REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MISC. CRIMINAL APPLICATION NO. 530 OF 2012

HELMUTH RAME ……APPLICANT

VERSUS

REPUBLIC ……RESPONDENT

(From the original order in Criminal case of the Chief Magistrate's court at Nairobi before T. Murigi, Senior Principal Magistrate on 24th October, 2012)

RULING

Mr. Helmuth Rame is an accused person in Criminal case No. 2261 of 2005. In that case he was charged with one count of conspiracy to defraud contrary to Section 317 of the Penal Code and three counts of obtaining money by false pretences contrary to Section 313 of the Penal Code. The record before me shows that the case was heard by several magistrates but the relevant proceedings relating to this application start with the record of Mrs. C. Githua S.P.M. (as she then was)who heard the prosecution case resting with the calling of the P.W. 10.

On 2nd December, 2009 the prosecutor is record as having told the court "**this is the close of the prosecution case".** Mr. Kinyanjui the counsel for the accused and Mr. Gikonyo for the state then undertook to file written submissions which they did and subsequently highlighted the same. On 29th December, 2010 the learned trial magistrate delivered the following ruling,

> **"From the evidence on record, this court is satisfied that a prima facie case has been established against the accused person and consequently he has a case to answer. He is hereby put on his defence under Section 211 of the C.P.C."**

After several mentions Mrs. Githua was elevated to the High Court and matter placed before Mrs. G. W. Ngenye Macharia who ordered that the case be heard *de novo*. The said order was made at the instance of the learned counsel for the accused while the learned counsel for the State was of the view that the case be continued from where it had reached but left it to the court.

The case did not start *de novo* as ordered but subsequently landed in the hands of Mrs. Murigi, S.P.M. after Mrs. Ngenye Macharia was deployed to be a full time Deputy Registrar. Mr. Kinyanjui the learned

counsel for the accused informed Mrs. Murigi that there was a related civil suit No. 16 of 2006 which exonerated the accused. Both the learned counsel for the accused and the State undertook to provide the relevant proceedings and judgment to the trial magistrate.

After some submissions were made on a subsequent hearing, Mr. Kanjama appeared for the complainant and resisted the application by the accused person to be exonerated from criminal liability. Mr. Gikonyo then moved to withdraw the criminal case against the accused person under Section 87 of the Criminal Procedure Code. This was supported by Mr. Kinyanjui while Mr. Kanjama vehemently opposed the step taken by Mr. Gikonyo on behalf of the Director of Public prosecutions. In a ruling delivered on 24th October, 2012 the learned trial magistrate Mrs. Murigi declined to terminate the proceedings and ordered that the case proceeds for hearing to its logical conclusion.

Aggrieved by the said order Mr. Gikonyo on behalf of the Director of Public Prosecutions moved the court by way of a letter dated 6th November, 2012 asking that this court calls for and examine the record of the said proceedings to satisfy itself on the legality and propriety of that order. This related to;

a) The Honorable magistrate decision in which she dismissed the application by the Director of Public Prosecutions to withdraw the criminal case and directing that the matter proceeds to logical conclusion.

b) The Hon. magistrate to direct the prosecution to proceed with the matter when they have elected not to do so and the accused person has not objected to the withdrawal of the case.

c) The Hon. Magistrate misapprehended the law relating the threshold in civil and criminal cases as the High Court had exonerated the accused person in the civil matter before it from any liability.

Relying on those points set out above he asked the court to review the lower court order. By a letter dated 24th June, 2013 the learned counsel for the complainant asked the court to also examine the record and revise the order for the case to start *de novo* on the grounds that

i. The prosecution had called 10 witnesses who had all testified.
ii. The prosecution had made a prima facie case against the accused and was put on his defence.
iii. This is a 2005 matter and to start it afresh would not be in the interest of justice and it is only logical and in the interest of justice for the case to proceed from where it was.
iv. The complainant is a Kenyan residing in America and to start the case *de novo* would mean securing his attendance yet again and this would unfairly expose him through expenses and anxiety.
v. The order to start *de novo* is a discretionary one to be exercised based on considered facts and clear principles but the subordinate court's decision was made merely after an ungrounded application by the accused.

In the pendance of this application the accused filed Miscellaneous Criminal Application No. 146 of 2013 seeking orders of stay of the case against him pending the revision orders in this application, that is, Criminal Revision No. 530 of 2012. Learned counsel on record have filed their submissions and cited various authorities which I have read.

