



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**Miscellaneous Criminal Application 54 of 2009**

**NAIBEI GERISHOM KISACH.....APPLICANT**

**VERSUS**

**REPUBLIC:.....RESPONDENT**

**RULING**

This is an application brought under sections 72 and 77 of the constitution of Kenya as read with Rules 11 and 29 of the Constitution (supervisory and Protection of fundamental Rights and Freedoms, popularly known as the Gicheru rules). The applicant prays that:-

- a) There be stay of any proceedings including mentions in Criminal Case SRM.CR.Case No.608/2009 Iten till this Petition is heard and determined.
- b) The continued prosecution of Iten Criminal Case No.609/2009 against the Petitioner will occasion a violation of the Petitioner's Constitutional right under S.77 of the Constitution and that the case be declared a nullity.
- c) This honourable court do order the reinstatement and hearing of Eldoret Criminal CaseNo.5235/2008 to its logical conclusion or in the alternative does order the Petitioner be acquitted of all the charges.
- d) That the court do grant such other orders as this honourable court shall deem just.

The Petitioner swore an affidavit in support of his application stating that on 28<sup>th</sup> October 2008 he was charged before the Chief Magistrate's Court at Eldoret in Criminal case No.5235 of the charge of stealing by servant and he took plea on the said date. That the case was heard over several days and all the prosecution witness, save for only one of them gave evidence. This last prosecution witness was the investigation Officer in the case who when he took the witness box he passed a note to the prosecutor which note the prosecutor read out to the court to the effect that the OCPD Keiyo was requesting that the case against the Petitioner be withdrawn under S. 87 (a) of the Criminal Procedure Code to facilitate further investigations. In a ruling dated the 30<sup>th</sup> July 2009 the case was ordered withdrawn under S.87 (a) of the Criminal Procedure Code. He states that he was rearrested at the door of the court and was taken to Iten Police Station and as the court was not sitting on 31.07.2009 he was detained at the said police station until 3<sup>rd</sup> August 2009 when he was produced in the Iten Court to answer the same charges as in the Eldoret case and despite protestations from his counsel he had to take plea on the same date. The Petitioner states that no possible investigations could have been conducted between 30<sup>th</sup> and 31<sup>st</sup> July 2009. He thinks that the withdrawal of the case from Eldoret to Iten was due to the prosecution shopping for a court favourable to it and that is evident from the favourable orders the Iten court granted the prosecution and the prosecution did not intend to give the Petitioner a fast and fair conclusion of the case and that the prosecution was merely seeking more time to manufacture evidence against the Petitioner as no investigations were conducted. The Petitioner describes the withdrawal of the Eldoret Criminal case No. 5235/09 as an abuse of the court process and a violation of his right to a fair trial as advice to him from his advocate is that the prosecution could have substituted the charge in Eldoret case, amended it and called

whatever witnesses they wished instead of withdrawing it and so the institution of the Iten court case was abuse of due process. He fears that the prosecution will repeat the same thing in the Iten court as they did in the Eldoret court unless stopped by this court. He states that a lot of court time was spent in the Eldoret case and his time and money too were spent and he describes the whole process as a travesty of justice. He is of the view that the way things have proceeded is not the way civilized society should prosecute its cases.

At the hearing of the application Mr. Chirchir quickly conceded the application as he did not think that the police had proceeded in good faith.

I have considered this application. It appears that the police have blundered in this case. Whereas section 87(a) CPC rightfully exists, its application must be in accordance with the law and an accused person must be treated in fairness. Was it necessary to withdraw the case in Eldoret and immediately charge the Petitioner on the same charge in Iten or was it just convenient for the police to do that? The reasons given for the withdrawal of the Eldoret case was that the prosecution needed to undertake further investigations. They kept the Petitioner in police custody for three days within which period no investigations were done. They had said they wanted to take the Petitioner's handwriting specimens and none were taken according to him. And not being satisfied the police were at it again in the Iten court asking that the accused be put in again for another three days. Judiciously the court at Iten did not allow a further 3 day incarceration on flimsy reasons. It appears to me that the police were acting in bad faith and may have noticed weaknesses/gaps in their case which they were attempting to fill. This behavior is unlawful, high handed, capricious and oppressive and this court disapproves it. The power under section 87(a) CPC should be used to advance the cause of criminal justice and not to suppress it. It is not a power given to the prosecution so as to use it in infringing the constitutional rights of the accused herein.

I must now ask myself whether the Petitioner would suffer injustice if the trial in Iten proceeds. I think the answer to that must only be in the affirmative. That being so the case in Iten being SRM Cr. Case No.608/2009 is hereby terminated. This is the High Court, the one court that is empowered and vested with the duty to uphold the constitution and the rights of all yes even the rights of accused persons and equality of all persons before the law. What then does the court do with the case before the Chief Magistrate in Eldoret? That case was virtually concluded, left only with the evidence of the Investigating Officer. The same question above again arises here – would the Petitioner suffer injustice if the trial in the Eldoret case proceeds? The answer to this, in my considered view is in the negative. And it will be remembered always that justice cuts both ways and the justice of the case is that the evidence of the remaining prosecution witness be taken and the case do proceed to its logical conclusion. I accordingly set aside the withdrawal ordered under S.87 (a) CPC and do hereby order that Eldoret Chief Magistrate's Criminal Case No.5235/2008 shall proceed from where it was stopped by the order of 30/07/2009 and shall proceed to its logical conclusion.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 25<sup>th</sup> DAY OF FEBRUARY 2010

**P.M.MWILU**  
**JUDGE**

**IN THE PRESENCE OF**

Paul Ekitela - Court clerk  
Nyamweya -= Advocate for Petitioner  
Kabaka holding brief for Mr. Chirchir for the Republic.