REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

MISC CRIMINAL APPLICATION NO. 308 OF 2020

MARTIN MURAGE MACHARIA.....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

RULING

1. This ruling is the subject of a notice of motion application dated 11th November 2020, expressed to be brought under the provisions of; "Article 159(2), 165(3a & D2) of the Constitution of Kenya 2010, and Section 176, 632, and 464 of the Criminal Procedure Code (Cap 75) Laws of and all enabling enactments."

2. The applicant is seeking for the following orders:

> *a) That, the proceedings in SRMC at JKIA in Criminal Case No. 23 of 2018; Republic versus 1st and 2nd applicants be stayed pending the hearing and determination of the notice of motion;*
>
> *b) That, the charges in SRMC, at JKIA in Criminal Case No. 23 of 2018; Republic versus the 1st and 2nd applicants be withdrawn upon the payment of Kshs 1,130,000 to the complainant;*
>
> *c) That, the Honourable Court be pleased to make such further and other reliefs as it may deem fair and expedient in the circumstances of the case.*

3. The application is based on the grounds thereto and an affidavit sworn by the 1st applicant, Martin Murage Macharia. He avers that, the applicants are currently facing criminal charges in the aforesaid case at the Resident Magistrate's Court at JKIA.

4. The case has reached defence stage but in the meanwhile, the complainant therein, and the applicants have reached an agreement that, the complainant be paid a sum of Kshs 1,130,000 in return of her withdrawing the charges.

5. Pursuant thereto, the applicants have paid a substantial sum of money. However, when their lawyer, the learned counsel Mr Muthama, sought for the court to recognize the agreement, the court "brushed it aside" without making a determination.

6. The applicants aver that, in the given circumstances the court abdicated its duty under article 159 of the Constitution of Kenya, 2010 (herein "the Constitution") and Section 176 of the Criminal Procedure Code (herein "the Code"), when it declined to recognize the agreement, hence the invocation of the court's power under article 165 of the constitution and Sections 362 and 364 of the Code.

7. The application was served upon both respondents, whereupon the 1st respondent appeared and requested for time to respond to the application and by an order of 12th April 2021, the court allowed the respondents a period of seven (7) days to respond to the application. However, none of them filed a response.

8. Similarly, although the 2nd respondent, was served through the office of the Honourable the Attorney General, they didn't enter appearance in the matter neither did they respond to the application.

9. Be that as it were, the applicants filed a supplementary affidavit dated 15th March 2021 sworn by their defence learned counsel Mr. Ojwang Agina, annexing a settlement agreement. Subsequently, the application was canvassed through the filing of submissions.

10. The applicants submitted in a nutshell, that, under article 165 of the constitution of Kenya, and in the light of the decision in the case of in the matter of; *Kenya Hotel Properties Limited vs Attorney General & 5 Others (2018) eKLR*, the court has jurisdiction to hear and determine this matter and/or grant the reliefs sought.

11. Further, under the Section 176 of the Code and as slated in the case of; *Kelly KasesmBunjiku vs Director of Public Prosecutions (DPP) &Another, (2018) e KLR,* the court has power to promote reconciliation and facilitate the settlement of issues in amicable manner, ensuring that, the parameters of public interest, interest of justice and need to prevent abuse of legal process are adhered to.

12. The Applicant further submitted that under article 165 of the Constitution and Section 364 of Code, supported by the decision in; the case of; *Kalala Paulin* Musankishay & Another vs Republic (2020) eKLR; the Honourable court has supervisory jurisdiction and power to revise and alter the orders issued by the "Lower Senior Resident Magistrate's Court JKIA. "

13. However, the respondent filed response submissions and submitted that, the 1st applicant has been charged alongside two others who are not parties to this application. Further, the applicants have been placed on their defence after the conclusion of the prosecution case. The 3rd accused who is not a party to this application has since given his defence.

