



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CRIMINAL REVISION NO. 312 OF 2010
IN THE MATTER OF CM CRIMINAL CASE NO. 2341 OF 2003
REPUBLIC vs CHARLES GITHINJI MUIGUA & JOHN NGIGI WATHIRU
AND
IN THE MATTER OF A SURETY-ESTHER WANGUI WACHIRA
JUDGMENT ON REVISION

The Applicant stood surety for the 1st accused against whom the prosecution withdrew charges under **Section 87(a) of the Criminal Procedure Code** (*Cap. 75, Laws of Kenya*). The said Section says -

"87. In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney-General, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal -

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted."

There is no question that where charges are withdrawn against an accused person under Section 87(a) of the Criminal Procedure Code, the prosecution may institute fresh charges against the accused at a later stage. The accused was not called to his defence, and could not be acquitted as would be the case under Section 87(B) above.

The question raised here is what happens to the surety of the person against whom charges have been withdrawn? Common sense would of course dictate that he has no more liability and he too should be discharged from his liability to ensure the accused attends court or else he may forfeit his security.

There is no basis for the trial court to require a surety to attend court once charges against the accused for whom he stood surety have been withdrawn.

There is however no provision that automatically releases the surety from his obligations under the surety ship to the accused whose charges have been withdrawn by the prosecution. The proper course of action is to apply under the provisions of Section 128(1) (*mutatis mutandis*), of the Criminal Procedure Code for

the release and discharge of the surety, and release of her title deed.

In the meantime, the orders of the learned trial magistrate for the arrest of the surety Esther Wangui Wachira issued on 26th March 2010 are irregular, and hereby quashed and set aside.

Dated, signed and delivered at Nakuru this 19th day of November, 2010

M. J. ANYARA EMUKULE

JUDGE