



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS CRIMINAL APPLICATION 876 OF 2007
AVRIL ATIENO ADONCIA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The applicant's application by Chamber Summons was filed pursuant to ss.65, 70, 72, 77 and 84 of the Constitution of Kenya, s.362 of the Criminal Procedure Code (Cap.75, Laws of Kenya), and s.29 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, Legal Notice No.6 of 2006.

The application carried the prayer that this Court do call for and examine the record of criminal proceedings in Criminal Case No. 4778 of 2007, **Republic v. Avril Atieno Adoncia**, in the Chief Magistrate's Court at Makadara. The Court was being asked to "satisfy itself as to the correctness, legality or propriety of the proceedings and orders recorded and passed by the Subordinate Court and the regularity of the proceedings of the Subordinate Court ,with a view to permitting a withdrawal of the said suit by the complainants and acquitting the accused person."

The general grounds founding the application were as follows –

- (a) that the applicant's constitutional right to a fair trial was negated by the failure to bring her before the Court within 24 hours of being arrested;*
- (b) that the trial Court "wrongly and unjustly refused to allow the [applicant] to travel to London where she works, even after bond terms had been set, and [the] affidavit of a proposed contact person offered, and therefore the applicant's presumption of innocence was negated";*
- (c) that unless the learned Magistrate's orders are annulled, the applicant stands to lose her status and her job in the United Kingdom;*
- (d) that the applicant and the complainant had reached an amicable resolve, and the complainant had applied to withdraw the complaint, but the learned Magistrate turned down the application for withdrawal;*
- (e) That the Subordinate Court had, in this matter, conducted itself as both judge and prosecutor;*
- (f) That it is in the interest of justice, that the complainant be permitted to voluntarily withdraw the*

outstanding complaint.

Two affidavits are attached as the evidentiary basis for the application herein, the first by **Lynette Okiro**, Senior Legal Counsel of Kenya Airways; the other the applicant herein.

The first of these deponents identifies Criminal Case No. 4778 of 2007 as the one in respect of which the applicant has lodged the instant application; and she depones that *the complainant in that case was her organisation, Kenya Airways*; the applicant had travelled from London to Nairobi by the said airline, “on a ticket that had been stolen.” Kenya Airways, following the complaint and the subsequent arrest of the applicant, had held “several meetings with her, to try and investigate the matter further.” Such investigations came to a close, when Kenya Airways, “of our [own] volition decided to terminate this matter, on condition that the applicant meet the cost of the ticket.” It had, in the process of investigation, “become apparent that the applicant had only inadvertently come into possession of the ticket.” In these circumstances, “the complainant and the accused have reached a negotiated agreement and as such, Kenya Airways would like to withdraw its....complaint against the applicant.” The deponent thus concludes her affidavit: “*it is the humble request of Kenya Airways and I am duly instructed by the management to request the Honourable Court to permit a withdrawal of the complaint forthwith. A letter of request [addressed to the Makadara Law Courts Chief Magistrate] is herein annexed...*”

The applicant depones that she bought a Kenya Airways ticket *in London* and travelled to Nairobi, but was, upon arrival, informed that the said ticket was a stolen one. She depones that she had been *detained* at Jomo Kenyatta Airport in Nairobi for five days, when it was found that her Kenya Airways ticket had been a stolen item. The deponent avers that the Subordinate Court had *refused* her application to travel to London, even when the prosecution raised no objection to the same. She depones that she was due back at her place of work in London, on 26th November, 2007, but the Subordinate Court would not allow her to travel; and she apprehends that she may, on that account, lose her job in the United Kingdom. The deponent depones that she found herself in hardship and, after negotiating with the complainant, secured an *agreement to have the air-ticket complaint withdrawn*. But the learned Magistrate rejected the application, on the grounds that “*it was in the interest of public policy that [trial] should proceed, and....the Court would not be used as a debt collector.*”

This matter was heard before me on 14th July, 2008, with learned counsel **Mr. Ligunya** and **Mrs. Gakobo** respectively representing the applicant and the respondent.

Mr. Ligunya, after presenting the applicant’s application and evidence, contended that the learned Magistrate in the Subordinate Court, had consistently “conducted himself in such manner as to deprive the accused of a fair hearing.” In this regard counsel cited the learned Magistrate’s refusal to allow the applicant to travel abroad, even when the Directorate of Criminal Investigations gave their indication that they had no objection to such a request; and such refusal being dispensed without reasons stated. The position taken by the trial Court, counsel urged, showed that the accused was being treated as guilty, notwithstanding the rule of presumption of innocence for an accused who has not yet been found guilty; and this would amount to a violation of the accused’s trial rights.

