REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION

HIGH COURT CRIMINAL REVISION NO. 67 OF 2014

(Arising from Makadara Cr. Case No. 1243 of 2013)

REPUBLIC…….……APPLICANT

VERSUS

GEORGE KARIUKI GICHUKI & 2 OTHERS…….……RESPONDENTS

RULING

The request for revision was made by the Director of Public Prosecutions (DPP) vide his letter dated 25th August 2014 of a ruling delivered on 20th August 2014 by Hon. T. Okello Senior Principal Magistrate in **Makadara Criminal Case No. 1243 of 2012 Republic vs George Kariuki Gichuki & 2 others**. The ruling of the magistrate followed a *Nolle Prosequi* request dated 6th August 2014 by the Applicant. The request for *Nolle Prosequi* was rejected by the court which refusal has given rise to this revision application.

The brief history of the case is that the Respondents were charged with stealing contrary to Section 275 of the Penal Code. It was alleged that on 2nd March 2012, at Tetra Pak Limited in Industrial Area within Nairobi, jointly stole six bags of polythene raw material valued at Kshs.1,527,478.00, the property of the said Tetra Pak Limited. The Respondents took plea on 5th March 2012. As at the time the request for *Nolle Prosequi* was made, two witnesses had testified. The said request also followed a refusal by the learned trial magistrate to have the case withdrawn under Section 87(a) of the Criminal Procedure Code. The latter application was made on 28th May 2014 by the learned prosecutor Ms.Oundo following allegations that the prosecution had been unable to secure the remaining witnesses who had expressed threats to their lives if they testified in the case. To the dismay of the defence, the application for withdrawal of the case by the prosecution was made after the trial magistrate had given a last adjournment to the prosecution. In declining to allow the application, the learned trial magistrate stated in his ruling delivered on 2nd July 2014 that if indeed there were threats to the witnesses, the prosecution would have sought the aid of the Witness Protection Agency so that the witnesses would be protected as they testified. He observed that with the existence of the agency, the trial ought not to have been interfered with and that the application made by the prosecution was not merited. The learned trial magistrate relied on the same reasons in declining to allow the *Nolle Prosequi*.

In the letter by the Applicant requesting for revision of the ruling dated 20th August 2014, it is alluded

that there were good grounds why the remaining witnesses who were employees of the complainant company refused to testify. They had filed complaints that their lives were in danger whereupon the police took up investigations on the said complaints. In the course of the trial, the matter took a drastic dimension when one of the accused persons who turned a state witness received similar threats and was subsequently found murdered. The fears of the witnesses were compounded when the prosecutor applied for warrants of arrest when they failed to turn up to testify. Although the court subsequently lifted the warrants of arrest, the witnesses were not comfortable to appear in court to testify despite the fact that the court had ordered that the police carry out investigations into the allegations raised by the witnesses. Furthermore, the complainant company arrayed fears that the witnesses who were its employees were being exposed to harm. Its concern was transmitted to the DPP through its lawyer, learned counsel Mr. Fred Ojiambo who indicated that the complainant was no longer interested in pursuing the matter.

The onerous duty of this court is to consider whether there was an illegality, impropriety or irregularity pursuant to Section 363 of the Criminal Procedure Code in the decision of the learned trial magistrate in declining to allow the *Nolle Prosequi* filed by the Applicant.

The power to the Applicant to discontinue with criminal proceedings is conferred upon him by Article 157 (6)(c) of the Constitution which provides that the DPP:

> ***"May discontinue at any stage before judgment is delivered, any criminal proceedings instituted by the DPP or taken over by the DPP under paragraph (b).***

Paragraph (b) on the other hand provides that the DPP may:

> ***"take over and discontinue 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.''***

Under Sub-Article (8)

> ***''The DPP may not discontinue prosecution without the permission of the Court"***

It is the latter provision which informed the court to decline the *Nolle Prosequi* filed by the DPP. As provided by **Article 157 (11),** in exercising the power of withdrawal of a case, the DPP is required to

> ***''have regard to the public interest, the interest by the administration of justice and the need to prevent and avoid abuse of the legal process''***

