



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL REVISION NO. 72 OF 2013**

REPUBLIC ..... APPLICANT

VERSUS

FAHMI SALIM SAID .....RESPONDENT

**RULING**

By way of an application dated 4th July, 2013 the state seeks orders for revision as hereunder:-

(a) The order of the magistrate declining the withdrawal of the proceedings be reversed to allow the Director of Public Prosecutions exercise his constitutional powers under article 157 of the Constitution 2010 and sections 5(4)(e) of the office of Director Public Prosecutions Act.

(b) A declaration that a magistrates court cannot exercise supervisory jurisdiction over actions of the Director of Public prosecutions.

(c) A declaration that pending the enactment of the statute contemplated under article 23(2) of the Constitution 2010, a subordinate court cannot exercise original jurisdiction to hear and determine applications for redress of the denial, violation or infringement of or threat to a right of fundamental freedom in the Bill of rights.

(d) That the orders of this court be served upon the learned trial magistrate and other subordinate courts.

The grounds are that the ruling by trial magistrate was made without jurisdiction under article 23(2) of the constitution of Kenya 2010.

(2) That the learned trial magistrate in his ruling purported to exercise supervisory power over the actions of the Director of Public Prosecutions, a power, he does not possess under the constitution and cannot in law purport to grant Judicial Review orders against anybody or authority exercising Judicial or quasi Judicial functions such as the Director of Public Prosecutions, which power is specifically reserved for the High Court under article 165(6) of the Constitution.

That the learned trial magistrate relied on extraneous matters such as the period taken by the Director of Public prosecutions to do the letter dated 14th June, 2013 directing the withdrawal of the proceedings under section 87 (A) of the Criminal Procedure Code.

That is not denied that the exercise of the DPP's prosecutorial powers under the Constitution 2010,

may be subjected to Judicial oversight in appropriate cases, but that oversight should be sparingly and Judiciously exercised devoid of capricious exercise of power.

That the refusal by the learned magistrate to grant an adjournment as prayed by the prosecution on 14th June, 2013 was without merit since the defence was not opposed to it and that the refusal to grant the adjournment was not judicious and was not in good faith and out of a desire to ensure an expeditious disposal of the case.

That the insinuation by the learned trial magistrate that the Director of public prosecution was exercising his powers without due regard to the public interest or to check the abuse of legal process was a misapprehension of article 157 (1) of the constitution as the Director called for the files to satisfy himself as to the legality, propriety or correctness of the decision to charge.

That the learned trial magistrate mind was clouded with extra judicial considerations as found in page 8 of the proceedings.

That he did not address himself to the considerations pertinent to review of prosecutorial decisions and lastly that he did not address himself to the provisions of section 5, 23, 25(2) 27 and 57(4) of the office of the Director of Public prosecutions Act No. 2 of 2013.

In the replying affidavit of the interested party **Fahima Mohamed Shali** it is deponed that ground one is not based in law as it purports to oust the jurisdiction of the magistrates courts in adhering to the principles of the Constitution.

That ground 2 is misguided as nowhere in the learned trial magistrates ruling did he purport to hold or exercise or apply supervisory powers over the actions of the DPP.

It is contended that the letter dated 14th June, 2013 was drafted within a period of the hour after the failed attempt of adjourning the case.

The letter was not addressed to the court. That while the DPP has powers to terminate proceedings at any time before Judgment the case before the trial magistrate was different because the application which was made by the prosecutor was one of adjournment even though the Complainant and Director of Prosecution witnesses were present.

That the trial court exercised its oversight authority correctly by refusing to withdrawal the case.

The interested party depones that there was never any extra Judicial contact between it and a Judicial officer and the allegation is reckless and without basis.

Further that she did write a protest letter on the manner in which the prosecution had totally sidelined her input in the trial process.

As regards the issue of bad faith, it is contented that it is not difficult to discern malice and bad faith especially where the DPP at the instigation of a complaint by the Accused person is bent on withdrawing charges because an adjournment was denied by the court and further in a situation where the Accused has a case already filed seeking damages for court attendances of Ksh. 60,000/= per day. In the event of withdrawal of the criminal case the Accused would have an upper hand in the civil matter also before Court.

In the present case an application for adjournment was made by the prosecution so as to await directions from the DPP.

Mr. Magolo counsel for the Accused also intimated that they had raised complaints on abuse of office by police and the DPP was investigating the complaints.

The magistrate declined to grant the application for adjournment and ordered the case to proceed at 11:00 am. At 11:30 am the prosecution presented the court a letter of the same date and addressed to the DCIO and a copy to the OC Prosecution for compliance. The letter was instructing the OC to comply with withdrawal of the cases under section 87 (a) of the Criminal Procedure Code. The trial magistrate in his ruling delivered on 19th June, 2013 declined to grant the order of withdrawal under section 87 (a) of the Criminal Procedure Code.

In his ruling the trial magistrate did refer to various articles in the Constitution.

