



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
HIGH COURT REVISION NO. 195 OF 2015

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165(3), (6), & (7) OF THE
CONSTITUTION OF KENYA, 2010 AND**

**IN THE MATTER OF SECTION 10 OF THE JUDICATURE ACT, CAP 8 AND THE HIGH
COURT (PRACTICE AND PROCEDURE) VACATION RULES, PART 1 RULE 3**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

NAIROBI CHIEF MAGISTRATE'S COURT.....1ST RESPONDENT

ARVINDKUMAR PATTNI.....2ND RESPONDENT

RAMESHKUMAR VITHALDAS GAGADA.....3RD RESPONDENT

FRANK NG'ANG'A GIKONYO.....4TH RESPONDENT

AND

MILIMANI LAW COURTS CRIMINAL CASE NO.1400 OF 2014

REPUBLIC

VS

- 1. ARVIND KUMAR PATTNI**
- 2. RAMESHKUMAR VITHALDAS GAGADA**
- 3. FRANK NG'ANG'A GIKONYO**

RULING

By an Originating Notice of Motion, the Applicant prays for the following orders:

That this Honourable court be pleased to urgently call for and examine the record in the Milimani Law Courts Criminal Magistrate's Court Criminal Case No. 1400 of 2014, Republic Vs 1. Arvind Kumar Pattni 2. Rameshkumar Vithaldas Gagada 3. Frank Ng'ang'a Gikonyo, so as to satisfy itself and pronounce on the correctness, legality and propriety of the orders of the subordinate court in the interest of fair administration of justice.

- a. That this honourable Court be pleased to revise, vary and/or set aside the orders given by the subordinate court on 25th June, 2015 in the proceedings so as to accord with the fair administration of justice therein.
- b. That this Honourable Court be pleased to issue such order as it may deem necessary to meet the demands of the administration of justice including but not limited to setting aside the dismissal of the charges and ordering for a fresh trial to be conducted before a different magistrate.

The main ground on which the application is premised is that the learned trial magistrate dismissed the charges against the 2nd to 4th Respondents based on a circular issued by a public officer as opposed to the law.

The application is supported by the affidavit of Daniel Karuri, an Assistant Director of Public Prosecutions sworn on 7th August, 2015. In brief, the gist of the Supporting Affidavit is that the 2nd to 4th Respondents were the accused persons in the trial proceedings having been charged with the offence of failing to keep a register of transactions contrary to Section 11 (1)(b) as read with Section 11(2) of the Trading in Unwrought Precious Metals Act, Cap 305, Laws of Kenya. They pleaded not guilty on 30th September, 2014 and the trial was set down for hearing on 9th December, 2015 before Court No. 2. Each of them was released on a cash bail of Kshs.5,000/=.

On 9th December 2014, the matter was re-allocated to Court No. 5 and fixed for hearing on 25th March, 2015. On this date, the trial did not take off as the prosecutor needed to conduct a pretrial with the witnesses and the matter was set down for hearing on 29th April, 2015. On this date, PW1 one, Moses Njiru Njeru testified. His evidence was that for one to conduct such business in gold dealership, a special dealer's license is required. He stated that he was aware that the two companies associated with the three accused persons namely Ushindi Exporters Limited and Skyhawk Limited were licensed to mine and deal with gold and had been issued with special dealers licenses. The two licenses were marked for identification. The said witness further observed that the accused persons were exempted from keeping records of the names of the dealers vide a circular to all gold dealers by the Commissioner of Mines and Geology, Mr. Moses Masibo dated 6th January, 2012. The circular was also marked for identification. In cross examination, the witness confirmed that the circular issued by the Commissioner of Mines and Geology reflected the Government's position on inclusion of names of parties to the transactions and that there would be no wrong on the persons exempted from keeping records specifically in disclosing the names of persons dealing in gold. In that respect, it was obvious that the witness evidence had exonerated the accused persons from any wrong doing.

Based on that observation, the learned trial magistrate prevailed on the prosecutor to liaise with the investigating officer on whether the Director of Public Prosecutions intended to continue with the charges against the accused persons. The matter was fixed for 12th May, 2015 on which date the Investigating Officer confirmed having consulted the Director of Public Prosecutions but no response had been received from him. A mention date was fixed for 11th June, 2015. On this date, the court was informed that the Director of Public Prosecutions had not yet given his advice. The matter was again fixed for mention on 25th June, 2015. The position was the same as at 11th June, 2015 as the Director of Public

Prosecutions had not yet given his response. At that point, the learned magistrate observed that, based on the evidence of PW1 who had exonerated the accused persons, it was fruitless to continue with the trial as in any event the same would end up in an acquittal. She referred to the circular identified by PW1 in that regard. She proceeded to dismiss the charges and accordingly acquitted the accused persons. The Applicant was dissatisfied with this drastic move which culminated into this application.

