

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION APPLI. 268 OF 2004

REPUBLIC.....APPLICANT

VERSUS

RAEL CHEROP MARTIM.....RESPONDENT

RULING

This is a Notice of Motion purported to have been brought under Section 87(a), 362, 364 and 365 of the Criminal Procedure Code (Cap.75). It is brought by the State. It seeks for orders that – 1. The honourable court do call for and examine the records in Eldoret Chief Magistrate Criminal Case no.669 of 2000. 2. The orders of the honourable Principal Magistrate Eldoret made on 23rd March 2004 be revised. 3. The proceedings held after 23rd March 2004 be held to be null and void and be quashed. 4. Any other orders that the honourable court may be pleased to grant. The Notice of Motion has one ground on its face and is supported by the affidavit of Andrew Jeremiah Omutelema of the Attorney-General’s Chambers sworn on 17th December 2004. The ground of the application is that the learned trial magistrate had no jurisdiction to order the withdrawal of the case under section 87(a) of the Criminal Procedure Code (Cap.75).

At the hearing of the application, Mr. Omutelema the Principal State Counsel submitted that the orders of the lower court dated 23rd March 2004 should be held to be null and void and quashed. The prosecutor was entitled to participate in the proceedings but he did not. Secondly, the court did not have powers to order withdrawal of the proceedings as no application for the same was made by the prosecutor. Also, that the subsequent proceedings were null and void. The court did not have powers to order that the case be heard denovo. The prosecutor should have been heard before that order was made.

I have considered the application and the submissions of the learned Principal State Counsel. I have also perused the proceedings before the learned magistrate. On the 23rd March 2004 it is recorded in the proceedings in the lower court that the matter was before W. N. Njage, Principal Magistrate. The record does not show that there was a court clerk or a prosecutor present before the learned magistrate. The learned magistrate recorded the proceedings on that day as follows – “COURT: File perused. This matter is part heard and involves several documents. Obudho; Case to be heard novo under section 200 C.P.C and bring fresh charge. Order accordingly.” It is clear from the above record that the learned Principal Maigstrate marked the case as withdrawn under 87(a) of the Criminal Procedure Code (Cap.75). Section 87 (a) of the Criminal Procedure Code (Cap.75) provides – 87. In a trial before a subordinate court a public prosecutor may, with the consent of the court or instructions of the Attorney-General, at any time before judgement 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 the 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.

From the above provisions of the law, it is clear to me that an application for withdrawal of a case under 87(a) of the Criminal Procedure Code (Cap.75) has to be made by a public prosecutor. It follows therefore, that in the absence of such an application by a public prosecutor, the learned magistrate had no jurisdiction to withdraw a case under section 87(a) of the Criminal Procedure Code (Cap.75) as he did. According to the record, there was no public prosecutor present on the date that the learned magistrate

made the orders for withdrawal of the case under 87(a) of the Criminal Procedure Code (Cap.75). Additionally, there was no application for withdrawal of the case by a public prosecutor.

Therefore, in my view, the learned Principal State Counsel is right in stating that the learned trial magistrate did not have jurisdiction to withdraw the case. I agree with him. From the record the learned magistrate ordered that the case be heard denovo under section 200 of the Criminal Procedure Code (Cap.75). The learned magistrate did not also have jurisdiction to order that the case starts denovo. This was because he had already purported to withdraw the case under section 87(a) of the Criminal Procedure Code (Cap.75).

In that event he would not be entitled, to make any further orders in the matter unless the accused person was recharged by the prosecution. Section 200 of the Criminal Procedure Code (Cap.75) cannot apply once a case has been withdrawn. There were also subsequent proceedings in the case following the learned magistrate's orders of 23rd March 2004. Those proceedings are also null and void as they purported to proceed to deal with a matter which had already been marked as withdrawn by the learned Principal Magistrate under section 87(a) of the Criminal Procedure Code (Cap.75), on 23rd March 2004.

In view of the above reasons, I find merit in this application. I allow the application and revise and quash the orders of the learned Principal Magistrate made on 23rd March 2004. I also find and declare that the proceedings held after 23rd March 2004 are null and void. I order that the case do proceed for hearing as provided for by law, from where it stopped prior to the orders of the Principal Magistrate of 23rd March 2004, before a magistrate of competent jurisdiction. **Dated and Delivered at Eldoret this 23rd Day of June 2005**

George Dulu

Ag. Judge

In the Presence of: Mr. Omutelema for State/Applicant

Mr. Kathili for the Respondent