REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO.1 OF 2014

TITUS KOOME KUBAI……..…….1ST PETITIONER

JULIUS KITHINJI MEEME…….……2ND PETITIONER

PAULO KOBIA……3RD PETITIONER

VS

DIRECTOR OF PUBLIC PROSECUTIONS……..…..RESPONDENT

JUDGEMENT

Before me is a Petition dated 30th September 2014, and brought pursuant to the provisions of Article 2,10,47,48 and 50 of the Constitution of Kenya in which the Petitioners seek the following prayers:

1. **That this Honourable Court do declare that the actions of the Responded in invoking the provisions of Section 87 (a) of the Criminal Procedure Code on 5th February 2014 in Maua Criminal Case No. 1440 of 2012 (REPUBIC –VS- TITUS KOOME & 2 OTHERS) was done in bad faith and led to the direct infringement of the petitioners constitutional guarantees of a fair trial and was thus unjustified and unconstitutional.**
2. **That the subsequent and immediate charging of the petitioners in Maua Criminal Case No. 1407 of 2014 was done in bad faith and it's direct import was invalidating the trial courts determination 05/02/2014 in Maua criminal case No. 1440 of 2012 that the prosecution did not deserve an adjournment in the trial and was thus unconstitutional.**
3. **That Maua Chief Magistrate criminal case No.1407 of 2014 infringes the constitutional rights of the petitioners to fair hearing in an expeditious manner and the entire proceedings are a nullity and unconstitutional.**
4. **That the use of the respondent of section 87 (a) is an affront to the principals of the constitution and thus the entire section 87 (a) is unconstitutional and should be struck off from the statutes.**
5. **That in the alternative to prayer (4) supra this court do issue a clear guideline as to how, when and under what circumstances the respondent may be allowed to invoke the provisions of section 87(a) of the Criminal Procedure Code.**
6. **That the court do make further and/or better orders that will promote the rule of law and operalizations of the provisions of Articles 2,10,47,48 and 50 of the constitution in relation to accused persons.**
7. **That costs of this petition be paid to petitioners.**

The petitioners' case is that they were initially charged with the offence of assault in Maua criminal case No. 1440 of 2012 on 14th May 2012 which was later consolidated with criminal case No. 2833 of 2012 on 3rd October 2012.

On 4th June 2013, the prosecution sought and was allowed to substitute the initial charges with those of robbery with violence and as a consequence, the petitioners were remanded in custody as they could not secure the hefty bonds granted. Witnesses for the prosecution were called and the prosecution occasioned several adjournments on grounds of missing police file. On 5th February 2014, the prosecution sought an adjournment on the grounds that they did not have the police file but the court declined the application and stated that the prosecution's antics were punishing the accused persons who were in custody. Upon rejection of the application for adjournment, the prosecution proceeded to apply to withdraw the case under Section 87 (a) of CPC, the application was granted following which the petitioners were re-arrested, and charged afresh vide criminal case No. 1407 of 2014, thus provoking the instant petition.

On the other hand, it was contended by Mr. Mungai, Learned Counsel for the State, that the instant application challenges the Constitutionality of section 87 (a) of the CPC and how it can be applied. Counsel urged that under Section 87 (a) of CPC, the DPP is mandated to withdraw a charge and that the discharge is not a bar to subsequent proceedings; that in allowing an application Section 87 (a) of CPC, the court should consider public interest; that the petitioners face a serious charge of robbery with violence which carries a maximum life sentence.

I have carefully considered the pleadings by the parties; the authority relied upon by the petitioners and the record of proceedings from the lower court.

