



**REPUBLIC OF KENYA**

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

**MISC. CRIMINAL APPLICATION NO. 10 OF 2016**

STEPHEN MUCHIRI MUCHANGI .....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION..... RESPONDENT

**RULING**

1. The applicant in his notice of motion dated 16th of March 2016 seeks for the following orders:-

*a)That this honourable Court be pleased to review and/or set aside the orders of the learned trial magistrate Hon. V.O. Nyakundi made on 29/2/2016 in Embu Chief Magistrate's Court Sexual Offence No. 5 of 2015.*

*b)That this Honourable Court be pleased to review the court orders granted on 3rd March 2016 by the Chief Magistrate Hon. Gicheru that Sexual Offence caseNo. 5 of 2015 be withdrawn under Section 87(a) of the Criminal Procedure Code.*

*c)That this Honourable court do order thereinstatement and hearing of Embu ChiefMagistrate's Court Sexual Offence No. 5 of 2015 and termination of Embu Chief Magistrate's Sexual Offence No. 11 of 2016 or in the alternative doorder that the Applicant be acquitted of all the charges facing him.*

2. The grounds supporting the application are that the complainant was heard in Sexual Offences case No 5 of 2016 and the matter was adjourned to another date. The applicant then engaged an advocate to represent him and when he came on record the file went missing and was subsequently reconstructed and an order made that the matter be heard *de novo*. The prosecution called two witnesses including the complainant who was a minor. She gave evidence and exonerated the applicant from any blame.

3. The prosecution without any justification applied for the matter to be transferred to another court which application was allowed by Hon. V.O. Nyakundi who referred the matter to the Chief Magistrate for directions without giving any reasons. When the matter went before the Chief Magistrate Hon. M. N. Gicheru the prosecution successfully applied to have the matter withdrawn under Section 87(a) of the Criminal Procedure Code.

4. In allowing the withdrawal, the Chief Magistrate did not consider the rights of the applicant to a fair and expeditious trial. The applicant was immediately re-arrested before he left the dock and remanded until the following morning when he was arraigned before the court and charged with the same offence. The applicant believes that the prosecution's actions were clearly aimed at seeking for a second chance to see whether the complainant would change her testimony and implicate the applicant.

5. It is also contended that the Chief Magistrate failed to consider Section 40 of the Sexual Offences Act with regard to withdrawal of Sexual Offences. It is for the foregoing reasons that the applicant seeks for review of the orders of the Chief Magistrate and those of Hon. V.O. Nyakundi.
6. The respondent opposed the application and stated that it is seeking for an interpretation for Section 87(a) of the Criminal Procedure Code on whether or not the discretion of the court was exercised lawfully. The applicant faced a charge of defilement under the Sexual Offences Act whereas the trial magistrate V.O. Nyakundi recused himself and sent the file to the Chief Magistrate who granted withdraw under Section 87(a) on application by the respondent.
7. It is argued by the respondent that the Hon. Chief Magistrate exercised his discretion judiciously and in the interest of justice by taking into account the facts of the case. It is noted that the original file went missing and a duplicate file was opened which was kept under lock and key. It was contended that Section 87(a) allows withdrawal of charges at any time before an accused person is called upon to make a defence and that such withdrawal does not bar subsequent charges against the accused.
8. The respondent further submitted that the court in allowing the application for withdrawal exercised its discretion in the interest of justice. At the time of withdrawal the applicant had not been put to his defence and he was not subjected to any form of prejudice by the prosecution.
9. The respondent relies on the case of ***GEOFFREY MUHUZANI VS DIRECTOR OF PUBLIC PROSECUTIONS [2016] eKLR*** where the court held that withdrawal under Section 87(a) is not an abuse of the process of the court when reasons are given for it and that subsequent charges may be brought.
10. The respondent further states that it is evident that the prosecution stated the reasons for the withdrawal before the honorable court which were taken into consideration in allowing the application. Re-arresting the accused and arraigning him before the court with similar charges was within the law and that there was no violation of the applicant's fundamental rights and freedoms. The respondent urged the court to dismiss the application.
11. The submissions of the applicant extensively deal with the facts supporting the application and states that the defence objected to the withdrawal and informed the court of the intention of the prosecution to re-arrest the applicant but the court went ahead and allowed the application. It is argued that the motive of the prosecution in withdrawing the charges was to remedy the situation whereby the minor had recanted her evidence and the applicant. The applicant further argues that the prosecution are using Section 87(a) to seal the loopholes in its case.
12. The applicant relies on Section 40 of the Children's Act which provides that Sexual Offences may be withdrawn with the consent of the victim. It was therefore clearly wrong for the prosecution to use Criminal Procedure Code provisions to withdraw the case and this points to ulterior motives on the part of the prosecution. It also ignores the seriousness of Sexual Offences.
13. It is further argued that the court in allowing withdrawal failed in its duties as the custodian of the law for it ought to be guided by the provisions of the Constitution with regard to the fact that its sovereign powers are delegated by the Constitution which is the supreme Law of the land.
14. The applicant argued that the director of Public Prosecutions may not discontinue proceedings without the permission of the court and as stipulated under Article 157(8) of the Constitution. The court has a role to play in withdrawal of criminal cases. The court requires to take into consideration the rights of the parties in exercising its discretion. Public interests also requires to be considered by the court and the state in exercising the powers donated by Article 157. The powers of the Director of Public Prosecutions are not absolute and must be exercised in accordance with the Constitution and with the permission of the court.
15. Under Article 50 of the Constitution the applicant argues that he is entitled to a fair hearing and expeditious disposal of his case. The withdrawal of the charges after a period of one year and the re-arresting of the applicant called for a prolonged trial. The act of the prosecution amounted to violation of

