



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.1 OF 2013**

**IN THE MATTER OF ARTICLE 19 AND 22 (1) AND 22 (2) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE OFFICE OF THE ATTORNEY GENERAL ACT, CAP 49**

**AND**

**IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23 AND 157 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLE 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF A THREAT OF INFRINGEMENT OF THE FUNDAMENTAL RIGHT OF  
A FAIR HEARING**

**AND**

**IN THE MATTER OF CRIMINAL CASE 810 OF 2011 – CHIEF MAGISTRATE'S COURT AT  
NYERI**

**BETWEEN**

**JOHN WARUNGU WANJERI ..... PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 1ST RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT**

**RULING**

By an amended chamber summons under **Article 10 (2) (b) 19, 20, 21, 23, 25, 50, 156 and 157** dated 18th February 2013 filed under certificate of urgency the petitioner moved the court for orders:-

1. *THAT the matter be certified urgent.*
2. *THAT the Honourable Court be pleased to issue a conservatory orders barring, restraining and/or forbidding the 1st respondent from withdrawing Criminal case No.810 of 2011 Chief Magistrate at Nyeri with view of charging the petitioner/applicant before the High Court with murder pending the hearing and determination of this application.*
3. *THAT the Honourable Court be pleased to issue a conservatory order barring, restraining and or forbidding the 1st respondent from withdrawing Criminal case No.810 of 2011 Chief Magistrate Court at Nyeri with a view of charging the petitioner/Applicant before the High Court with murder pending the hearing and determination of the petition filed herein.*

The petition was supported by an annexed affidavit by the applicant wherein he deponed that he is charged with the offence of manslaughter in CMC Criminal case No.810 of 2011 ongoing before Chief Magistrate and that before being charged with the present offence the State had charged him with the offence of murder which was withdrawn on 25th August 2011 under **Section 87** and charged him with the current charge of manslaughter.

That despite the manslaughter case having proceeded and with one witness the 1st respondent intends to withdraw the charges of manslaughter and charge him with murder. He deponed further that he is entitled to a fair hearing and an expeditious trial and that the matter being a 2011 case it would be prejudicial for him to be charged with offence of murder again.

He further deponed that notwithstanding the fact that the prosecution is entitled to amend or substitute the charges he faces before the close of the prosecution case, the same should be done with due consideration and regard to his constitutional rights to a fair and expeditious trial which rights can not be waived, curtailed or restricted.

It was deponed further that the petitioner was not aware of any new evidence that had come to the 1st respondent's knowledge which was not there when the earlier charge of murder was withdrawn.

The application was certified urgent and conservatory orders issued pending the hearing and determination of the petition interpartes and in reply thereto the 1st respondent filed a replying affidavit through JOB KAIGAI KARUNDU Assistant DPP in which it was deponed that upon charging the accused person with manslaughter, relatives of the deceased complained to the Director of Public Prosecutions who in exercising his constitutional mandate called for and perused the file before directing that the charge of manslaughter be withdrawn and a fresh charge of murder preferred against the applicant.

It was deponed that the Director of Public Prosecutions had a constitutional mandate to discontinue at any stage before judgment any criminal proceedings instituted by him or taken over by him and that the applicant had not demonstrated how his rights to fair trial shall be infringed by the intended withdrawal with the actual goal being to achieve justice both to the applicant and the victim/victim's family.

### Submissions

It was submitted on behalf of the applicant that he was arraigned before the Deputy Registrar on 29th July 2011 in compliance with the Law, when the State sought for more time to have him their custody and on 25th August 2011 the prosecution inspector Limo acting under the instructions of the 1st respondent withdrew High Court Criminal case No.22 of 2011. The applicant was subsequently charged with manslaughter in Criminal case No.810 of 2011 before Nyeri Chief Magistrate.

It was submitted that by withdrawing the charge in Criminal case No.22 of 2011 the proceedings before the High Court in exercising powers under **Section 25** of the **Office of DPP Act** and **Article 159** of the **Constitution** the same was subject to the court's permission. It was therefore submitted that in intending

to charge the applicant afresh with murder that constituted to an abuse of the legal process.

It was submitted that in exercising of the prosecutions powers the 1st respondent should be guided by the objections of the office of **Director of Public Prosecutions Act No.2 of 2013** which provides under **Section 4** that there should be impartiality, upholding of the rules of natural justice, promotion of public confidence in the integrity of the office, same the cause of justice and prevention of abuse of the legal process.

