



**REPUBLIC OF KENYA**

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

**CRIM. REVISION NO. 24 OF 2017**

**REPUBLIC..... APPLICANT**

**VERSUS**

**SIMON OKOTH..... ACCUSED**

**AND**

**MELVIN ONYUMA**

**T/A GERMAN POINT..... COMPLAINANT**

*(Arising from a Ruling dated 17th February, 2017 in Kiambu Chief Magistrate's Criminal Case No. 1574 of 2016 by Hon. S. Atambo, Principal Magistrate)*

**RULING ON REVISION**

1. Simon Okoth was arraigned before the Kiambu Chief Magistrates' Court on 04/07/2016 charged with a single count of shop breaking and committing a felony contrary to section 306(a) of the Penal Code. The particulars of the charge as stated in the charge sheet were that on 04/07/2016 at about 13:00 Hrs, in Village Market within Nairobi County, jointly with others not before the Court, Simon Okoth allegedly broke and entered a shop namely German Point Restaurant and therein committed a felony namely theft and stole valuables as per a list attached to the charge sheet all valued at Kshs. 965,000/=, the property of Melvin Onyuma, the Director of German Point Restaurant.

2. When the case came up for hearing on 02/11/2016 before the Learned Hon. S. Atambo, the Learned Prosecutor informed the Court that after reviewing the evidence and the circumstances, the ODPP had resolved to seek the leave of the Court to withdraw the charges under Article 157(6)(c) of the Constitution as read together with section 87(a) of the Criminal Procedure Code.

3. The Prosecutor based his request to withdraw the charges on two grounds. First, he informed the Court that the ODPP had made the decision to charge the Accused Person based on incomplete information resulting from non-disclosure of material information given to the ODPP by the OCS Gigiri who had drawn the file which the ODPP relied on to prefer the charges. Secondly, the ODPP had formed the opinion that at its heart, the dispute was civil in nature – arising from Milimani Commercial Courts CMCC No. 6021 of 2013 – and that a criminal trial was the wrong forum to resolve the dispute. Apparently, the OCS had failed to disclose to the ODPP that the Accused Person had acted pursuant to a valid Court order issued in CMCC No. 6021 of 2013. In essence, the Prosecutor came to the conclusion that it was an abuse of the criminal justice system to continue with the prosecution of the Accused Person given the information they now had.

4. The Complainant was opposed to the application for leave to withdraw the charges and addressed the Court as such. The Complainant's arguments were mainly factual: that there was sufficient evidence to show that the Accused Person went beyond the orders granted by the Court in Milimani Commercial Courts CMCC No. 6021 of 2013 and that, therefore, there was sufficient basis for the criminal charges. The Complainant balked at the idea that this was a purely civil case which should be resolved in the civil litigation or that they should pursue private prosecution.

5. The Learned Trial Magistrate considered the rival arguments of the parties and gave her ruling dated 17/02/2017. In it, she declined to grant leave for withdrawal of the charges and ordered that the case be fixed for hearing. The Prosecution is of the opinion that the decision was not appropriate and sought revision through the present application.

6. When the matter was scheduled before me, the parties generally rehashed the arguments they had presented before the trial Court.

7. The Prosecution submitted that the Accused Person was an employee of Market Masters Limited and was acting in the course of his employment when the incident over which he is charged happened. The Prosecution submitted that the Office of the Director of Public Prosecutions approved the charges with partial information presented by the OCS – GIGIRI. During the date of plea and counsel for the Accused Person brought to the ODPP's attention to the fact that the crux of the charge was a civil case at Milimani Law Courts CMSC 6021/2013 between Market Masters Limited and the complainant, German Point. Upon inquiring, the ODPP established that indeed there was a civil dispute and that the facts did not disclose the commission of any offence. According to the Prosecution, that information was only brought for the attention of ODPP after the charges were approved.

8. The Prosecution is of the view that the dispute arose when an order in Milimani CMCC No. 6021/2013 was being executed and the remedy for any grievances pursuant to such execution was within the provision of the civil process and not criminal trial. The ODPP came to the conclusion that the dispute is a civil one camouflaged as a criminal dispute as it related to goods collected by an auctioneer in the course of his duty. The Accused was not one of the participants for he was neither an auctioneer nor an employee of the auctioneer.

9. Finally, it is ODPP's position that the offence of store breaking cannot be proved as the said store belonged to the employers of the accused Market Masters and they were merely repossessing it.

10. On his part, Mr. Mutua for the Complainant persisted in his submissions that the Learned Trial Magistrate was correct to decline leave to withdraw the charges. According to him, the ODPP has not advanced any valid grounds for the Application. He is of the view that the Learned Trial Magistrate exercised her discretion correctly and there is nothing to show that the Learned Magistrate abused her discretion.

11. Mr. Mutua insisted that there was no discovery of new evidence which would have entitled the DPP to seek to withdraw the charges. He intimated that the decision to withdraw was, therefore, in bad faith. He reminded the Court that victims have rights under the Victims Protection Act and lamented that the ODPP had not consulted the complainant before seeking to withdraw the charges. Had the ODPP done that, Mr. Mutua argued, the Complainant would have supplied the ODPP with any further relevant information it needed to prosecute the case. Mr. Mutua argued that the ODPP did not do so in this case. Finally, Mr. Mutua argued that the DPP's decision to withdraw the charges is an administrative decision. As such, it is amenable to the Fair Administrative Actions Act (FAAA). Therefore, Mr. Mutua argued, it behoved the DPP to consult the Complainant and hear its side of the story before coming up with the decision.