14. That the applicants initially, informed the court of the reconciliation arrangements on 30th May 2018, and the court encouraged the parties to proceed with the same. However, when the matter was taken over by another trial Magistrate, the case started de novo and subsequently the prosecution's case closed without the parties alluding to any agreement.

15. That, the record of the trial court on 26th June 2020, does not support the alleged "brushing aside" of the issue of reconciliation by the court and that, the applicants were represented by the counsel throughout the proceedings. Further, although the provisions of; Article 159 (2) (c) provides that, alternative forms of dispute resolution be promoted, the same must be consistent with the "constitution and any other written law."

16. Similarly, withdrawal of the complaint under section 204 of code must be formally brought before the court and the court given sufficient reasons to permit the withdrawal. No such application has been made or formal agreement filed before the trial court in proof of the alleged agreement.

17. At the conclusion of written and oral argued arguments advanced by the respective parties, I have considered the application in the light of all the materials placed before the court and I find that, first and foremost, it is a fact that, the applicant(s) herein have been charged alongside one Callelo Abongo Nyabando, the 3rd accused. That accused is not a party to this application

18. Secondly, although the application shows on the face value that, it has been brought by two applicants, the affidavit supporting the application sworn by the 1st applicant does not indicate that, he is swearing it on behalf of; the 2nd applicant or has authority to do so on the 2nd applicant. Therefore, it is uncertain whether indeed the 2nd applicant is a party of this application.

19. Be that as it were, to revert back to the matter herein, the history of the proceedings in the trial court reveals that, the prosecution case commenced, with plea taking on 15th February, 2018. The case proceeded up to, 15th February 2019, when the trial court ruled that, each accused had a case to answer, and placed them on their defence.

20. The question that arises is whether the applicant(s) sought for the court to recognize the alleged settlement agreement. The history of the matter further reveals that, the matter was scheduled for defence hearing on 20th December 2019, but as the trial Magistrate was away on training it was stood over to 6th December 2019. However, the 1st accused and/or 1st applicant was said to be indisposed, whereupon the matter was stood over to 4th February 2020.

21. On that date, 4th February 2020, the defence counsel was said to be bereaved and the matter was stood over to 5th February, 2010. It did not proceed on that date as, the defence counsel was unwell. However, 3rd accused's defence was heard and the case stood over to 19th February 2020, to allow the applicants herein, cross examine the 3rd accused.

22. On 19th February 2020, the case was adjourned as the trial Magistrate was a said to be way in a meeting and the defence counsel unwell. Therefore, the matter was stood over to 10th March 2020; then to 26th March 2020, 15th July 2020 and then to 16th July 2020.

23. However, that date, the 2nd applicant was reported be in self-quarantine for fourteen (14) days and hearing stood over to 7th August 2020, but on that date, the 2nd applicant was said to still be recuperating. The court did not seem to be convinced and issued a warrant of arrest against him. The matter was then stood over to 2nd September 2020 for defence hearing.

24. On 17th September 2020, the warrant of arrest was lifted and defence hearing set for 1st October 2020 but did not proceed and was then fixed for hearing on 14th October 2020. On that date, the 1st applicant's learned counsel; Mr Agina, sought for certified copies of proceedings, the 2nd applicant stated that, he could not proceed as his counsel was absent, and to be allowed to reach out to the learned counsel Mr Agina to represent him. However, the prosecution and 3rd accused opposed the application.

25. The learned counsel, Ms Agina however, argued that the right to represent an accused person is a constitutional right; and so is the right to proceedings. The court allowed the request for typed proceedings and stood over the matter to 17th November 2020.

26. On that date, the 1st and 2nd applicant(s) renewed the application for adjournment due to lack of typed proceedings, and again the 3rd accused and the prosecutor objected to the application. After analyzing the history of the case, the court observed that, the matter has been delayed at the behest of the 1st and 2nd applicants for various reasons.