It was further submitted that the outcry of the family of the victim should not have any bearing to the decision by the 1st respondent in discharging the constitutional mandate of the office. It was submitted that in withdrawing the earlier charge the 1st respondent must have reviewed the evidence and that there should be certainty in conducting prosecutions.

It was submitted that in conducting its affairs the 1st respondent should not be directed by any person as provided for under **Article 157 (10)** of the **Constitution** and therefore by belong to the influence direction and advise of the relatives of the deceased person the 1st respondent acted unconstitutionally.

The following cases were submitted without any comment on the same by the applicant.

1. *Githunguri -vs- R*[1985]
2. *R. -v- Jared Wakhule Tubel & another* [2013] e KLR
3. *Smyth -vs- Ushewokunze* [1998] 4 LRC 120
4. *Ivan -vs- Attorney General* [1999] 2 LRC 716
5. *Gregory & another -vs- R.*

On behalf of the 1st respondent it was submitted that the same derives his prosecutorial powers from **Article 157 (6)** of the **Constitution of Kenya 2010** and that the powers of the 1st respondent under **Section 25** of the **Office of DPP Act No.2 of 2013** includes powers to discontinue criminal proceedings at any stage before the delivery of judgment but subject to court's permission.

It was submitted that the powers of withdrawal of proceedings is not a bar to subsequent proceedings unless the same was done after the close of the prosecution case. It was submitted that in taking the intended action the 1st respondent with the guiding principles of **Section 4** of the **Office of DPP Act** and **Article 157 (II)** of the Constitution.

It was submitted that the petitioner will have a chance to defend himself before a fair and impartial court and reliance was placed on the cases of:-

1. **Thuita Mwangi and two others -vs- Ethics and Anti-Corruption Commission and two others** [2013] KLR.
2. **The Kenya section of the International Commission of Jurists -vs- The Attorney General and two others** [2012] e KLR.

It was submitted that criminal proceedings are instituted by the state for the court to determine a person's guilt or innocence or to set a convicted person to punishment and therefore the 1st respondent had not abused the court process. It was further submitted that the individual interest on the rights of the applicant should not be elevated beyond that of the public in relation to the mischief of the criminal law and process.

From the pleadings and submissions herein the following issues have been identified by the court for determination:-

- a. *Whether the constitutional powers of DPP to institute and withdraw proceedings are absolute.*
- b. *Whether the petitioner herein has been prejudiced nor the withdrawal of earlier murder prosecution and substituting the same with manslaughter which the DPP now intends to withdraw and charge the petitioner again with murder.*

The following facts are undisputed:-

1. On 29th July 2011 the petitioner was arraigned before the D/R on a charge of murder and then in criminal case No.22A of 2011 when plea taking was fixed for 11th August 2011 when the prosecution requested for a further period of 14 days to enable the petitioner undergo psychiatric evaluation.
2. On 25th August 2011 the prosecution applied for and was allowed to withdraw the said charges and the same charged with manslaughter in Nyeri CMC Criminal Case No.810 of 2011 wherein the petitioner took plea on the same date and a plea of not guilty entered.
3. On 10th November 2012 the trial commenced before Hon. D.O. Ogembo the SPM Nyeri in which PW1 BONIFACE MAINA WAITHAKA testified and was cross examined by Mr. Mbiyu Advocate for the petitioner.
4. On 7th June 2012 the prosecution informed the court that he had instructions to have the matter withdrawn under **Section 87 (a) CPC** so that the petitioner could be charged with murder in the High Court.
5. It is this application for withdrawal which led to the current petition on the basis that the right of the petitioner to an expeditious and fair trial would be compromised.

The petitioner therefore sought a declaration that the intended substitution of the manslaughter charges with the charge of murder amounted to an abuse of the legal process is oppressive and not in the interest of administration of justice and therefore sought an order stopping or barring the 1st respondent from charging the petitioner with murder.

The office of the Director of Public Prosecution is established under **Article 157 (1)** of the **Constitution** and his powers are as given in **Sub Article 6** as follows:-

**“157(6) The Director of Public Prosecutions shall exercise state powers of prosecution and may -**

- a. **Institute and undertake criminal proceedings against any person before any court other than court martial in respect of any offence alleged to have been committed.**
- b. **Take over and discontinue any criminal proceedings commenced in any court (other than court martial) that have been instructed by another person or authority with the permission of the person or authority.**
- c. **Subject to clause (7) and (8) discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Prosecution or taken by the Director of Prosecutions under paragraph (b).**

The constitution under **Article 157 (8)** limits the powers of the DPP in respect of discontinuation of prosecution with permission of the court and in **Article 157 (II)** provides that in exercising the powers the DPP 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.

