Kilungu Principal Magistrate’s Court Criminal Case No. 205 of 2019.

13. The DPP derives his powers to discontinue criminal proceedings from Article 157(6) – (8) of the constitution which provide as follows:-

**The director of Public Prosecutions 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 criminal 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 stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)**

**7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.**

**8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.**

14. All these provisions must be read together with Article 157 (9) – (11) which provides as follows:

**(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.**

**(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions shall not be under the direction or control of any person or authority.**

**(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.**

15. Article 157(6)(c) is key in the matter before this court. There is no time limit as to when and at what stage the DPP may discontinue proceedings as long as it is before judgment is delivered. Secondly, the discontinuation should have been permitted by the court. This is where the real issue lies in this matter.

16. The trial court as early as 16<sup>th</sup> July, 2019 was aware that the DPP had issues with the proceedings in the case before it. The prosecuting counsel's immediate supervisor wanted a brief and their input, on the same. An adjournment was granted on that basis. When the case resumed on 11<sup>th</sup> September, 2019 for hearing the learned prosecutor explained to the court the outcome of their deliberations as an office. He/she gave reasons for the intended discontinuance of the proceedings.

17. The trial Magistrate wanted a substantial brief from the prosecuting counsel's supervisors, on the issue. She also wanted the investigating officer to be present in court to respond to the accusations levelled against him, by the prosecuting counsel.

18. My view to all the demands by the learned trial Magistrate with all due respect is that she went beyond her mandate. According to Article 157(9), the Prosecuting counsel appears in court on behalf of the DPP. The said counsel is expected to be honest and truthful, in executing that duty. If there is any dishonesty the DPP would be expected to address that. To therefore demand for a substantially prepared brief by the DPP after the prosecuting counsel's submissions amounts to literally saying the counsel was not being honest which should not have been the case.

19. Secondly, when the constitution provides that the DPP may not discontinue proceedings without the permission of the court what does it mean? My interpretation is that unlike the by gone days the DPP must give reasons for the intention to discontinue proceedings. The reasons must be satisfactory, but not beyond reasonable doubt. If it goes beyond reasonable doubt, then it would amount to the court directing the DPP on how to handle its matters and /or even supervising that office. This would in turn violate Article 157(10). In this case the trial court was told by the prosecuting counsel that the DPP had acquired evidence which included a car hire agreement and M-pesa statement receipts issued to 3<sup>rd</sup> parties as regards payment for car hire. He/she pointed out that had the DPP been in possession of this evidence at the time of charging the accused, they would not have charged him. (underlining is for emphasis)

20. For the court to demand to know how this new evidence was obtained or came to the attention of the DPP when nobody had complained also amounts to interference with the DPP's mandate. Further the investigating officer was not a party in the proceedings and neither was he on trial for him or her to appear and respond to accusations levelled against him by the prosecution. That again was a matter solely between the DPP and the investigating officer.

21. In a nutshell I find that the prosecution had given sufficient reasons for its decision to discontinue the proceedings against the Applicant. Further the Applicant had not objected to the request which ought to have been allowed. Since the Applicant had already been placed on his defence the provision applicable is section 87(b)CPC and not section 87(a) CPC.

22. On the issue of release of the motor vehicle registration KCL 750B, the Respondent did not lay any claim to it. The Kilungu Principal Magistrate's Court Criminal Case No. 513 of 2018 was finalized and is before this court on Appeal. The Respondent has not indicated as to whether there are any adverse orders in respect to the said vehicle in that matter. The said vehicle shall be released to the Applicant for safe custody and on certain conditions due to the pending Appeal.

23. The upshot is that the application for review is merited and I allow it and make the following orders:

*i. The ruling dated 30<sup>th</sup> August 2019 by Hon. E. Muiru Senior Resident Magistrate is hereby set aside and substituted with an order allowing the application by the DPP under Article 157(6) (c) of the constitution as read with section 87(b) Criminal Procedure Code. The Applicant stands acquitted in Kilungu Principal Magistrate's Court Criminal Case No. 205 of 2019.*

*ii. The motor vehicle registration No. KCL 750B to be released to the Applicant for safe custody. He shall not dispose of it until the pending appeal in respect to Kilungu Principal Magistrate's Court Criminal Case No. 513 of 2019 is heard and determined.*

Order accordingly.

**Delivered, signed & dated this 18<sup>th</sup> day of December 2019, in open Court at Makueni.**

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**H. I. Ong'udi**

**Judge**