



No. 33

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 73 OF 2013

IN THE MATTER OF SECTION 276(1) AND (2) OF THE CRIMINAL PROCEDURE CODE

PAUL NYAMWACHE NYAMWAMU APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that “*on the night of 3/4/2013 at Engorwa Sub-location in Masaba South district within Kisii County jointly with others not before court murdered Jane Ombati.*”
2. Before plea was taken, the accused by an application dated 25/6/13 expressed to be brought under section 276 (1) of the Criminal Procedure Code seeks the quashing of the Information on the grounds set out in paragraphs 4 and 5 of the Supporting Affidavit of the accused as follows:

“4. THAT upon liaison between the office of the Director of Public Prosecution and my Advocate and since investigations are complete I have been informed by my advocate that it has been ascertained that I was not involved in the murder of the deceased and that the prosecution intends to withdraw the charges leveled against me and enjoin me as a prosecution witness.

5. THAT I seek relief from this Honourable Court to be released and the charges against me quashed. I respectfully submit that the dictates of fairness and justice in view of the peculiar facts herein warrant that I should not be deprived of my liberty and that I should be released.”

3. In replying to the application by the accused, the State has filed a replying affidavit by Tom Imbali, Senior Prosecution Counsel, dated 26/6/13 whose paragraphs 3-7 support the accused’s application in the following terms:-

“3. THAT I do know and affirm that the accused was arraigned in court for purpose of compliance with Article 49(f) of the Constitution as a murder suspect upon time which investigations were still ongoing.

4. THAT the investigation is now complete and upon analysis of the available evidence we have established that there is no sufficient evidence to continue with the murder charges against the suspect.

5. THAT since plea has not been taken and pursuant to section 276(1) and (2) of the Criminal Procedure Code, we wish to move the court to have the charges against the suspect withdrawn and the accused enjoined as a prosecution witness.

6. THAT we have liaised with the applicant's advocate and stated the respondent's decision to withdraw the charges against the applicant.

7. THAT I swear this affidavit and state that there is no opposition to the accused/applicant's application herein."

4. Counsel for the accused and for the State, respectively Miss Michoma and Mr. Shabola made oral submissions and ruling was reserved.

5. Section 276 of the Criminal Procedure Code is in the following terms:-

276(1) If an information does not state, and cannot by amendment authorized by section 275 be made to state, an offence of which the accused has had notice, it shall be quashed either on a motion made before the accused pleads or on a motion made in arrest of judgment.

(2) A written statement of every such motion shall be delivered to the Registrar or other officer of the court by or on behalf of the accused and shall be entered upon the record."

6. With respect to counsel, clearly the provisions of law apply to situation where there is a defective charge not where as here, it is suggested that the accused was arraigned before the court prematurely before the conclusion of the investigations which subsequently revealed that there was no evidence to link the accused to the crime. The accused's application is therefore not competent.

7. However, the said paragraphs of the learned state counsel's affidavit reveal an intention of the State to withdraw the charge against the accused and to use the accused as a state witness. The state counsel prosecuting the brief has disclosed that there exists a criminal case no. 68 of 2013 in which two other persons have been charged with the same offence, and it is expected that the accused herein will be a prosecution witness in the said case.

8. Under Article 157(6) (c) of the Constitution of Kenya 2010, the Director of Public Prosecution is empowered with the permission of the court, **to discontinue at any stage before judgment is delivered any criminal proceedings instituted or taken over by the Director of Public Prosecutions.** As the intention of the Director of Public Prosecutions to discontinue the proceedings herein is clear from the affidavit of the state counsel, the court will in considering the request for withdrawal by the State deem the replying affidavit as an application under Article 157

(6) (c) of the Constitution and proceed to deal with its merits.

9. The reasons given for the request to withdraw are that upon conclusion of the investigations, it has been established that there is no evidence to link the accused with the offence charged and that the accused will instead be presented as a prosecution witness in the case already pending before the court as Criminal Case No. 68 of 2013, Kisii.

10. I find that the reasons given by the state to be reasonable in the circumstances of the case and I do therefore grant the permission contemplated under Article 157 (8) of the Constitution for the Director of Public Prosecutions to discontinue the prosecution of the accused by withdrawing the Information dated 12th June 2013 herein.

11. Accordingly, the accused, Paul Nyamache Nyamwamu, will forthwith be released from custody unless he is otherwise lawfully held.

Dated, signed and delivered this 26th day of JUNE 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

Miss. Michoma for the Accused

Mr. Shabola for the State

Mr. Bibu Court Clerk