Under Article 157 (6) (c) of the Constitution, the Director of Public Prosecution may discontinue at any stage before judgment is delivered any criminal proceedings instituted thereby or taken over by his office. If that step is taken after the close of the prosecution case, the defendant shall be acquitted. See – Article 157 (7). Article 157 (8) of the Constitution provides that the Director of Public Prosecutions may not discontinue prosecution without the permission of the court. It is further provided at Article 157 (11) as follows,

> **"In exercising the powers of this Article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent and avoid abuse of the legal process."**

In her ruling of 24th October, 2012 Mrs. Murigi had this to say,

> **"What is before the court is to determine whether or not a crime was committed. What was before the civil court was the rights of the parties.The issues are different and ought to be determined independently. The complainant is a stakeholder/party in this case and going by the submissions of Mr. Kanjama I find that he is objecting to the withdrawal of the case by the DPP. The upshot of the foregoing is that the application is dismissed, case to proceed for hearing to its logical conclusion."**

The ruling refusing the withdrawal of the case at the instance of the Director of Public Prosecutions reinforces the provisions of the Constitution that the Director may not exercise those powers without the permission of the court. What this means is that the power is not absolute and the court has the final say.

Several factors come into play in addressing such orders. These include the fact that each case depends on its own circumstances and that the public interest underlines all such orders. **In criminal case No. 56 of 2007 Republic versus Izlam A. Omar and others** the Republic filed a *nolle prosecue* on behalf of the Attorney General signed by the Assistant Deputy Public Prosecutor to terminate criminal proceedings against the respondents who were facing a charge of theft by servant contrary to Section 281 of the Penal Code.

The learned counsel for the respondents objected to the said *nolle prosecue* on the ground that the prosecution had ulterior motives. The learned trial magistrate stayed the proceedings pending the hearing of the objection by the respondents. The state being dissatisfied with such a stay made a refence to the High Court. After hearing the reference Kimaru J, in his ruling said as follows,

> "**The role of a trial court is not and cannot be reduced to merely endorsing the decision of the Attorney General. A trial court has a duty to ensure that justice is done to the parties who appear before it. If it appears that the Attorney General, in exercise of its powers to enter a nolle prosecue is acting contrary to the established constitutional norms of a fair trial, a trial court is within its rights to refuse to enter nolle prosecue and refer the matter to a constitutional court for determination as to the legality of the decision by the Attorney General. A trial court cannot fold its arms and say it cannot hear an aggrieved party who is challenging the exercise of the power vested on the Attorney General by the law."**

With respect I agree. That ruling was made in on 30th November, 2007 before the Constitution 2010. However, it is instructive that the power of the court is specifically reinforced in the provisions I have cited above. Any other ruling to the contrary would fly in the face of those constitutional provisions.

The step taken by the Director of Public prosecutions was after the close of the prosecution case and after the trial court had found the accused has a prima facie case and put him on his defence. To withdraw the case at this stage may put into question the public interest and the interest of the administration of justice and the need to prevent and avoid abuse of legal process. I say so because, one of the reasons advanced by the Director is that the civil proceedings had exonerated the accused.

The High Court Judgment in Civil Suit No. 16 of 2006 was delivered on 30th March, 2011. The application to withdraw the case against the accused was made on 26th June, 2012 which was over one year after the said judgment. It is hard to comprehend that the reason was because the accused had been exonerated by that decision. If that be the case, the best recourse is for the accused to state this in his defence. In any case, the cause of the action in the civil case was founded on contractual obligations and breach thereof.

It is also clear that the complainant on whose behalf the Director was acting had not been consulted. My assessment of the attendant circumstances and facts is that the learned trial magistrate was correct in refusing to accept the withdrawal of the case against the accused. The question that follows is whether the case should start *de novo* or proceed from where it had stopped.

The accused person was and is represented by counsel. The record shows that the witnesses were subjected to lengthy and searching cross-examination. It has not been stated what value will be added if the order for starting the case *de novo* were to be granted. It is considered that many years have gone by since the accused was first arraigned in court. This however cannot be attributed to the court alone. The record shows both learned counsel for the accused and the state were equally busy with other matters during the trial. Be that as it may, the memory of the witnesses cannot be guaranteed, yet we have a written record of what transpired during the trial.

Indeed, it has been observed in the past that although the accused has all the rights to be informed of the provisions of Section 200 of the Criminal Procedure Code it has been held,

> **"Section 200 is a provision of the law which is to be used very sparingly indeed and only in cases where the exigency of the circumstances, not only are likely but will defeat the end of justice, if a succeeding magistrate does, or is not allowed to adopt and continue a criminal trial started by a predecessor or owing to the latter becoming unavailable to complete the trial".**

See – Ndegwa vs Republic (1985)KLR 534 and Criminal Revision No. 6 f 2013 Epraim Wanjuhi Irungu and 7 others vs Republic.

The Constitution demands that justice shall not be delayed. If an order were to be made to start this case afresh we shall be breaching the Constitution. I find that that order was misplaced and that the hearing should and must continue from the defence case as ordered by Mrs. Githua (as she then was). Lastly, the prayer that Mr. Gikonyo not should be allowed to prosecute the case has not been justified. The submission is based on the perception and in any case this is not the trial court.

Having said so, it follows that the revision sought is declined and the stay order made in Miscellaneous Application No. 146 of 2013 is hereby lifted and vacated.

Orders accordingly.

SIGNED DATED and DELIVERED in court this 30th day of April 2014.

A.MBOGHOLI MSAGHA

JUDGE