



**Director of Public of Prosecution v Maiyo (Criminal Revision
E061 of 2023) [2023] KEHC 23012 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23012 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL REVISION E061 OF 2023
SM GITHINJI, J
OCTOBER 3, 2023**

BETWEEN

DIRECTOR OF PUBLIC OF PROSECUTION APPLICANT

AND

LEPAPA OLE MAIYO RESPONDENT

RULING

CORAM: Hon. Justice S. M Githinji

ODPP - Applicant

Lepapa Ole Maiyo – Respondent

1. Vide a letter dated September 5, 2023, the applicant herein the office of the Director of Public Prosecution applied for orders of revision under Article 165 (1), 165 (3) (a), 165 (6) of the Constitution and Sections 362 and 364 of Criminal Procedure Code principally seeking review of the orders issued on September 4, 2023 by Hon James Ongondo in Malindi Criminal Case no E469 of 2022 and substitute the same with orders allowing the applicant to withdraw the case under Section 87 (a) of the Criminal Procedure Code.

Disposition

2. The applicant’s letter raises the following issues for consideration;
 1. Whether the court has the jurisdiction to hear and determine this matter by way of revision.
 2. Whether the director of public prosecutions has powers to institute and withdraw criminal cases.



3. The applicant has moved this court under Article 165 of the Constitution and Section 362 and 364 of the Criminal Procedure Code which bestow this court with supervisory jurisdiction over subordinate courts.

4. Article 165 (6) and (7) which are relevant for present purposes provide as follows:

"165

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

At section 362, the CPC provides that:

"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, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."

5. In Republic vs Juma & 2 others (Criminal Revision E160 of 2021) [2022] Mativo J (As he then was) stated that:

"...Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs".

6. The court referred to the English case of Gallagher vs Gallagher, 212 So 2d 281, 283 (La Ct App 1968).

7. In light of the above, it then follows that this court has the jurisdiction to hear and determination the issue of revision brought by the applicant.

8. Now onto the questions of the power of the DPP to withdraw criminal cases. Article 57(6) of the Constitution states;

"The Director of Public Prosecutions shall exercise state powers of prosecution and may:

(c) subject to clauses (7) and (8) discontinue at any stage before judgment is delivered. Any criminal proceedings instituted by the DPP or taken over by the DPP under paragraph (b)"

At sub-Article 8

"The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court".



And at sub-Article 11,

"In exercising the powers conferred by this article, the DPP shall have regard to public interest, the interest of administration of justice and the need to avoid abuse of the legal process."

9. In my view the above provisions reveal that the Director of Public Prosecutions, the DPP has the legal and constitutional mandate to withdraw criminal cases instituted by itself or taken over by itself, but must obtain permission of the court by offering justifiable reasons for such withdrawal. It is upon the provision of such justifiable reasons that the court would proceed to allow the withdrawal.
10. The constitution (at sub-Article 11) gives the guiding principles that the DPP shall consider in determining whether to withdraw. The 3 guiding principles are public interest, interests of administration of justice and the need to avoid abuse of the legal process. These 3 elements put a responsibility on the DPP to ensure that such withdrawal is done in good faith and pursuit of the fairness and justice. If the process is tainted by elements of unfairness or injustice, then the DPP would be failing in upholding these constitutional principles. The court would then be reluctant to allow the intended withdrawal.
11. Section 87 of the criminal procedure code provides as follows;

In a trial before a subordinate court, a public prosecutor may, with the consent of the court or on the instructions of the DPP, at any time before judgment is pronounced withdraw from the prosecution of any person.....”
12. Again the element of consent of the court is noted regarding applications for withdrawal under section 87 of the Criminal Procedure Code. This means that for the court to allow withdrawal, the prosecution must convince the court by giving good reasons that would justify the action. A denial of the consent would properly ensue if no good reason has been given.
13. In the Republic Versus Leonard Date Seketo (2019) eKLR case as cited to me by the prosecution, the Hon Justice Nyakundi, observed that;

"An important element of the power to initiate, undertake or withdraw any criminal proceedings by the prosecutions is to ensure justice is not only seen to be done but that justice is done in the matter.”
14. The power granted to the Director of Public Prosecutions to discontinue prosecution is not absolute as it's subject to court's sanction.
15. The prosecution advanced the reason that there was lack of crucial evidence to prove that the accused was culpable. In my view, this is a justifiable reason to warrant a withdrawal. In the interest of justice, I therefore set aside the orders of the trial court disallowing the withdrawal and substitute it with an order allowing the prosecution to withdraw the case against the respondent under Section 87 (a) of the Criminal Procedure Code. The said orders are made on condition that should the prosecution consider initiating the same charges against the respondent then they shall do so within one month from the date hereof, failure to which the discharge shall operate as an acquittal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF OCTOBER, 2023

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S.M. GITHINJI



JUDGE