27. The applicant(s) were granted 1½ hours to peruse the file and proceed with the hearing, but the learned counsel; Ms Agina for sought for time to seek review of the ruling within seven (7) days and matter stood over to 25th November 2020 for mention for further orders, but on that date, it was stood over to 30th November 2020, as the applicant(s) had filed the subject miscellaneous application. Finally, the matter was stood over to 15th December 2020.

28. It is clear from the afore detailed analysis of the proceedings that there is no record of a formal request to the court by the applicant(s). However, the applicant(s) seem to suggest that, the application was made orally.

29. It is the applicant's argument that the court abdicated its duty under section 176 of the code, by not accepting the settlement agreement. At this stage I shall examine the circumstances under which criminal proceedings may be lawfully terminated.

30. The constitutional mandate to institute and withdrawal any criminal case is vested in the Office of the Director of Public Prosecutions (ODPP). This office was established by the *Director of Public Prosecutions Act 1990,* to institute, conduct and supervise prosecutions and related proceedings.

31. The mandate is derived from, article 157 (6) (c) of the Constitution which states as follows: -

> "*The Director of Public Prosecutions shall exercise State powers of prosecution and may--*
>
> > *(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;*
> > *(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and*
> > *(c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)".*

32. Pursuant to the aforesaid, a criminal case may be terminated by ODPP under section 87 of the Code which states that: -

> "*In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, 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".*

33. In the same vein, article 159 (2) (c) of the Constitution, implores upon the courts to promote alternative dispute settlement mechanisms and states as follows: -

> "*In exercise of judicial function, the courts and tribunal shall be guided by the following principles: -*
>
> > *(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause 3"*

34. As a consequent to the aforesaid provisions, a criminal case may be terminated by the agreement of the parties, under various provisions of the code. In that regard, the provisions of; section 176 of the code states that a criminal case may be determined through reconciliation. It states as follows: -

> "*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 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.*

35. Similarly, the provisions of, section 202 of the code allows termination of proceedings and it states that: -

> "*If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case*

until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit"

36. In the same vein, section 204 of the code, provides for withdrawal of a criminal case by the complainant and stipulates as follows:

"Withdrawal of complaint If a complainant, at any time before a final order is passed in a case under this Part, 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".

37. In the instant matter, the applicant(s) are relying on the provisions of; section 176 of the code to argues that, the court should have allowed the settlement agreement. In that regard, I find that, first and foremost, by the use of the word "may" under the provisions of; section 176 of the code the court has discretionary power to promote reconciliation. Thus, the provisions are not mandatory and court can allow the application, decline to allow it. Further, the terms of settlement and/or reconciliation are subject to approval by the court/

38. Secondly, the offence which are a subject in the subject matter of the settlement should not be a felony and/or aggravated in degree. In that respect the penal code states that, a "felony" means an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more.

39. The applicants in this matter have been charged with the offences of; forgery contrary to section 345 as read with section 348 of the penal code, making a document without authority contrary to section 359 (a) of the penal code, uttering a false document contrary to section 357 of the penal code and obtaining money by false pretence contrary to section 312 as read with section 313 of the penal code.

40. *I note that, section 349 of the penal code provides for the general* punishment for forgery and states that: -

"Any person who forges any document or electronic record is guilty of an offence which, unless otherwise stated, is a felony and he is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years" (emphasis added).

41. I further find that, section 357 that creates the offence of making documents without authority which the applicants are charged with states that: -

"Any person who, with intent to defraud or to deceive—

(a) without lawful authority or excuse makes, signs or executes for or in the name or on account of another person, whether by procuration or otherwise, any document or electronic record or writing; or

(b) knowingly utters any document or electronic record or writing so made, signed or executed by another person, is guilty of a felony and is liable to imprisonment for seven years" (emphasis mine).

42. Finally, the penalty for an offence under section 313 of the Penal Code is provided for as follows: -

"Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour and is liable to imprisonment for three years

43. It is therefore clear that most of the offences the applicants are charged with are felonies which are contra the provisions of section 176 0f the Criminal Procedure Code. Such offences are treated as serious and in most cases attract a harsh and deterrence sentence.