Article 47 which provides for fair administrative actions thus,

**“ Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”.**

Article 50 to a fair hearing.

Article 157 on the powers of the DPP and in particular sub article 6 which provides,

**“ The Director of Public Prosecutions shall exercise state powers of prosecution and may (c) subject to clause (7) and (8) discontinue at any stage before Judgment is delivered any criminal proceedings instituted by the Director of public prosecutions or taken over by the Director of public prosecutions under (b).**

**(8) The Director of public Prosecutions may not discontinue posecution without the permission of the court”.**

The trial magistrate further proceeded to amplify on article 50 on the right to a fair hearing, positing that the constitution now envisages consent of the court before a withdrawal can be allowed after the court interrogates on the legality, fairness and judiciousnesses of the application. That prosecutorial powers belong to the people and are held, conferred and exercised by the DPP as a trustee for the people of Kenya.

To buttress his argument he relies on article 157 (11) which provides,

**“ In exercising the powers conferred by 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”.**

The application before this court is brought under section 362 and 364 of the Criminal Procedure Code which gives the High court the power to call for and examine the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any findings sentence or order recorded or passed and as to the regularity of any proceedings of any subordinate court.

The court is asked to make a declaration that a magistrates court cannot exercise supervisory jurisdiction over actions of the Director of public prosecutions. I find that particular prayer to be very broad and lacking specificity. However, in respect to the matter at hand article 157 (8) of the constitution is very clear that the permission of the court has to be sought before the withdrawal of a case by the Director of Pubic prosecutions.

Secondly in exercising those powers conferred by the constitution article 157 (11) he shall have regard to the public interest, the interests of the Administration of Justice and the need to prevent and avoid abuse of the legal process. Those are the guiding factors to be adhered to before a withdrawal can be entertained. Now, what is the role of a magistrate in whose court an application for withdrawal of a case is made by the Director of public prosecutions.

In **Republic -Vs- Enock Wekesa 2010 eKLR Misc. Criminal Revision No. 267 of 2010** Kitale Martha Koome Judge (as she then was) had to grapple with a similar application.

She did pose the same question. Was the magistrates court supposed to be a rubber stamp? Ought not the magistrate interrogate the reasons given by the DPP as to satisfy himself as to whether they answer to the threshold set by the constitution and in particular article 157(11)?

Is that interrogation tantamount to interpretation of the constitution by a magistrates court?

Article 159(2) provides,

**“ In exercising Judicial authority the courts and tribunals shall be guided by the following principles.**

**(a) Justice shall be done to all, irrespective of status;**

**(b) Justice shall not be delayed.**

**(c) Alternative forms of dispute resolution including reconciliation mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3).**

**(d) Justice shall be administered without undue regard to procedures technicalities and**

**(e) the purpose and principles of this Constitution shall be protected .....”.**

These principles are not the preserve of the High Court but all courts and tribunals.

I do not think that the act of interrogating the reasons given by the DPP in withdrawing a case is tantamount to interpretation of the constitution which powers are donated to the High Court under article 165 of the Constitution.

In respect to the present case it is observed that the parties have a long standing family dispute and there are a plethora of complaints to all kinds of organizations some of which are against the police and the courts.

I do find that there was nothing sinister by the office of the DPP to call for the necessary files and make a decision on the matter. What I find to have been rather hasty is the decision to make an application for withdrawal even before the necessary files had been perused. There is also the matter of the complainant herself. She ought to have been given a hearing before the application was made more so because of the reasons that there is in existence a Civil Suit which is hinged on these criminal proceedings. A withdrawal of the criminal proceedings would invariably boost the Accused Civil Suit in which he has claimed loss of earnings of Ksh. 30,000/= per day as a result of Court attendances in the Criminal Cases against him.

I do not find good grounds to interfere with the ruling of the learned trial magistrates dated 19th June, 2013. The cases will proceed to hearing as earlier ordered. I have noted in the correspondence forming the basis of the complaints, while not attempting to a portion blame and for purposes of equanimity, the cases will be heard before other magistrates of competent jurisdiction.

Ruling delivered dated and signed in open court this **29th of October, 2013.**

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**M. MUYA**

**JUDGE**

**29th OCTOBER, 2013**

**In the presence of:-**

Learned Counsel for Accused Magolo

Learned State Counsel Mr. Jami holding brief Mureithi for the state

Learned counsel Nabwana for original Interested party

Court clerk Musundi

**M. MUYA**

**JUDGE**

**29TH OCTOBER, 2013**

**Mr. jami:** We will request a copy of the ruling. Same to be furnished to the parties.

**M. MUYA**

**JUDGE**

**29TH OCTOBER, 2013**

**Mr. Nabwana:** We ask for directions.

**Court:** Matter for mention ( Criminal case No. 528 of 2013 and 1000 of 2013) before the Chief Magistrate on 19th November, 2013 for allocation to other magistrates of competent jurisdiction apart from Kimanga Resident Magistrate.

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**M. MUYA**

**JUDGE**

**29TH OCTOBER, 2013**