The application was vehemently opposed by the 2nd to 4th Respondents. At this point I would wish to point out that the Attorney General was served with the application on behalf of the 1st Respondent. He neither entered appearance nor appeared to prosecute the application. Learned counsel Mr. Ndambiri was on record for the 2nd to 4th Respondents. On behalf of the latter, there is a replying affidavit sworn by the 4th Respondent on their behalf on 28th October, 2015. The chronology of what transpired before the learned trial magistrate was as explained by the learned state counsel Mr. Karuri both in the Supporting Affidavit and oral submissions made before me on 9th November, 2015.

The contention of 2nd to 4th Respondents is that the learned trial magistrate was right and within the law in dismissing the charges against the accused persons. It is contended that the Director of Public Prosecutions having taken too long to give his advice, and being obvious that the charges were hopeless, in the interest of justice, the most prudent thing to do was to dismiss the charges. Furthermore, based on that evidence, it was obvious that the trial court's decision did not in any way undermine the doctrine of separation of powers, specifically that of the Director of Public Prosecutions to control criminal proceedings. In that regard, the trial magistrate was impartial in arriving at a decision that the case was hopeless as the key witness had already exonerated the accused persons. If other witnesses were to continue with evidence, the same would amount to abuse of the court process and a waste of the court's precious time. Further, it was important for the court to note that the Director of Public Prosecutions had been given sufficient time to give his advice on whether he intended to continue with the prosecution of the accused persons but had failed to do so.

Learned counsel for the 2nd to 4th Respondents while reiterating the content in the Replying Affidavit submitted that the decision of the trial magistrate was made in the public interest and administration of justice. According to him, it did not matter how many witnesses the prosecution would call. The obvious result was that the entire trial would end up in an acquittal. He submitted that the learned trial magistrate was right in referring to a workshop she attended in which as judicial officers, they were encouraged to dismiss charges when the trial was eminently hopeless. Such dismissal of charges is in exercise of a judicial officer's administrative mandate in the interest of justice.

I have accordingly considered the application together with the rival submissions. The office of Director of Public Prosecutions is established under Article 157 of the Constitution. Under Sub-Article (6), the powers of the Director of Public Prosecutions are clearly spelt out as follows:

- 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 under paragraph(b).

Under (c) above, the Director of Public Prosecutions is conferred with discretionary powers to discontinue at any stage, before judgment, any criminal proceedings instituted by him. Under Sub-Article (11), in exercising the powers conferred on him by Article 157, the Director of Public Prosecutions must 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 instant case, it is obvious the criminal proceedings against 2nd to 4th Respondents were instituted by the Director of Public Prosecutions. Therefore, unless in the course of procedure, the need to terminate the proceedings arose, any premature termination of the proceedings had to be instituted by the Director of Public Prosecutions himself. The scenario obtaining in the current case

is that the trial magistrate was right and proper in advising the prosecutor to consult the Director of Public Prosecutions with a view to giving his advice on whether he intended to continue with the criminal proceedings against the accused persons. She needed to await the advice of the Director of Public Prosecutions before taking the drastic action of terminating the charges. The circumstances prevailing were such that the trial court on its own motion could not terminate the case. Upon realization that the Director of Public Prosecutions was taking too long to give his response on whether to terminate the charges, she ought to have ordered that the matter proceeded with the calling of other prosecution witnesses. I agree that based on the evidence of PW1, there was a likelihood that the trial may have ended up in an acquittal. But again, the evidence of the remaining witnesses was still unknown to the trial magistrate herself. Her action leads to the inference that all other witnesses may have adduced hopeless evidence. But that was not the case as a trial court is not seized of the evidence that either the prosecution or the defence would adduce. The making of an assumption of the likely outcome of the case was bad for the trial. That notwithstanding though, the learned trial magistrate ought to have awaited an application by either party for the termination of the charges after which should would have ruled on it. Otherwise only the Director of Public Prosecutions had the powers on his motion decided to terminate the charges. The learned trial magistrate thus usurped the powers of Director of Public Prosecutions in prematurely terminating the charges. She should have ruled that the remaining witnesses be called to adduce evidence after which she would have summarized the same and made a ruling on whether the accused persons had a case to answer.

In any case, it was a misdirection on the part of the trial magistrate to refer to a seminar she had attended as source of her knowledge which informed her that the charges ought to have been terminated. The materials given in such workshops may not necessarily be law. She did not cite the law she was relying on in making her decision. There was therefore, an irregularity in the manner in which the charges were terminated. Having made the above observations, it is the view of this court that this application is meritorious and I accordingly give the following orders:

- a. I hereby revise by setting aside the orders of the subordinate court issued on 25th June, 2015 in Criminal Case No. 1400 of 2014 terminated the charges against the 2nd to 4th Respondents.
- b. The criminal proceedings against the 2nd to 4th Respondents shall forthwith be re-opened.
- c. The original file in the criminal proceedings shall forthwith be remitted to the trial court for mention on 27th November, 2015 before the Chief Magistrate for allocation of a suitable hearing date.
- d. The 2nd to 4th Respondents are hereby admitted to a cash bail of Kshs.5,000/= each as earlier given, which shall be paid to the trial court on 27th November, 2015.

It is so ordered.

DATED and DELIVERED this 24th day of November, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

..... *for the Applicant.*

.....*Respondents.*