



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 150 OF 2014**

**BETWEEN**

**HON. JOHN NJOROGE CHEGE ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**JUDGMENT**

1. The petitioner is a Member of Parliament. He has been charged with three counts of corruptly soliciting a benefit under the *Anti-Corruption and Economic Crimes Act, 2003* in *Nairobi Anti-Corruption Case No. 5 of 2013 – Republic v John Njoroche Chege*.
2. In the course of the proceedings in the Magistrates Court, the complainant, Abdirahman Mohamed Abdullahi, filed an affidavit sworn on 17<sup>th</sup> January 2014 in which he deponed, “*THAT due to both my health status and my religious tenets, I have decided to voluntarily withdraw all that complaint contained in Nairobi Chief Magistrates Anti-Corruption Court No. 5 of 2013 wholly*”.
3. Counsel for the petitioner, Mr Mwangi, submitted that the matter ought to be withdrawn in accordance with **section 240** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* and that the delay in concluding the issue before the Magistrate’s Court violates the petitioner’s right to a fair and expeditious trial under **Article 50** of the Constitution.
4. I called for the proceedings of the Subordinate Court to satisfy myself of the legality and propriety thereof and upon perusal of the proceedings, I noted that the issue of the withdrawal of the complaint had not been dealt by the learned Magistrate.
5. **Part VI** of the *Criminal Procedure Code* deals with the “*Procedure in Trial before the Subordinate Court*”. **Section 204** thereof titled “*Withdrawal of complaints*” provides as follows; “*If a complainant, at any time before a final order is passed in a case under this Part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.*”
6. The issue of whether a complaint is withdrawn and the consequences thereof is a matter within the jurisdiction of the subordinate court. The High Court, exercising its jurisdiction to enforce fundamental rights and freedoms under **Article 165(3)(b)** of the Constitution, should not interpose proceedings before the Magistrate’s Court to pronounce on the matters which are ordinarily within the province of that court. My position is fortified by the decision in *Republic v Enock Wekesa*

**and Another Kitale Criminal Revision No. 267 of 2010 [2010]eKLR** cited by Mr Mwangi. That decision was made on a revision application after the trial magistrate had dismissed an application by the prosecution to terminate the case. Consequently, I decline the invitation to determine whether the complaint before the Magistrate's Court should be withdrawn under **section 204** of the **Criminal Procedure Code**.

7. Mr Mwangi complains that the proceedings are being delayed and that the petitioner right to have the trial commence and conclude without unreasonable delay under **Article 50** is violated. The petitioner was charged on 4<sup>th</sup> July 2013 and the trial scheduled for 3<sup>rd</sup> September 2013. On that date both the defence and prosecution and defence applied for adjournment and the matter was stood over for hearing on 23<sup>rd</sup> October 2013. On 23<sup>rd</sup> October the matter the prosecution applied for an adjourned which the defence did not oppose. When the matter came up for hearing on 30<sup>th</sup> January 2014, the magistrate who was to hear the matter was absent hence the matter was fixed for mention on 11<sup>th</sup> February 2014 when the issue of the complainant's affidavit was raised. The prosecutor insisted that the matter be set down for hearing and the court fixed the matter for hearing on 25<sup>th</sup> April 2014. On that date the matter was adjourned for mention on 2<sup>nd</sup> July 2014 to enable parties pursue this petition and for the prosecutor to take instructions.
8. For delay to constitute a violation of **Article 50(2)(e)** of the Constitution, the petitioner must demonstrate that the delay is "unreasonable." In **Julius Kamau Mbugua vs Republic CA Criminal Appeal No 50 of 2008 [2010]eKLR** the Court of Appeal held that the trial within a reasonable time guaranteed in **section 77(1)** of the former Constitution (which is equivalent to **Article 50(2)(e)** of the Constitution) relates to the whole of the judicial process, starting from when a person is charged and ending at the determination of the trial. It noted that the general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination where the court is obliged to consider all the relevant factors within the context of the whole proceedings. The Court observed that although an applicant has the ultimate legal burden to prove a violation, the evidentiary burden may shift depending on the circumstances of the case but the Court may make a determination on the basis of the facts emerging from the evidence before it without undue emphasis on the burden of proof. The Court stated that the standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable.
9. The history of the case I have recounted shows that the adjournments of the case were grounded on reasons amplified by the parties. Adjournments are permitted under **section 205** of the **Criminal Procedure Code**. Any further delay in the trial is occasioned by the fact that the accused chose to move this Court for relief for the alleged violation of its rights. The delay therefore is not the kind contemplated under **Article 50(2)(e)** of the Constitution.
10. In the absence of any violation of fundamental rights and freedoms demonstrated, the Court cannot grant relief under **Article 23** of the Constitution. In the circumstances, the petition lacks merit and it is dismissed with no order as to costs.
11. The learned magistrate is directed to deal with the proceedings in accordance with the law.

**DATED and DELIVERED at NAIROBI this 29<sup>th</sup> day of May 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Mwangi instructed by Mwangi Mwaura and Partners Advocates for the petitioner.

Mr Okello, Senior Deputy Public Prosecutor, instructed by the Directorate of Public Prosecutions for the respondent.