It is therefore clear that the powers of the DPP are not absolute since they are limited by the constitution and further since the same can only discontinue a prosecution with permission of the court it therefore means that the court can decline to allow the DPP to discontinue prosecution and order the same to proceed with prosecution depending on the circumstances of each case.

It must however be pointed out that it is only a discontinuation under **Article 157 (7)** that is if it is after the close of the prosecution case when the defendant shall be acquitted and as stated by Justice F. Gikonyo in **R. -vs- Jared Wakihule Tubei Bungoma High Court Revision case No.26 of 2012 reported in [2013] e KLR** there is a rebuttable presumption that that discontinuance which does not fall under **Article 157 (7)** is not a bar for future prosecution and that the DPP must take into account public interest in arriving at the decision and the interest of the administration of justice.

I therefore find that the 1st respondent have powers to withdraw, discontinue and institute fresh charges against the petitioner however subject to the constitutional limitations as set out herein above.

The other question which the court has to decide is whether in making the decision herein the 1st respondent acted against the constitutional provision of **Article 157 (10)** which provides that the Director of Public Prosecution shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person.

The petitioner has submitted that in giving in the demands of the relatives of the victim, the 1st respondent violated his constitutional mandate. In answer to this issue one needs to look at **Section 5(4) (e)** of the **Office of the Director of Public Prosecutions Act No.2 of 2013** which provides that the Director shall review a decision to prosecute or not to prosecute any criminal offence. Further **Section 25** of the **Act** provides for discontinuing of criminal proceedings where in **Sub Section (2)** thereof provides:-

**“Pending the permission by the court in accordance with Sub Section (1) the Director may apply orally or in writing to the court for a stay of proceedings with a view that such proceedings may be taken by the Director to prevent and avoid abuse of the legal process and to protect the public interest.”**

It is clear that the statute gives the Director of Public Prosecution powers to review the decisions and in exercising the said power the DPP can use information from any source including from the family of the victim provided that the same complies with the doctrine of legality and that the decision to charge the petitioner with murder was not irrational.

The final issue for determination is whether the petitioner has been prejudiced in any way. From the affidavit evidence and submissions, the petitioner is aware that the earlier withdraw of the intended charge of murder was no bar to a further charge of the same offence. He is alive to the fact that the 1st respondent has powers to withdraw the charges he is facing at any time before judgment however subject to the provisions of the constitution and criminal procedure Act as was stated in the case of **Nicholas Muriuki Kangangi -vs- The A.G. Nairobi Court of Appeal Civil Case No.331 of 2010**. It therefore follows that the petitioner has not been prejudiced by the intended decision of the DPP.

The petitioner has also raised the issue of violation of his rights to fair trial. It must be pointed out that justice must look at both side. The petitioner's rights to fair and speedy trial must be balanced with the rights of the state and the family of the victim too and in this I find support in the decision of **Rand J in Boucher -vs- R. [1955] 110 CC 263 at 270**:

**“It can not be over emphasized that the purpose of a criminal prosecution is not to obtain a conviction. It is to lay before a jury what the crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of facts is presented. It should be done fairly. The role of the prosecution excludes any motion of wining or losing; his function is a matter of public duty that which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.”**

Further it must be pointed out that the petitioner should have made his application before the trial court where therein the state had made an application for withdraw since **Article 157 (8)** of the **Constitution** gives that court the power to give the DPP the permission to withdraw the charge.

The petitioner has therefore failed to demonstrate to this court that the DPP have taken into account any extraneous matters rather than the goal of justice to both the petitioner and to the family of the deceased in his intention to withdraw the charges of manslaughter and to charge the petitioner with murder. It is further clear to my mind that the applicant's rights to free and fair trial will still be safeguarded should the same be charged with murder which based upon the prosecution evidence to be tendered before the trial court might still be reduced to manslaughter.

I therefore see no constitutional basis to interfere with the intended decision of the 1st respondent and therefore find that the petitioner's application herein lacks merit and the same is hereby dismissed.

**Signed and dated this day of 2014**

**J. WAKIAGA**

**JUDGE.**

Delivered by Justice J. Ngaah on behalf of Justice J. Wakiaga this 18th day of December 2014

**J. NGAAH**

**JUDGE.**

In the presence of:

----- for Appellant

----- for Respondent

1.