Upon the perusal of the court record in CRC 1440/2012, it is apparent that when the matter came up for hearing on 15th November 2012, the prosecution sought an adjournment on the grounds that the complainant was in great pain from the cuts he had suffered during the attack whereupon the hearing was adjourned to 11th March 2012. On 11th March 2012, Mr. Mutembei, Counsel for the 1st and 2nd accused sought an adjournment on the grounds that he had just been instructed and needed time to look at the statements, which application was strongly opposed by the prosecution. The said application was however granted and the matter slated for hearing on 4th June 2013. On 4th June 2013, the prosecution sought leave to amend the charges from grievous harm to robbery with violence contrary to Section 296 (2) of the PC which application was opposed by the defence but nevertheless, was allowed by the court. The prosecution intimated to the court that they had three witnesses and were ready to proceed. The defence on the other hand intimated to court that since the charge had just been amended, they needed fresh instructions to adequately prepare and therefore sought an adjournment which adjournment was granted and the matter was adjourned to 28th August 2013. On 28th August 2013, Mr. Mutembei again indicated to court that he was unwell and sought an adjournment. The prosecution did not oppose the application but however intimated to court that they had 3 witnesses whereupon the matter was adjourned to 25th November 2013.

On 25th November 2013, an adjournment was once again sought at the instance of the prosecution which adjournment was granted and the matter adjourned for hearing to 5th February 2014. On 5th February 2014, the prosecution sought an adjournment which application was rejected whereupon they sought the court's permission to withdraw the matter under section 87 (a) of the CPC, which application was allowed. Thereafter the petitioners were immediately re-arrested and charged with the current offence thus provoking the instant petition.

The court in allowing the application for withdrawal under section 87 (a) of the CPC stated inter alia as follows:

> ***"I also note that this is not a matter where the prosecution can be stated to have lost interest. On 28/11/12, the complainant and other witnesses were in attendance but the matter could not proceed as the complainant was in great pain allegedly from the cuts***

sustained. Subsequently, on 11th March 2013, when the prosecution was ready to proceed, the defence sought adjournment because counsel had just been appointed and needed time to see the witness statements. The matter was adjourned to 4th June 2013 when the defence again sought adjournment on the basis that the charge had been amended and he needed time to take further instructions. The case was adjourned to 28/8/13 when again the defence sought adjournment for the reason that the counsel was unwell. On this occasion the prosecution again had 3 witnesses. The matter was adjourned to 25/1/13 when the prosecution sought adjournment for the reason that the police file was missing, on this occasion 3 witnesses were in attendance. Today the prosecution did not have witnesses and sought adjournment which was denied. The record speaks for itself that it is the defence that has caused several adjournments and not have been ready except for the last 2 occasions. It cannot be true therefore that they have lost interest. I am reminded in the circumstances to allow the application to withdraw the case under section 87 (a) of the CPC."

The provisions of section 87 (a) of the CPC which the petitioners seek to challenge provide as follows;

"***87 in a trial before a subordinate court a public prosecutor <u>'may'</u>, with the consent of the court or instructions of the DPP at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal-***

a. ***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."***

Under this section, the court has a broad discretion to grant or not grant an application for withdrawal of a case because the word used is *<u>'may'</u>*.

Article 157 (1) and (6) of the Constitution of Kenya which establishes the office of Director of Public Prosecutions provides as follows;

"***(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. **……**

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).***

Sub- article 11 thereof further provides as follows:

"***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."***

In the case of ***<u>CRISPUS KARANJA NJOGU V ATTORNEY GENERAL UR CRIMINAL APPLICATION NO.39 OF 2000 (HC),</u>*** the court considered the exercise of the court's discretion where a *nolle prosequi* was entered and it was stated as follows:

"***Thus rightly contended, this court is the sole constitutional entity vested with the responsibilities, rather the Attorney General, of ensuring that criminal justice system is not abused or used oppressively. This court does, for instance, by inquiring whether the***

power of entering a nolle prosequi vested in the Attorney- General has been exercised in accordance with this constitution or any other law……..so that, under our constitution, the exercise of such powers of the Attorney General with respect to the entering of a nolle prosequi can be questioned by the court……the power of the Attorney General under section (26) (3) of the Constitution are subject to the jurisdiction of the courts by virtue of section 123 (8) of the constitution. Where therefore the exercise of the discretion to enter nolle prosequi does not meet the test of constitutionality by virtue of section 123 (8) of the constitution then the nolle prosequi so entered will be deemed and declared unconstitutional."