And, counsel urged, the Subordinate Court then committed a second transgression of the rights of the accused: whereas she had successfully shown to the complainant that she had obtained the offending air-ticket by inadvertence, and the complainant had agreed to seek *withdrawal of the criminal charge*, the learned Magistrate had refused the application for withdrawal of the charge.

Learned counsel submitted that s.204 of the Criminal Procedure Code (Cap.75) did recognise *amicable resolve*, as a mode of concluding criminal charges which have been lodged in Court; and that there would be no basis for the learned Magistrate to refuse the representations of the Senior Legal Officer of Kenya Airways, that the airline was seeking withdrawal of the criminal charge.

Counsel submitted that the Subordinate Court, rather than give fulfilment to the principle of amicable settlement, had gone off at a tangent, and ruled that the charge in question was not caught by s.204 of the *Criminal Procedure Code*; he had held that the charge was a matter of *public interest*, rather than of

private interest; that there was some *public policy* which prohibited giving effect to the amicable settlement; that the Court was not to serve *private interest* as a form of debt collector.

Counsel contested the learned Magistrate's explanation of his decision: it was **not** a public-interest question; the accused and the complainant had arrived at an amicable resolve; it was only right that the Subordinate Court should facilitate the said resolve, or, otherwise, it would come to hold the embarrassing position of prosecutor-cum-judge. Counsel asked that this Court do allow the *withdrawal of the charge* which had been laid against the accused.

Learned counsel, **Mrs. Gakobo** urged that the Subordinate Court's ruling was not devoid of rationale, because of the fact that the Court, at that time, had "not yet received confirmation that the accused was the employee of a bank in the United Kingdom."

Learned counsel thought there was justification in the learned Magistrate's rulings; in her words:

"The ticket had been purchased in London. This ticket was alleged to have been stolen. So there must have been a complainant in London. It is not clear if there was any communication between the complainant in London, and [Kenya Airways] in Nairobi."

From the facts, however, the complainant was Kenya Airways, and no one else. It is thus difficult to understand counsel's suggestion that some unidentified complainant existed in London; and it is equally unclear what relevance could be attached to a communication between such unknown complainant in London, and Kenya Airways at its headquarters in Nairobi.

Mrs. Gakobo urged that s.204 of the Criminal Procedure Code requires that *the Court be satisfied*, before a charge lodged before the Court can be withdrawn. So, even though the nub of the applicant's argument is that the learned Magistrate unreasonably held on to continuity of trial proceedings, **Mrs. Gakobo** is, in effect, contending that there was no basis for withdrawing the charge, so long as the Magistrate was *not satisfied*. The effect of this argument, it is clear, is that the inclination of the Subordinate Court, on the question of *satisfaction* or otherwise, was absolutely binding on the applicant, and she could not rely on any *principles governing her trial rights*, or on any principles founded on *statute law*.

Mrs. Gakobo, while acknowledging that s.176 of the Criminal Procedure Code carried provisions regulating amicable settlement, maintained that the Subordinate Court *had* "exercised its discretion in a judicious manner" – because that Court gave reasons why it held as it did.

It was also learned counsel's contention that the instant application did not properly move the Court, in its *criminal revision jurisdiction*, exercised by virtue of ss.262 and 264 of the Criminal Procedure Code (Cap.75, Laws of Kenya).

In the response, learned counsel, **Mr. Ligunya**, submitted that the trial Court's remit was restricted to the charge shown on the charge sheet; and in that charge, the *complainant* was stated to be Kenya Airways; there was no other complainant; and this complainant was precisely the one who had sought to have the criminal charge withdrawn. Any other perception of the complainant would, counsel urged, be in departure from the content of the record; and this was good cause for the High Court to call *for and examine the correctness, legality and propriety of the rulings* of the Subordinate Court, by virtue of s.362 of the Criminal Procedure Code. Counsel submitted that the Subordinate Court's findings were not proper; that Court had stated that it was moved by *public policy* considerations, yet such public policy was, in the circumstances of the case, irrelevant. It was urged that the Subordinate Court had wrongly construed *amicable resolve*, in criminal justice, as "an attempt to use the Court as a debt-collection agency", yet it was entirely legal to resort to such resolve.

Section 362 of the Criminal Procedure Code thus provides:

"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any

finding.”

In the instant matter, the orders made by the Subordinate Court were brought to this Court’s attention by way of an *application*, as already indicated. The High Court can get to know of an irregularity in a Subordinate Court record either through the High Court’s *own initiative*, or through *representations from outside* – such as by way of a letter, or even an application.

