



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
CRIMINAL REVISION NO 7 OF 2016
IN THE MATTER OF KANGEMA PM CRIMINAL CASE NO.58 OF 2016
(REPUBLIC -VS- SAMUEL GATHUO KAMAU)

AND

IN THE MATTER OF AN APPLICATION BY THE TRIAL COURT FOR REVISION

REPUBLIC..... APPLICANT

VERSUS

SAMUEL GATHUO KAMAU.....RESPONDENT

RULING

1. The Respondent (accused in the trial court) was originally charged with ***assault causing actual bodily harm*** contrary to **section 251** of the ***Penal Code***. On 01/02/2016 he pleaded not guilty to the charge and the case was set down for trial.
2. On 13/04/2016 when the trial was to commence the learned prosecution counsel informed the trial court that the parties had requested time to reconcile and sought another date for mention of the case. On 27/04/2016 the prosecution counsel informed the court that reconciliation had “become futile”. The Accused then complained about delay in commencing trial after the case was fixed for hearing on 06/06/2016. But hearing did not proceed on that date as the learned prosecution counsel stated that she was unwell.
3. Again hearing did not proceed as scheduled on 17/06/2016 as the prosecution counsel stated that she wanted to look afresh at the charge. On 01/07/2016 a substituted charge was filed. The accused now stood charged with ***robbery with violence*** contrary to **section 296(2)** of the Penal Code which carried a mandatory sentence of death on conviction. He pleaded not guilty to the fresh charge. His bail terms were also enhanced at the application of the prosecution. He was apparently unable to meet the new conditions and was returned to custody.
4. On 25/07/2016 the Accused informed the court that he wished to reconcile with the complainant, and that they were talking towards that end. The learned prosecution counsel objected to any move towards reconciliation, citing the seriousness of the offence. The trial court then reserved the matter for ruling on 27/07/2016. There is no record of the complainant saying anything about the intended reconciliation mentioned by the Accused.
5. In his “ruling” of 27/07/2016 the trial court (**D M Kivuti, SRM**) posed the following questions for

determination –

- (a) Whether a complainant can withdraw a criminal complaint of any nature?
- (b) Whether section 204 of the CPC allows the court to exercise discretion even in the face of a complainant's intention to withdraw a criminal complaint?
- (c) Whether a case of robbery with violence can be withdrawn by compromise of the complainant and the accused?
- (d) Whether section 204 (aforesaid) envisages exemptions to withdrawal of criminal complaints?

6. The learned trial magistrate then proceeded to analyze each issue posed by each question he framed, and in some instances he provided answers. He then delivered himself as follows -

“The question that lingers in my mind is that what if the court is disinclined to permit a withdrawal and the complainant either refuses to testify in trial or becomes hostile to the prosecution case? The result in my view would be the same. The prosecution would be faced with a punched up (sic) case which may not sustain a conviction.

However, approaching this matter on the footing that the gravamen of the offence is so serious that the accused, if convicted, would be sentenced to life imprisonment...the dictates of justice...in this matter demand the case proceed for full trial. The aforesaid competing interests are in active conflict with the right of the complainant to withdraw the complaint, bearing in mind the constitutional underpinning necessitating out of court negotiation or reconciliations, the spirit of Alternative Dispute System Article 159 (2) (C) of the Constitution is perspective (sic).

All the factors cited and the court's duty to balance the various interests, it would need the wise intervention of the superior court of record to discern the proper cause faced with the instant application. I would therefore as a matter of duty and invoking under Article 165(6) order the following:-

- (a) That the ruling and proceedings thereto herein to be forthwith and expeditiously typed.
- (b) The file be forwarded to the Resident Judge at Murang'a for direction in respect to issues (a) - (d) as framed in the body of the ruling.
- (c) The matter to be placed before the Deputy Registrar Murang'a High court for possible directions.
- (d) The officer in-charge Murang'a G.K. Prison to produce the accused on 1/08/2016 before the High Court at Murang'a.

Mention on 1/08/2016 before Murang'a Law Courts.”

7. It will be seen that the learned trial magistrate shied away from making the crucial decision whether or not to allow the complainant to withdraw the complaint. This was his main duty; the business of any court of law is to make decisions on any issue placed before it by the parties. Any unsatisfied party may then seek the intervention of a higher court – by appeal or review or otherwise. But a lower court cannot shuck that responsibility of making the decision and throw the matter to the **High Court** to make the decision for it!

8. Article 165(6) of the *Constitution of Kenya, 2010* that the trial court herein relied upon states –

“(6) The High Court has supervisory jurisdiction over the subordinate courts and even over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court”

Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. It does not include any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect to convictions, sentences, acquittals (**sections 347, 348 and 348A of the Criminal Procedure Code, Cap 75**). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See **Article 165 (7) of the Constitution and sections 362 and 364 of Cap 75**.

9. So, the subordinate court concerned must first make a definite decision – be it a conviction, acquittal, sentence, order, etc., before the High Court can exercise its supervisory jurisdiction by way of appeal or revision.

10. In the circumstances, I direct that the trial court in *Kangema PM Criminal Case No 58 of 2016 (Republic versus Samuel Gathuo Kamau)* be taken back to that court for the trial court to make a definite decision whether or not to allow the complainant in the case to withdraw his complaint under section 204 of the Criminal Procedure Code. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 29TH DAY OF SEPTEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 30TH DAY OF SEPTEMBER 2016