



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO. 104 OF 2015

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE.....2ND RESPONDENT

WILFRED THIONG'O NJAU.....EX-PARTE

JUDGEMENT

1. The Applicant, Wilfred Thiong'o Njau was the accused person in **Kiambu Chief Magistrate's Court Criminal Case No. 2392 of 2011** in which he had been charged with stealing by servant contrary to Section 281 of the Penal Code. On 17th March, 2015 when the said matter came up for hearing before the trial magistrate, the prosecutor applied for adjournment on the ground that no witness had turned up in Court. Counsel for the Applicant vehemently opposed the application for adjournment. The magistrate concurred with him that the matter had indeed been adjourned several times and thus rejected the application for adjournment.
2. At that juncture the prosecutor applied to withdraw the matter under Section 87(a) of the Criminal Procedure Code (CPC). In response counsel for the Applicant stated:

“S 87 (a) CPC was not meant for misuse though it is constitutionally allowed.”

The Court thereafter made the following order:

“Matter withdrawn under S. 87(a) CPC. I discharge the accused under the section. Securities be released to sureties.”

3. The Applicant's case is that the 1st Respondent, the Director of Public Prosecutions and the 2nd Respondent, the Inspector General of Police now intend to re-arrest him and have him charged afresh in regard to the same offence supported by the same evidence. Through the notice of motion application dated 21st April, 2015 the Applicant therefore applies for an order of prohibition directed against the respondents prohibiting them from arresting, detaining or charging him in relation to matters that had taken him to Court in **Kiambu Chief Magistrate's Criminal Case No. 2392 of 2011**.
4. According to the Applicant he will be excessively and unfairly punished if he is re-arrested having attended court for four years. Further, that he is also an accused person in criminal case No. 1036

- of 2013 arising from the same facts and involving the same witnesses.
5. It is the Applicant's case that a fresh trial will go against public policy and deny him a fair trial. He asserts that a retrial will be against his legitimate expectation. Further, that Section 87(a) of the CPC was not meant to cushion inaction and negligence or cover failures on the part of the prosecution.
 6. The Applicant also averred that on the day the matter was withdrawn the investigating officer and a witness by the name Stella Wanjiru were within the Court compound ready to testify.
 7. The respondents opposed the application through the replying affidavit of a prosecution counsel Chiira Chris sworn on 28th May, 2015. The respondents disclosed that they indeed intend to re-arrest and charge the Applicant as they are allowed to do so by Section 87(a) of the CPC.
 8. The only question to be answered in this matter is whether the respondents' decision to re-arrest and charge the Applicant afresh amounts to abuse of power.
 9. Section 87 of the Criminal Procedure Code States:

“87. In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney-General*, 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;

(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted.”

10. A plain reading of the said Section clearly shows that the DPP is allowed to withdraw from the prosecution of any person but such withdrawal, if done before the person is placed on his defence, shall not operate as a bar to subsequent proceedings against the person on account of the same facts.
11. The office of the Director of Public Prosecutions is created by Article 157(1) of the Constitution and given state powers of prosecution under Article 157 (6) 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) 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).”

12. Under Article 157(6)(c) any criminal proceedings may be terminated before the delivery of judgment subject to clause (7) and (8) of Article 157. Clause (7) provides that:

“(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.”

Clause (8) states:

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

13. Clause (8) of Article 157 requires the DPP to exercise his power of discontinuation of a prosecution with the permission of the court.
14. The proceedings of 17th March, 2015 in **Kiambu CM Criminal Case No. 2392 of 2011** clearly show that the DPP was granted permission by the Court to discontinue the prosecution. As correctly pointed out by the respondents in their submissions, if the Applicant was aggrieved by the decision of 17th March, 2015 then he ought to have either appealed against the decision of the magistrate or sought review against it.
15. In **George Taitumu v Chief Magistrates Court Kibera & 2 others [2014] eKLR** D.S. Majanja, J was confronted with a similar application and he opined that:

“22. I would also add that DPP and the Police are not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial. They duty of the prosecutor is bring the new information and evidence to the attention of the accused and for the court to give the accused the opportunity to interrogate the new evidence and adequate time to prepare his defence. Likewise, after discharge of the accused under section 87(a) of the CPC, the court cannot prevent further the investigations into the subject of the trial.”

16. The learned Judge continued and stated that:

“27 Section 87(a) of the CPC gives the learned magistrate broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. In light of Article 157(11) of the Constitution such discretion has to be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interests of administration of justice and the need to prevent and avoid an abuse of the legal process.

28. According to the proceedings of 20th January 2014, it is clear that the prosecutor pre-empted the learned magistrate’s decision on the adjournment by applying to withdraw the case against the accused.....”

I agree with the observations of the learned Judge.

17. A keen look at the facts of the matter before me shows that the Applicant’s criminal case had been in Court for close to four years. It had been adjourned many times at the request of the prosecution. In a scenario where the trial court had found that the application for adjournment was not merited, the trial court ought to have rejected an application for discontinuation under Section 87(a) CPC and asked the prosecution to close its case on the evidence on record. A decision would then have been made on the evidence already adduced. It does not serve any purpose to deny the prosecutor an adjournment and then proceed to allow withdrawal under section 87(a) CPC as this amounts to an application for adjournment through the backdoor as the accused person is likely to land in court again.
18. In this matter the decision of the magistrate has not been challenged. The power of discontinuation was exercised by the DPP within the parameters of the Constitution and the CPC. As such, I find the application unmerited.
19. The Applicant did mention in passing that he is also facing trial in **Kiambu CM Criminal Case No. 1036 of 2013**. It is his case that his second trial arises from the same facts as those of **Kiambu CM Criminal case No. 2392 of 2011**. It is his case that in **Kiambu CM Criminal case No. 1036 of 2013** the charges, the witnesses, exhibits and the entries in the Occurrence Book are the same with those for **Kiambu Criminal Case No.2392 of 2011**. It is difficult for this Court to make a just determination on this issue as the Applicant did not exhibit the witness statements,

copies of exhibits and entries in the Occurrence Book so that the Court could determine if the two matters indeed arose from the same transaction.

20. In short, the Applicant's notice of motion dated 27th April, 2015 is dismissed for want of merit. Each party to meet own costs of the proceedings.

Dated, signed & delivered at Nairobi this 19th day of August, 2015.

W. KORIR,

JUDGE OF THE HIGH COURT