12. Mr. Mutua cited *Helmuth Rame v R [2014] eKLR* for the proposition that the fact that there is an on-going or concluded civil dispute covering the same subject matter is not a per se reason to withdraw criminal charges. The Learned Judge in that case reasoned that criminal charges are a different species from civil proceedings and that fact that an Accused Person had succeeded in avoiding liability or blame

in civil proceedings is not sufficient reason to dismiss or withdraw criminal charges against him.

13. I should begin by pointing out that the Learned Trial Magistrate in this case was correct in her statement of the law and the legal principles applicable. The law is found in Article 157 of the Constitution. It is thus:

*6. The Director of Public Prosecutions shall exercise State powers of prosecution and may—*

.....

*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.*

*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.*

14. The Learned Trial Magistrate was, therefore, correct to derive the three-part test stated by the High Court in (**R vs Enock Wekesa & Another**[2010] eKLR and **Moses Miheso Lipiyav R**[2010] eKLR). This is that in determining whether to permit the DPP to discontinue charges, the Court will test the decision against public interest; interests in the administration of justice and the need to avoid abuse of the legal process.

15. This tripartite test stipulated in Article 157(11) must be viewed together with the other principles laid out in Article 157. Seen as such, I have derived at least five principles which the Court should evaluate in considering an application to withdraw criminal charges. These are:

a. The rule of law principle underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority;

b. The need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution;

c. The need to ensure that the criminal process of the court is not abused to further or defeat private interests which are, or should be, the subject of civil proceedings or for other improper purposes;

d. The public interest in either the continuation or discontinuation of the criminal prosecution including consideration of whether criminal prosecution is a proportionate response to the facts at hand; e. Wider interests in the administration of justice including considerations of the impact of the prosecution on the community and the precedential effects of the decision to continue or discontinue the prosecution.

16. In all these, it is important to recall that the discretion to determine when and if to commence or discontinue criminal charges is placed by the Constitution solely on the DPP. As such, the Court can only review a decision made by the DPP in this regard when there is evidence that the discretion has been abused. The following paragraph in an earlier case ring true and bear repeating here:

*The law and practice, then, are quite clear: while the discretion of the DPP is unfettered, it is not unaccountable. While the authority to prosecute is entirely in the hands of the DPP, it is not absolute. On the other hand, while the power of the Court to review the decisions of the DPP are untrammelled, they are not to be exercised whimsically. While the Court can review the DPP's decisions for rationality and procedural infirmities, it cannot review them on merit.(Patrick Ngunjiri Maina v the DPP & 2 Others [2017] eKLR.)*

17. In the present case, looking at all the factors and the information placed before the Learned Trial Magistrate, I am unable to confidently come to the conclusion that the Learned Trial Magistrate did, that it was an abuse of the DPP's discretion for him to seek the withdrawal of the charges. In coming to my conclusion, I have reminded myself that the role of the Court is not to second-guess the DPP once he makes the determination to commence or discontinue criminal charges. Rather, the role of the Court is to police the use of that discretion by the DPP. It is, therefore, not enough that the Court would have made a different decision if it were in the position of the DPP. Instead, the Court must be satisfied that the DPP's decision was manifestly unreasonable, irrational or one that no reasonable person adverting their mind to the matter in question would make.

18. With respect, that is not the case here. The DPP, in my view, gave a straightforward reason why he sought to discontinue the criminal charges: the new information he had in his possession led him to the belief that the Officer who had originally investigated the case had not fully disclosed the facts and that the new information in his possession persuaded him that criminal charges are not warranted in the case. The criminal charges as framed are about store-breaking and committing a felony. The DPP has become aware of Court orders issued in Milimani Commercial Courts CMCC No. 6021 of 2013 which permitted the Accused Person's employer to enter the premises. The Accused Person entered the premises in the course of his employment with Market Masters and in pursuance of the Court Order. While the Complainant is entitled to its opinion that the Accused Person went beyond the authority of the Court Order in taking goods belonging to the Complainant, the DPP has formed the opinion that the Accused Person merely complied with the Court order.

19. In the circumstances of this case, unless the Complainant can demonstrate to the Court that the DPP is manifestly unreasonable or irrational in his opinion or that he is animated by some ulterior motive, the Court has no sufficient basis to second-guess the decision of the DPP to discontinue the proceedings. To do so would not only undermine the constitutional scheme whereby the DPP is given sole prosecutorial powers to be exercised without direction from anybody (including the Courts) but will also prejudice the Accused Person by subjecting him to a criminal trial in a situation where the DPP has already concluded, after a review of the evidence, that conviction is not sustainable. This would, in my view, be arbitrary, whimsical and oppressive. Herein lies the difference between the present case and the **Helmuth Rame Case**. In the latter case, the Accused Person had already been placed on his defence when the DPP sought to withdraw the case. As such, the Court could easily conclude that it was manifestly unreasonable for the DPP to seek withdrawal at that stage. Needless to say that is not the situation here.

20. It is true that the DPP is obligated to consult the Complainant before such a decision to withdraw is made. However, I do not think that the remedy for lack of consultation is to subject the Accused Person to a criminal charge where the DPP has already concluded on the facts that they are not sustainable and where, on the facts, the Court has concluded that the DPP's position is borne out by the facts and circumstances of the case.

21. For the reasons stated above, the Application for revision is merited. Consequently, the Court makes the following directions and orders:

**i. That the application to withdraw the case made before the Learned Trial Magistrate under**

**section 87(a) of the Criminal Procedure Code was merited.**

**ii. Consequently, the ruling and order of the Learned Magistrate dated 17<sup>th</sup> February, 2017 be and is hereby set aside and in its place an order allowing the Prosecution's application for withdrawal of the case against the Accused Person under section 87(a) of the Criminal Procedure Code is entered in its place.**

22. Orders accordingly.

**Dated and delivered at Kiambu this 28<sup>th</sup> day of September, 2017.**

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**JOEL NGUGI**

**JUDGE**