



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 27 OF 2018

GERVASIO MUGO KINYUA.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

R U L I N G

1. In his application dated 29/06/2018 the applicant seeks for orders for reconciliation with key witnesses in what he calls a traditional mechanism to settle the matter. He states that the key witness in the Runyenjes Criminal Case No. 538 of 2014 in which he was convicted with the offence of robbery with violence, has indicated that he would want to withdraw the said case.

2. The background facts are that after the applicant was convicted, he lodged an appeal in Embu HCRA No. 1 of 2015 which was dismissed. He filed a second No. 44 of 2015 in the Court of Appeal which was also dismissed. The appellant was sentenced to death and is now serving sentence at Kamiti Maximum Prison.

3. In his affidavit he states that the prosecution witnesses are willing and without being persuaded ready to avail themselves before this court to withdraw the charges facing him.

4. The application was opposed by the respondent in the replying affidavit of the prosecution counsel Leah Mati.

5. She deposes that the applicant was convicted with the offence of robbery which is a felony. The witness has not *locus standi* to withdraw the case after conviction and even after two appeals in courts of different levels against the judgment have been dismissed.

6. It was argued that any purported withdrawal of a case like the one the applicant is referring to is not only illegal by a travesty of justice. It would also expose the victims of the said robbery to injustice and would defeat the very objective of criminal justice.

7. The respondent further stated that reconciliation though provided for under the Constitution, would not be applicable in this case.

8. The applicant seeks for orders to be allowed to reconcile with the key witnesses so that he could withdraw the charges facing him.

9. From the onset, the law applicable is that related to reconciliation and withdrawal of charges in a criminal case.

10. Section 204 of the Criminal Procedure Code provides: -

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.

11. Section 176 of the Criminal Procedure Code provides: -

In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.

12. The provisions of Section 204 are very clear that withdrawal of a criminal case by the complainant may be allowed by the court for sufficient grounds and that it results to an acquittal.

13. Section 176 on the other hand allows the accused and the complainant to reconcile in offences of personal nature. The court if it is dissatisfied with the reasons advanced may terminate the proceedings.

14. The Director of Public Prosecution has power to take over or to discontinue at any stage any criminal proceedings under **Article 157(6) of the Constitution**.

15. Section 208 of the Penal Code explains who the complainant in a criminal case is. It includes the prosecution and the person named in the particulars of the charge. It was so held by the court in the case of **RUHI VS REPUBLIC [1985] KLR 373**.

16. In the case of **REPULIC VS MAURA [1979] KLR 209** the High Court held that a complainant included a public prosecutor.

17. The Office of the Director of Public Prosecution controls public prosecutions under the powers conferred upon him under Article 157. The law also allows a complainant who complained to the police a window of exit under Section 204 and 176 of the Criminal Procedure Code.

18. However, unlike the Director of Public Prosecutions who has powers to discontinue criminal proceedings, the complainant who is the chief witness and the victim of the offence is limited to only withdrawal of offences which are misdemeanors or reconciling in offences of personal nature.

19. It is therefore clear that the complainant contemplated under Section 204 has no power to withdraw a case where the accused is charged with a felony. The applicant in this case was charged with robbery with violence which is not only a felony but an offence that was only punishable by death at the time the applicant was convicted.

20. The gist of this application is that even during the pendency of the trial, the complainant in the robbery case had no power to withdraw the charges against the applicant herein.

21. The case of the applicant has progressed tremendously after he was convicted in 2015. His appeal against conviction and sentence was dismissed by the High Court and the second appeal dismissed by the Court of Appeal.

22. Bearing in mind the powers conferred to the High Court and to the Court of Appeal in criminal cases, it is well established that this court cannot review the orders for dismissal of the appeals by higher courts by allowing withdrawal of a case by a complainant.

23. I have just stated that the complainant cannot withdrawal a felony during the pendency of the trial under the law.

24. Upon dismissal of the appeals in the superior court and the Court of Appeal, the decision of the trial magistrate was upheld. I am of the view that even assuming that the complainant was allowed to withdraw by the law which is not the case, there is no case that exists for withdrawal.

25. The applicant referred to reconciliation of disputes which is provided by **Article 159 (2) (c) of the Constitution** which provides:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

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

26. The DPP may then consider exercising his powers under Article 157 of the Constitution should he find the case deserving of such an approach. The law does not allow the accused and the victim to attempt such a process without the DPP being involved.

27. Furthermore, I reiterate that in the application before me, there is no dispute in existence for resolution under Article 159(2)(c) of the Constitution since the trial was concluded and the appeals dismissed in two different levels.

28. I am of the considered opinion that the material placed before me do not entitle the applicant to the orders sought.

29. I find this application lacking merit and I dismiss it accordingly.

30. It hereby so ordered.

DATED, DELIVERED AND SIGNED AT EMBU THIS 28TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for Respondent

Applicant present