

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL REVISION NO.5 OF 2014

(Review on Court Order of Bomet SRM Criminal Case No.512 of 2014

– Hon. G. Kiage – Resident Magistrate delivered on 22nd May 2014)

HARUN LETEIPA.....1ST APPLICANT

EVANS RUTO 2ND APPLICANT

DAVID KOKO.....3RD APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING ON REVISION

Pursuant to the letter dated 26th May 2014 authored by the firm of Koech J. K & Co. Advocates, proceedings relating to Bomet SRM Criminal Case No.512 of 2014 Republic vs Harun Leteipa & 2 others were placed before this court for perused under Section 326 and 364 of the Criminal Procedure Code.

I have examined the aforesaid proceedings and it is apparent that Harun Leteipa, Evans Ruto and David Koko, hereinafter referred to as the 1st, 2nd and 3rd Applicant's respectively were arraigned before the Bomet Senior Resident Magistrate's court to face a charge of transporting Forest produce without a permit contrary to Section 52 (1) A as read with Section 52 (2) of the Forest Act No.7 of 2005 Laws of Kenya. The particulars of the offence were that on the 6th day of May 2014 along Narok-Bomet road of Bomet town in Bomet County, jointly were found transporting 95 pieces of cedar timber (door shadows) measuring 7ft each, 89 pieces of cedar frames measuring 6 inches 7ft long, 409 pieces of cedar frames measuring 4 inches by 2 inches and 3.5 ft long and 36 pieces of cross door cedar frames measuring 7ft long, 216 cedar frames measuring 3 inches by 2 inches and 7ft long all valued at Ksh.643,550/= using motor vehicle registration number KAS 834Y Mitsubishi lorry without a permit from the Director of Kenya Forest Service.

The record shows that Mr. J. K. Koech, learned advocate defended the applicants before the court. The applicants pleaded not guilty to the charge on 8th May 2014. On 22nd May 2014 the case was placed for mention before Hon. G. Kiage learned Resident Magistrate, presumably for purposes of fixing a hearing date. On this date, the prosecution applied to withdraw the case against the applicants under Section 87 (a) of Criminal Procedure Code. The learned Resident Magistrate refused to grant the order on the basis that the same is premature and proceeded to set down the case for hearing on 4th August 2014. This prompted the Applicants to write the letter mentioned hereinabove. The learned advocate has annexed to his letter a copy of the opinion given by the office of the Director of Public Prosecutions to the police. The police were advised to withdraw the case against the Applicants under Section 87(a) of the Criminal Procedure Code. The Applicants have specifically stated what their complaint is. However, they have basically requested this court to invoke the provisions of Sections 362 and 364 of the Criminal Procedure Code. The aforesaid provisions gives this court the power to call for examination the record of any criminal proceeding before courts subordinate to it for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and or the regularity of the proceedings before the subordinate court. There is no doubt that the application which was refused was

made by the prosecution. I think the question before this court is whether the learned trial Resident Magistrate properly exercised his power to refuse the application for withdrawal. Under Section 87 (a) of the Criminal Procedure Code the prosecutor has the power to withdrawn a charge facing an accused person any time before judgment is pronounced with the consent of the court or on the instructions of the Director of Public Prosecutions. Under Article 157(6) (c) of the Constitution the Director of Public Prosecutions has the power to discontinue any criminal case before judgment before any court other than a court martial. However the Director of Public Prosecutions' power to discontinue a case is not absolute. Under Article 157(8) of the Constitution it is clearly stated that the Director of Public Prosecutions may not discontinue a prosecution without the permission of the court. The idea is to allow the court to ensure that the Director of Public Prosecutions does not abuse his prosecutorial powers. The law does not prescribe the grounds or reasons a court can use to decline the prosecution's request to discontinue a case. To begin with, it must be emphasized that the court has the discretion to accept or refuse the prosecution application to discontinue a case. In the case before the trial court, the learned Resident Magistrate declined the prosecution's request to discontinue the Applicants prosecution on the ground that the application was premature. I have already stated that the law does not prescribe the grounds the court should consider before determining the application. Under Article 157 (6) (c) of the constitution and Section 87 (a) of the Criminal Procedure Code, the Director of public prosecutions is allowed to discontinue the prosecution of a person before judgment. It is therefore not correct for the learned Resident Magistrate to decline the prosecution's request on the basis that the same is premature. For the above reasons this court is entitled to step in, in exercise of its supervisory power of revision. Consequently, the order disallowing the prosecution's request to withdraw the case against the Applicants under Section 87 (a) of the Criminal Procedure Code is set aside and is substituted by an order permitting the Director of Public Prosecutions to discontinue the prosecution of the Applicants. The case having been terminated the applicants namely: Harun Leteipa, Evans Ruto and David Koko are hereby discharged and set free.

Dated, signed and delivered in open court this 24th day of July 2014.

J. K. SERGON

JUDGE

In the presence of:

Miss. Kivali for Director of Public Prosecutions

Koech J. K. for Applicants.