Having in mind the provisions of **Article 157(11)** the Court ought to consider broadly whether fairness to both the complainant and the respondents would be met in allowing the discontinuance of the trial. That is to say, that justice ought to balance on all parties in the trial. The court must also ensure that the DPP does not abuse his power in entering a *Nolle Prosequi* against the standards set by the Constitution. In this respect, I am persuaded by the words of Hon. Justice L. Achode in the case of **HASSAN MAHATI OMAR & ANOR VS REPUBLIC (2014)@KLR** in which she stated that:

> ***''In considering what would be fair and just thing to do in the matter before me, I had recourse to the words of Lord Taylor in the case of R v Smurthinaite [1994]1 All ER 898 at page 903, in which he said:***
>
> *"Fairness of the proceedings involves a consideration not only of fairness to the accused but also, as has been said before, fairness to the public.''*
>
> ***… Indeed, the court does not operate in a vacuum and serves the interests of justice which are intended to safeguard the interests of the public.''***

The lower court proceedings show that after the plea was taken on 5th March 2012, the first witness

testified on 11th June 2012. Before this date, on 23rd April 2012, the prosecutor applied for adjournment on the ground that they did not have their police file. The trial next came up for hearing on 8th October 2012 when both the 2nd and 3rd accused persons applied for adjournment. On 18thJanuary 2013, the prosecutor again applied for adjournment without giving a reason for the application. The trial was set down for hearing on 5th February 2013. On this date, the matter did not proceed because the trial magistrate was visiting a scene. It was fixed for hearing on 15th February 2013. On the latter date, nothing proceeded. There is also nothing on record showing what transpired in court, but the trial was set down for hearing on 3rd July 2013. Come this date, the 2nd accused informed the court that his advocate was held up in an Election Petition at Makueni. The prosecutor was not also ready to proceed. He indicated to the court that the witnesses who were bonded were not present in court. The hearing was set down for 28th October 2013. Court issued summons to the witnesses.

On 28th October 2013, the prosecutor was not ready to proceed and he informed the court that the witnesses to whom summons were served had not availed themselves in court. He applied for their warrants of arrest. The defence was however ready to proceed. Warrants of arrest were issued to two witnesses namely; Fredrick Obwar Oduor and Moses Abok Were. The trial was set down for hearing on 11th November 2013. Before this date, the court sat on 5th November 2013 when counsel for the witnesses Mr. Simiyu informed the court that although warrants of arrests had been issued against the witnesses the same had not been served upon them. The two witnesses had presented themselves in court on account of the warrants issued. The prosecutor then present had no objection to the warrants of arrest being lifted which the court lifted accordingly.

On 11th November 2013, learned State Counsel M/s.Oundo took over the prosecution of the case. She reiterated that the warrants of arrest should be lifted against the two witnesses. The court reconvened at 2.30 pm when she informed the court that it had been brought to her attention that the two witnesses against whom the warrants of arrest had been issued had been threatened and were in fear of their lives and reluctant to testify. She submitted that one of them had been murdered. She requested the court to direct that the Director of Criminal Investigations investigates the said threats and table a report in court. She also applied for adjournment citing that she needed to study the police file to enable her proceed with the matter. Learned counsel for the 3rd accused, Mr. Musundi did not object to the application for adjournment but noted that the information on threats to the witnesses was unknown to the defence. The court adjourned the matter and set it down for hearing on 29th April 2014. It also made an order that the allegations of threats be investigated by the OCPD Makadara Division and that a report be availed in court on the mention date.

The matter was mentioned on 21st January 2014 and learned prosecutor Mr. Muriuki who was holding brief for M/s.Oundo informed the court that he needed to confirm if the OCPD Makadara Division had investigated the allegations of threats to lives of the witnesses. He did not however inform the court whether the investigations had been conducted or whether he had any communication from the said OCPD. The court then issued an order to the OCPD to appear in court on the hearing date to give a report on the matter.