the Constitutional rights of the applicant under Article 50.

16. The applicant relied on the case of **NAIBEI GERISHONKISACH VS REPUBLIC [2010] eKLR** where it was held that the prosecution acted in bad faith in withdrawing a case under Section 87(a) of the Criminal Procedure Code. The court went on to say that the power under Section 87(a) should be used to advance the cause of criminal justice and not suppress it. The applicant urges the court to have regard to the constitutional rights of the applicant and allow the application.

17. This application is brought under Article 50(2) (e), 157(11), 159(1)(b), 165(6) and 7 of the Constitution of Kenya, sections 362 and 364 of the Criminal Procedure Code. It is essentially an application for revision of the ruling of Hon. V.O. Nyakundi to disqualify himself from hearing CM Embu Criminal case no. 5 of 2015 and that of Hon. M.N. Gicheru for allowing withdrawal of the case under Section 87(a) of the Criminal Procedure Code.

18. The facts leading to this application are that the applicant was charged with defilement of a child in Sexual Offences case no. 5 of 2015. The complainant was heard before Hon. Nyakundi and the file subsequently went missing. It was also alleged that some witnesses had been threatened. The trial court reconstructed the file and ordered that the matter be heard *de novo*.

19. Two witnesses the complainant and her mother were heard and the prosecution applied that the matter be heard before another court on the ground that a certain court prosecutor had interfered with the case and influenced the complainant to change her version of the evidence and somehow exonerated the applicant (accused) from blame.

20. This was preceded by a written complaint from the office of the Director of Public Prosecutions in a letter dated 28/01/2016. The matter was referred to the Chief Magistrate Hon. M.N. Gicheru for directions.

21. Before the Chief Magistrate, the prosecution applied to withdraw the case under Section 87(a) of the Criminal Procedure Code (CPC). The reasons given is that an unnamed prosecutor had interfered with the evidence of the minor and forced her to give false evidence and that justice would not be served if the case proceeded as it was.

22. The defence raised an objection on grounds that the withdrawal was designed to fill in the gaps in the prosecution's case. The magistrate allowed the application after considering the arguments of both parties.

23. Section 87(a) provides:-

*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:*

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

24. Under this provision, it is clear that the court has a wide discretion as to allow or to refuse the withdrawal of a case.

25. The applicant also relies on Article 157 of the Constitution. Which spells out the functions of the Director of Public Prosecutions. The relevant provisions herein are Article 157 (1), (6), (8) and (11) which provides:-

*(1) There is established the office of Director of Public Prosecutions.*

*(6) 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).*

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

*(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.*

26. The jurisdiction of this court to review the ruling and to interpret various provisions is donated by Article 165(3)(d) of the Constitution and Section 362 as read with Section 364 of the Criminal Procedure Code.

27. It is trite law that the Director of Public Prosecutions (DPP) in exercise of its powers under Article 157 (11) shall have regard to public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

28. The court must also exercise its discretion under Section 87(a) and Article 157 (6) and (8) judiciously.

29. The provisions of Article 50(1) (e) which grant an accused person the right to a fair trial including expeditious disposal of the case.

30. The applicant seeks review of the orders of the first trial magistrate to disqualify himself and is in essence challenging the validity of the said orders.

31. The first complaint before Hon. Nyakundi was that the witnesses were being threatened by the accused. The O.C.S. Itabua was directed to investigate and file an affidavit of the witness who claimed to have been threatened. An affidavit sworn on 7/01/2016 by one Selessio Muriithi the father of the complainant was filed to the effect that the accused had threatened him.

32. He stated that the accused had indicated to the sub-area (village elder) that he wanted to meet him together with his (accused) parents and apologize about what he had done to his daughter. It was further deposed that the applicant said that he was ready to give monetary compensation in the presence of his advocate if Selessio agreed to withdraw the case. Selessio said he had declined to grant the request of the applicant.

The trial magistrate allowed the application to move the case to another court and indicated that it will be for the interests of justice. The reasons for the transfer were given by the prosecutor and the defence were given a hearing.

34. The order was, therefore, given after hearing both sides and it has not caused any prejudice to the accused. The complaint in the DPP's letter was not accusing the court but was concerned with the threat on the prosecution witnesses.