44. As observed in the case, of; Jamal faraji Serenge alias Juma Hamisi vs Republic, (2007) e KLR, by the court: -

"To allow withdrawals of cases like this, is tantamount to saying that, relatives of murdered persons can be allowed to withdrawal murder charges against accused persons whom they have forgiven. That cannot be allowed in our judicial system"

45. I also note that, the prosecution is on record as not being aware of the alleged settlement when the matter was first mentioned in court but had no objection to the same. In my considered opinion such arrangements as envisaged under section176 of the Code cannot be concluded without the involvement of the Public prosecutor.

46. The rationale behind these requirements are that, first and foremost, the constitutional mandate to institute public criminal proceedings is vested in the ODPP and therefore, in real essence and legal sense, the public prosecutor is the "complainant".

47. Further, though the word "complainant" is not defined in statutes, it is defined in most legal dictionaries as;

"an individual who files a written accusation with the police charging a suspect with the commission of a crime and providing facts to support the allegation and which results in the criminal prosecution of the suspect"

48. Similarly, the Public Prosecutor has been recognized as a "complainant" in several legal authorities. In, the unreported case of; *Republic*

vs Mwaura Ikeago, the Court of Appeal in Tanzania, by a majority decision of; Mustafa Ag V-P and Musoke JA) *observed inter alia that: -*

> *The word "complainant" is not defined in this section nor in the Criminal Procedure Code. But we learn from the judgment of Biron J, a senior judge of considerable experience in the High Court, that the word "complainant" is generally regarded by the judges in the High Court in Tanzania as including a public prosecutor. We would endorse this view which flows logically from the definition of the word "complaint" in section 2 of the Criminal Procedure Code that, it is "an allegation that some person known or unknown has committed or is guilty of an offence". It is not usual, and indeed would be superfluous, to define a word in a piece of legislation and also include definitions of all derivatives and variations of the word defined. Normally, where a word is defined in a document, an indication of the meaning of any derivative or variation of the word is thereby indicated, unless, of course, the context otherwise requires.*
>
> *In our view, it is logical within the rules of interpretation to hold that, the word 'complainant' includes a public prosecutor. What this means in effect is that where a private person complains directly to a magistrate in a criminal matter he is the complainant. If, however, the same person, instead of complaining to a magistrate were to complain to the police and the police brought a complaint to the court in the name of the Republic, the we think if follows that the Republic or the public prosecutor is the 'complaint' and the victim of the wrong complained becomes a witness for the purpose of substantiating the allegation"*

49. In the same vein, in the cases of; *Roy Richard Elimma & Another vs. Republic Cr. Appeal No. 67 of 2002*, the court held that the "complainant" in the contest of section 202 of the code, has been interpreted to "mean the "Republic" in whose name all criminal prosecutions are brought and not the victim of the crime who is merely the chief witness on behalf of the Republic."

50. Finally, in the case of; *Ruhi vs. Republic 1985 KLR 373*, the court held that, "the term complainant in; section 208(1) of the Criminal Procedure Code includes; the prosecution as well as the person so described in the particulars of the charge."

51. However, what is even more surprising is that, the alleged agreement on which the applicants are relying was not formally presented before the court and even if it was, it would be of no effect. This is because I have looked at the copy annexed to the supplementary affidavit of the applicant(s) counsel and I find that, it is not signed and/or executed by the parties thereto.

52. Therefore, it has no legal and/or binding force in law and could be relied on to allow an application under section 176 of the code.

53. The upshot of the aforesaid is that, I find that, the application has no merit and I dismiss it in its entirety. I order that the lower court file be returned to the trial court for the hearing of the matter that, has been pending for too long after the prosecution concluded its case.

54. It is so ordered.

Dated, delivered virtually, and signed on this, 10th day of May, 2021

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Ojwang Agina for the Applicant

Ms Ndombi for the Office of the Director of Public Prosecution

Edwin - Court Assistant