On the 29th April 2014, the trial did not proceed because the trial magistrate was away on other duties. It was set down for hearing on 20th May 2014. On this date, M/s. Oundo informed the court that she wished to make an application following the issues she had raised concerning the remaining witnesses. She stated that she had a letter dated 8th April 2014 authored by the OCS Industrial Area Police Station on instructions by the DPP that the matter be withdrawn under Section 87(a) of Criminal Procedure Code. The reason for the application was given as to enable the DPP to look into the issues relating to the aforestated witnesses. The defence opposed the application giving the reason that the same was made in bad faith because the accused persons had all along attended the trial. In any case, the prosecution witnesses had throughout failed to attend court prompting the court to issue warrants of arrest against them which ultimately meant that the prosecution had no evidence to offer. It was also the defence contention that there was no evidence tabled before the court of the allegations of threats to the witnesses. It was further submitted by the defence that if the court granted the request of withdrawal of

the case under **Section 87(a) of Criminal Procedure Code,** it would be tantamount to granting an adjournment indefinitely as the case would be reinstated at the whim of the prosecution. In attendance was learned Counsel Mr.Ojiambo for the complainant who concurred with the prosecutor that the matter raised of threats to the witnesses was not frivolous particularly bearing in mind that one of the probable witnesses had been murdered. In that respect, he urged the court to exercise its discretion and order that the accused persons be discharged as it would not be prejudicial to them. Of course the request by the prosecution was turned down after which the DPP filed the *Nolle Prosequi* which was also rejected by the court.

From the chronology of the events consisting the proceedings of the trial, it is very clear that the issue of threats to the subject two witnesses came too late in the day after the case had dragged in court for two years. From the submissions of the prosecutor before the magistrate, no particular evidence of the threats was tabled. It was also not disclosed to the court by what means the threats were being issued. Furthermore, it would be expected that particulars or evidence of death of the alleged witness be tabled before the court and more particularly the means by which he died. As at now, even this court cannot ascertain what the cause of the death of the witness was. Incidentally, there was also no disclosure whether those two subject witnesses were the only other witnesses who the prosecution intended to call. Again, a look at the record prior to the making of the application for withdrawal of the case under Section 87(a) of Criminal Procedure Code, the prosecution had made other applications for adjournment on account that the witnesses had not attended the trial. In those instances, the issue of threat to the witnesses had not arisen. The same having been raised when the trial had progressed too far, it was imperative upon the prosecution to demonstrate their existence. This not having been done, it was clear that the request for withdrawal of the case could not have been made in good faith.

Although the DPP consulted counsel for the complainant on this matter, which was intended to safeguard the interest of the public as envisaged under **Article 157(11**) the consultation was done too late in the day and after the prosecution were unable to secure the attendance of their remaining witnesses. In that regard, the role of this court and of the trial court cannot be reduced to merely rubber stamp the decision of the DPP so as to circumvent the discharge of justice for the accused persons. This is true because in all fairness, for the period preceding the making of the application which was way over one year since the commencement of the trial, the issue of the threat to the witnesses had never been brought to the attention of the court. It cannot be fair and in the interest of discharge of justice to take back the accused persons to where they began 3 years ago. Furthermore, as at now, there is still no evidence that those threats were investigated and what the outcome of the investigations was. It is clear on record that on the date the application for withdrawal of the case under Section 87(a) was made, the prosecutor was supposed to table a report of investigations of the threats by the OCPD Makadara Division. Instead of tabling the report, she made the said application for withdrawal of the case. It is gainsaid then that no investigations were carried out by the OCPD Makadara Division and/or to circumvent the tabling of a negative report in this regard, the prosecutor opted to make an application of withdrawal of the case.

In any event, as rightly observed by the learned trial magistrate in his both rulings, the prosecutor was aware of the existence of the Witness Protection Agency to which the witnesses would have been referred for protection as they prepared to testify. They failed to seize this noble opportunity and instead followed the path of circumventing justice. This goes against the tenet of **Article 50 (2) (e) of the Constitution** which provides that an accused has a right;

> ***"to have the trial begin and concluded without unreasonable delay."***

The spirit and letter of the entire Article 50 of the Constitution is to safeguard the right to a fair hearing of an accused person. That right cannot be exercised if the DPP were to be allowed to withdraw cases without any justifiable cause. In the present case, I have demonstrated that there was no justifiable cause for allowing the DPP to withdraw the case and the trial magistrate rightly directed himself in so finding. Had the reverse been the case, it would have amounted to an abuse of the process of court. I find no illegality or impropriety or irregularity in the rulings made by the learned trial magistrate.

In the end, this application must fail and the same is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2015

G. W. NGENYE – MACHARIA

JUDGE

1. M/s Oundo for the Applicant

2. 1st Respondent in person

3. Musudi holding brief for Mutua for the 2nd Respondent

4. Mr. Musudi for the 3rd Respondent

5. Ms. Elkarano holding brief for Mr Ojiambo for the complainant