In the instant case, it is not in dispute that CRC 1440/2012 had been adjourned a record 6 times. On three occasions, it was at the instance of the prosecution while on the other three, it was at the instance of the defence. The trial court in its ruling granting the application to withdraw the case under section 87 (a) of the CPC did consider these factors. The court further observed that the prosecution was within their right as granted by section 87 (a) of the CPC to make the application and that under the section, the prosecution was not barred from re-arresting and charging the accused should they so decide. As at the time that the charges were withdrawn, the petitioners had not been called upon to make their defence and therefore their discharge within the meaning of section 87 (a) of the CPC was not a bar to subsequent proceedings against them.

Under Article 157 (I) and (II) of the Constitution the DPP in exercising the powers conferred by this Article, 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. Constitutionally, withdrawal of a charge and the eventual charging of one again is contemplated under the CPC and the Constitution and it does not of itself constitute a violation of any constitutional right. The question the court needs to consider in this application is whether the application is brought in public interest. The interest of the administration of justice and the need to prevent an abuse of the legal process. In the instant case, did the court exercise its discretion judiciously bearing all the above factors in mind? The facts of this case have already been considered. The Criminal Case 1440/2012 had been in court for about two years from 14/5/2012 to 5/2/2014. As earlier noted, both sides take blame for the six (6) adjournments that the court granted. Taking into account the fact that the court had declined to allow a further adjournment on 5/2/2014 for the reasons that the prosecution had sought adjournment for similar reasons and the only adjournment would be punitive to them, it did not make any sense for the court to go ahead to allow a withdrawal under Section 87 (a) of CPC because the result was that the accused persons were re-arrested immediately thus causing an injustice to the accused on account of delay. In fact the petitioners were worse off than if the case had been adjourned. The inconvenience of being charged afresh, having to get other sureties in the matter, and starting all over with the possibility of the prosecution trying to get fresh instructions in the case was real. This being an offence of robbery with violence which is indeed a very serious offence, there was no guarantee that it would be heard expeditiously thus the court was in essence defeating the provisions of Article 50 (1) (e) that the trial will begin and be concluded without unreasonable delay. The above provision is buttressed by Article 159 (I) (b) that justice shall not be delayed. In my view, by allowing the application under Section 87 (a) of CPC after denial of adjournment it amounted to an adjournment through the backdoor. In my view, the court did not exercise its discretion judiciously because the court would as well have allowed an adjournment instead of the petitioners being subjected to a fresh lengthy, tedious trial that amounts to oppressing and vexing the petitioners. In this regard, whereas I recognize the court's broad discretion under the said section 87 (a) CPC and bearing in mind the seriousness of the offence, I hereby reverse the trial court's order in CRC 1440/2012 dated 5/7/2014 allowing the withdrawal of the case under Section 87 (a) of CPC. Instead, I substitute it with an order adjourning the case to another date, convenient to the court for further hearing by the trial court. If the trial magistrate is no longer at the station, the same to proceed before another magistrate competent to try the case.

This court was also invited to declare Section 87 (a) of CPC as being unconstitutional. The court was not given any good reason why the said section should be declared unconstitutional. In my view, Section 87 (a) of CPC must be read with Article 157 (8) and (11) of the Constitution which provides the purview under which the courts should exercise their discretion. If properly exercised, taking into account the

special circumstances of each case, there is nothing unconstitutional about the section.

In the end, I allow the application in part by ordering that the CRC 1407/2014 is hereby permanently stayed. The petitioner to appear before Chief Magistrate's Court Maua, to get directions in CRC 1440/2012 for further hearing.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF JUNE 2015

R.P.V. WENDOH

JUDGE

PRESENT

Mr. Mulochi for State

Mr. Igweta Holding Brief for Mr. Mbogo for Accused

Kirimi, Court Assistant