35. The DPP also suspected foul play in the way the case was progressing and especially starting the case *de novo* whereas the complainant had already been heard in the file, that had mysteriously gone missing.

36. The defence objected on grounds that the prosecution intended to fill in the gaps in its case. The ruling of the magistrate was brief and as follows:-

*I have considered the submissions by both sides. I find that it is fair and reasonable to allow that the case be withdrawn under Section 87(a) Criminal Procedure Code and it is withdrawn accordingly.*

37. This court called for and perused the court file. Sexual Offences Case No. 11 of 2015. The affidavit of the complainant's father on threats and attempts to have the case withdrawn by the accused who said he was ready to give monetary compensation to the complainant's parents triggered all the events that followed in this case.

38. Just before releasing the file to go to the Chief Magistrate for further directions, the court interviewed the father of the complainant who stated that before the complainant testified, he had seen the court prosecutor and the investigating officer lead her into the court Civil Registry. She stayed in the registry with the prosecutor for sometime before he came out holding her hand.

39. The complainant told the father later that she had been told to tell to the court that she was not defiled and that she had fallen off the bicycle of the applicant and hurt herself thus resulting in bleeding from her private parts. This is exactly what she said in her evidence when she testified in the skeleton file.

40. With all this information contained in the court file and with the ongoing investigations on the threat on witnesses as well as the affidavit and interview of the complainant's father by the magistrate, the prosecution was justified to take the action it took. The magistrate looked at the reasons given and found that it was in the interests of justice to allow the application.

41. I have perused the authorities cited by the defence whose facts are completely different from the ones in this case. The court must be guided by the facts of each case. In this case, I find no evidence of violation of the constitutional provision as to the applicant's rights of fair hearing under Article 50(2) of the Constitution. Rather, it is the rights of the minor victim who are at risk of being violated should the trial proceed as it is.

42. A case of defilement is a serious one which ought to be heard to conclusion to achieve justice to both parties. Justice is a double-edged sword which must penetrate both sides of the divide. The minor of tender age was not in a position to understand the intricacies involved in the interference by the prosecution which was not denied. She did not possess the legal capacity to make an informed decision and just told the court what the unnamed prosecutor told her to say. The said interference which caused concern to the DPP's office must be one of the issues that the trial magistrate took into consideration in exercising his discretion to allow withdrawal of the case under Section 87(a).

43. Section 40 of the Sexual Offences Act provides that it is the mandate of the Attorney General to decide whether police investigations on a sexual offences case should be discontinued. This Act was enacted in 2006 and revised in 2009 before the Constitution of Kenya, 2010 was enacted.

44. The constitution established the office of the Director of Public Prosecution under Article 157 as an independent office to deal with all criminal prosecutions. Sexual offences are criminal offences. The DPP was therefore within its mandate to apply to withdraw the case. Section 40 was therefore not violated as alleged.

45. I find that both parties were heard in the withdrawal application and that the magistrate Hon. M.N. Gicheru exercised his discretion judiciously in compliance with Article 157 of the Constitution.

46. The issue of the validity of proceedings arise in this case. The original file mysteriously went missing after the complainant testified for the first time. The prosecutor did not apply and the court did not make an order for opening a skeleton file. The opening of a skeleton file which was given a different number by the court was not authorized. It was not demonstrated whether sufficient effort to trace the original file

had been made. This file has no chargesheet and no plea was taken to commence the case afresh as required by the law.

47. The Director of Public Prosecutions had a reason to be disturbed that the accused and its own prosecutor were acting in bad faith which may have influenced the disappearance of the original file as shown in the DPP's letter to the court dated 28/01/2016. Although the defence say they were not served with the letter, it is in the court file and forms part of the complaint by the DPP and the complainant's father.

48. It appears that the accused, after failing in his mission to have the complainant's parents withdraw the case, he was determined to use any means at his disposal to achieve an acquittal. Nothing would have yielded positive results than interfering with the evidence of the witnesses starting with the most vulnerable one, the complainant aged 8 years.

49. The 2<sup>nd</sup> trial magistrate had all this information in the skeleton file which he must have perused after it was forwarded to him for directions. It follows that the trial magistrate proceeded to take the evidence of PW1 and PW2 without compliance with the law. A charge sheet should have been availed by the prosecution and the plea was required to be taken before the case could be heard. This omission renders the proceedings by Hon. V.O. Nyakundi recorded null and void for all intents and purposes.

50. In effect I make the following orders:-

*i. That the application has no merit and is hereby dismissed.*

*ii. That the orders of Hon. M.N. Gicheru made on 03/03/2016 are hereby upheld.*

*iii. That the proceedings in the skeleton file relating to the evidence taken on 25/1/2016 are hereby declared null and void;*

*iv. That a skeleton file be opened, plea taken and that the case be heard by another other magistrate who has not dealt with the matter and that the case be fast tracked.*

51. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF APRIL, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Andande for the Applicant**

**Ms. Nandwa for the Respondent**