



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIM. REVISION NO. 4 OF 2018

REPUBLIC.....APPLICANT

AND

JOHN LEONARD MUNYUA NGUGI.....1ST ACCUSED

ROBERT KINYANJUI MUNYUA.....2ND ACCUSED

SIMON NGUGI MUNYUA.....3RD ACCUSED

VERSUS

NDIRANGU KARANJA.....COMPLAINANT

(Arising from Kikuyu Principal Magistrate Court Criminal Case Number 750 of 2015)

RULING ON REVISION

1. The above accused persons were arraigned before the Principal Magistrate, Kikuyu on two counts, namely Forgery contrary to section 349 of the Penal Code, and Obstructing a police officer contrary to section 245(b) of the Penal Code. The offences allegedly occurred in 1996 and 2015 respectively.

2. On 25/5/2016 the matter came up for hearing. Ndirangu Karanja the complainant testified. Subsequently, on the scheduled hearing on 21st September 2017, the Prosecution Counsel made an application to withdraw the matter under Section 87(a) of the Criminal Procedure Code, pending 'further investigations'. Miss Kinyanjui Counsel watching brief for the complainant opposed the application pointing out that the complainant had already testified and in any case, there were witnesses in court ready to testify. On the other hand, Mr. Midwa Counsel for the accused persons, stated that the office of the DPP could be directed by anyone and that the complainant lacked audience before the court. The trial court delivered a ruling rejecting the application by the prosecution to withdraw the matter.

3. This ruling led Mr. Kinyanjui on behalf of the DPP to write a letter to this Court dated 15th March, 2018 seeking that this court be pleased:-

- a) to call for the Kikuyu criminal case no. 750 of 2015 court file for perusal and revision of orders of Hon. G. Onsarigo.
- b) to stay the proceeding in Kikuyu Criminal Case No. 750 of 2015 pending hearing and determination of the revision herein.
- c) That the court be pleased to revise and set aside the order of the learned Magistrate issued on 8th March, 2018 and 12th October, 2017 and replace with an order allowing the application to withdraw the case under section 87(a) of the CPC.
- d) to make a finding that the ODPP under the prosecution guidelines is entitled to review evidence in any case pending trial and make an appropriate application including withdrawal of a case under section 87(a) of the CPC.

4. The application was argued orally. Mr. Maatwa represented the DPP. He submitted that the ODPP called for the file and upon perusal, and in line with the prosecution policy, decided to withdraw the case, as the evidence did not meet the evidentiary criteria. It was stated that the principal offence in the trial court was forgery and an offence could not be sustained when the documents in question have not been analysed by an expert. Counsel submitted that the ODPP did not misuse its powers. Counsel for the respondents supported the application. He stated that a charge of forgery must be based on a document examiner's report. The complainant did not file any response to the

application despite service.

5. The DPP has wide prosecutorial powers under Article 157 of the Constitution. In the exercise of these powers, he is to have regard to the public interest and the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. And while he does not operate under the control or direction of any person, he cannot discontinue a proceeding without the permission of the court (see Article 159(8) of the Constitution and 87(a) CPC).

6. This means that in order to obtain the court's permission to withdraw charges, the DPP ought to give some sort of reasonable grounds. The record of the lower court shows that the prosecuting counsel merely offered the glib reason that the withdrawal was intended to facilitate "further investigations". The nature of the investigations was not stated and the trial magistrate properly pointed out that the ODPP's letter dated 27th June, 2017 containing instructions to withdraw the matter under Section 202 of the Criminal Procedure Code, cited the failure by the Complainant to attend court. This ground is obviously incorrect as by the said date, the Complainant had already testified.

7. The grounds advanced by the DPP in the present application were not placed before the trial magistrate during the first application for withdrawal. The Trial magistrate correctly declined to entertain a second application brought under the same section, and it matters not that the prosecution may have intended to raise the new grounds now stated before this court, too late in my opinion.

8. The trial court was obligated to exercise its discretion under Section 87(a) of the Criminal Procedure Code in a judicial manner. Thus the prosecution ought to have placed before the court sufficient grounds to warrant the exercise of the court's discretion to permit withdrawal of the case under Section 87(a) of the Criminal Procedure Code.

9. Despite the fact that the present revision application was supported by the Accused persons and not contested by the Complainant, it is my view that the trial magistrate correctly declined the application for withdrawal under Section 87(a) of the Criminal Procedure Code and further refused to entertain a subsequent similar application.

10. The DPP's handling of the subject matter was erratic at best. From the proceedings in the lower court, the ODPP representatives appeared to be unaware of the true circumstances of the case, giving rise to confused applications. The first application was not based on the reasons contained in the letter of instructions dated 27th June 2017, and which reasons at any rate had no bearing on the facts of the case.

11. During the attempt to make a second application, the representative of the DPP asserted that the previous application was made under Section 202 of Criminal Procedure Code, which statement was also inaccurate. Someone said that blunders will always be made but there is no rational explanation for the confusing steps taken by the DPP in the lower court. At the very least, counsel could have perused the lower court file before making the first application, and sought appropriate instructions based on the fact that the record showed that the matter had indeed proceeded to hearing. Seemingly, the prosecution counsel opted to proceed by way of a casual application based on the vague ground that the withdrawal was intended to pave the way for further unspecified investigations. And this, after the case had been in court for two years.

12. This court is not inclined to allow the revision application in the circumstances. The application having failed, the court directs that the lower court file be remitted back to the lower court and that new dates are taken for the expedited hearing of the case.

DELIVERED AND SIGNED AT KIAMBU THIS 30TH DAY OF NOVEMBER 2018

C. MEOLI

JUDGE

In the Presence of:

Miss Ndombi for the DPP

Accused – Present

Court Clerk - Kevin