As already noted, learned respondent’s counsel, **Mrs. Gakobo** contended that this matter was improperly brought under the Court’s revision jurisdiction, derived from ss.262 and 264 of the Criminal Procedure Code. The basis of this particular submission, however, was not clarified.

It was contended for the applicant that one ruling made by the Subordinate Court, was incorrect and irregular, and should be the subject of *revision* by the High Court. The relevant ruling was made by the Senior Resident Magistrate, **Mr. Muneeni**, on 18th December, 2007. It reads as follows:

“An application was made to withdraw the complaint by one Lynette Okiro, a Senior Legal Counsel with Kenya Airways. The reasons? Because, to use her words: “I have been instructed to have the charge withdrawn. She has paid all the monies.” When she was cross-examined by the prosecutor, Chief Inspector Ngure, she...said she was not the one who complained. The prosecution objected to the application. The prosecution argued that the applicant was not the complainant. [They] also said [they] had no instructions to withdraw the charges. I have considered the application in its [entirety]. From the particulars of the offence, the prosecution may have to prove where the offence was actually committed – how the accused allegedly [came] into possession of the air ticket. Secondly, my assessment is that a charge of this nature elicits more public interest than private. The public as a whole would have interest in a matter of this nature. It would be [a wrong] against public policy [and] public scrutiny [...] for parties to be allowed to sweep under the carpet transgressions of the law of this nature....Again, the Courts would not lend themselves to be used as debt collectors... For those reasons, I reject the application under section 204 of the Criminal Procedure Code.”

From the affidavit evidence, the person who would have been prejudiced is *Kenya Airways*, and Kenya Airways is the *complainant*; but the learned Magistrate attributes that status to some unidentified person or entity, possibly resident abroad. It is not clear, however, how such an unascertained person would help to advance the trial process, without being able to come as a *witness*. The learned Magistrate has also, *apparently*, doubted, the standing of the deponent **Lynette Okiro**, a Senior Legal Officer of Kenya Airways, as a person who can speak dependably for that airline.

Section 204 of the Criminal Procedure Code, which is relied upon by Kenya Airways as the foundation for *withdrawing* the criminal

proceedings, thus provides:

“If a complainant, at any time before a final order is passed in a case under this Part [i.e. Part VI – Procedure in Trials Before Subordinate Courts], satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused.”

As the *directory* term “may” is used in the foregoing passage, it logically follows that the Subordinate Court has a *discretion* in allowing withdrawal of a case, and acquitting the accused summarily.

It has to be stated, however, that the directory terms aforesaid are by no means consistent with *unreasoned*, or *churlish* exercise of decision by a Subordinate Court. The decision arrived at must, firstly, be in the *interests of justice*; must uphold the *efficacy of judicial decision-making*; must be *objective and fair*; must be exercised *according to law*.

The trial process was only going to be efficacious if *proper witnesses* were brought before the Court, and

they *proved* the case against the accused. The *complainant* would, naturally, be the *key* witness. That complainant, it is obvious to this Court, could only be *Kenya Airways*, and nobody else resident abroad, and of unknown identity. *Kenya Airways*, by its Senior Legal Officer, came and indicated that they had *no basis* for pursuing the case; and therefore continuing to try such a case would engage the Court's time in vain. So, I must hold that this factor made it *irregular* for the learned Magistrate to insist on having the criminal case prosecuted.

There is a further consideration which made it improper for the Subordinate Court to insist on proceeding with the criminal trial. Section 176 of the Criminal Procedure Code thus states:

“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to [a] felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.”

The case in question involved what is described in the affidavit evidence as *sheer inadvertence*; and the loser would have been *Kenya Airways*; but already, the accused had made good the loss which *Kenya Airways* would have suffered. In every sense this is a *private question* – quite unlike what the trial Court thought it was. Full recompense having been made over to the true complainant, any possible wrong had been *redressed*; and hence a correct decision according to law, ought to have taken into account the terms of s.176 of the Criminal Procedure Code (*Cap. 75, Laws of Kenya*).

I hold that the learned Magistrate's ruling was *incorrect* and *improper*, as it was not founded on the relevant provisions of the law.

I hereby revise and vacate the Subordinate Court's decision dated 18th December, 2007, and allow the prayers contained in the applicant's Chamber Summons application of 20th December, 2007. The trial Court shall see to the *withdrawal* of the proceedings in *Criminal Case No. 4778 of 2007*, in line with the request already made by the complainant, namely, *Kenya Airways*.

The proceedings in Criminal Case No. 4778 of 2007 shall be placed before the Chief Magistrate at the Makadara Law Courts for mention and directions in accordance with the ruling herein, *on 30th July, 2008*.

Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of July, 2008

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Ligunya

For the Respondent: Mrs. Gakobo