



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL REVISION NO. 9 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

KENNETH MUTHOMI GITONGA.....ACCUSED

RULING

1. The accused was charged with offence of **Obtaining Goods by False Pretenses** contrary to **Section 315 of the Penal Code**, a charge he denied and matter went into trial.
2. After one witness had testified on 11/07/2019. The prosecution sought her witness to be allowed to testify the next day as matter had been fixed for two days as the cheque images and Safaricom data being relied on was not available on the same day on the account of same having been misplaced.
3. The defence counsel objected to the introduction of new evidence as the copies of the same had not been supplied earlier. The Advocate gave only option that same be supplied to her on same day before next day and in default, same not to be allowed to be produced.
4. The trial court ordered same to be supplied by 1.00pm and in default the same to be treated as contempt of court and the evidence intended to be produced would not be allowed to be produced and thus court fixed the matter the next day on 12/07/2019.
5. Come next day, the defence informed court that the documents were served/supplied at 4.45pm instead of 1.00pm that is 3 hours and 45 minutes late thus sought court's directions on that non-compliance in terms of time of service/supply of the document.
6. In response, the State counsel confirmed that the supply was at same 4.04pm and lateness of 3 hours 45 minutes. But the State was ready to proceed with the hearing.
7. The defence had also stated that it was ready to proceed with the hearing.
8. The court and prosecutor admitted that they left court at 4.00pm and even noted that the prosecution/investigating officer could not beat 1.00pm deadline. However, court held that the non-compliance was contempt of court and thus disallowed the production of the documents.
9. Thus prosecution informed court that since the documents are crucial to the case, their side was not able to proceed without production of the documents thus sought to withdraw the case under **Section 87 (a) of the Criminal Procedure Code**.
10. The defence opposed the application on the basis that her client would be arrested if application was allowed and he would be charged again in court on same charges. She urged court to either prosecute case and ruling be made or charges be dismissed under **Section 202 Criminal Procedure Code** for lack of evidence.
11. The trial court rejected application under **Section 87 (a) of the Criminal Procedure Code**.
12. The State Counsel informed court that she intended to seek revision of the orders rejecting application aforesaid and thus sought some time to do so.
13. The defence did not oppose only commented that the prosecution did not stated what it wanted at trial stage.
14. The trial court fixed a mention on 26/07/2019 to await High Court on the matter.
15. Thus instant matter was lodged for my consideration. The prosecution set out 3 issues namely;

16. Whether trial court in disallowing key documents production due to late service (3 hours 45 min) the court right?
17. The input of **Section 87 (a) of Criminal Procedure Code** in the proceedings and whether invoking some provisions if evidence is insufficient can be termed as afterthought?
18. Thus court was urged to invoke **Article 165 of Constitution of Kenya and Section 362 and 304 Criminal Procedure Code** and allow prosecution to rely and produce documents in issue.
19. The defence hinged its response on the issue: whether conditions of withdrawal of the case under **Section 87 (a) Criminal Procedure Code** were fulfilled?
20. After citing the said provisions, the defence submit that the trial court acted within her mandate thus justification for revision, thus sought dismissal of the revision application instant.

ISSUES, ANALYSIS, AND DETERMINATION

21. After going through the above matters as grasped from trial court file, instant application and response thereof, I find key issues are:

- **The import of Section 87 (a) of Criminal Procedure Code in the circumstances of the case.**
- **Whether the evidence of Article 50 on fair trial were met?**
- **What are the directions to be given?**

22. Under **Article 165(6) and (7) of the Constitution** confers upon this Court supervisory jurisdiction over subordinate courts and empowers this Court to make any order to give any direction it considers appropriate to ensure fair administration of justice. The said provisions are couched in the following terms:

a. (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.

b. (7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of 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.

As regards the **Criminal Procedure Code, section 362 of the Criminal Procedure Code** provides as follows:

c. 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.

23. It is therefore clear that the powers of revision under section 362 of the Criminal Procedure Code are only to be invoked to enable this Court satisfy 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 subordinate court.

24. Therefore, if out of anger the Court makes a decision which wanting in its correctness, legality or propriety or the proceedings are irregular, this Court no doubt will step in and correct the same. That is my understanding of the position adopted in **Republic vs. Alice Chepkorir & Another [2018] eKLR** where the court held that:

“it would also appear that the learned trial magistrate fell into anger to make a finding and conclusion not fully based on evidence before the court but on assumptions and personal knowledge of the circumstances when she made her...”

25. Therefore it is my view that that jurisdiction should not be invoked so as to micro-manage the lower courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion.

26. Where an issue arises as to whether the decision of the Court below is correct in its merits either as a result of wrong exercise of discretion or otherwise, but which decision does not call into question, its legality, correctness or propriety, the right approach is to appeal against the same preferably at the conclusion of the proceedings or in limited instances before then. Dealing with the right to appeal in interlocutory ruling in a criminal matter, the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR**, held that:

“In ordinary criminal trials, there is generally no interlocutory appeals allowed for Section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence.

In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. As was stated by the High Court of Malaysia in Public Prosecutor vs. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735:

“The powers of the High Court in revision are amply provided under Section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

27. With regard to the powers of the Director of Public Prosecution he constitution under **Article 157 (6), (7), (8), (10) and (11)** vested him with express powers to prosecute all criminal cases on behalf of the state. The broad language of the Director of Public Prosecution to initiate, take down, continue or choose to discontinue any criminal prosecution before a court of law.

28. The constitutional and statutory responsibility to discharge any of these functions squarely rests with the Director of Public Prosecution. The consideration to initiate or discontinue a criminal proceeding is only to be weighed against the broader doctrine of justice for the public.

29. An important element of the power to initiate, undertake or withdraw any criminal proceedings by the prosecution is to ensure justice is not only seen to be done but that justice is done in the matter.

30. In this context **Section 87(a) of the Criminal Procedure Code** which is relevant to this application permits the prosecutor to apply before the court seized of the case to withdraw the charge or charges facing an accused person at any time before final Judgement. This power is deemed to be exercised in the interest of the administration of justice and to avoid abuse of the process.

31. According to **Section 87(a) of our code** the public prosecutor may with the consent of the court at any time before judgment withdraw from the prosecution of any person and upon withdrawal:(a) If it's 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.

32. (b) If is made after the accused person is called upon to make his defence he shall be acquitted the exercise of judicial discretion in determining between the two parameters is to ascertain that the derived power on both ways is reasonable and rationale to the objective sought to be achieved.

33. A central principle to be borne by the trial court is whether the threshold has been met before either of the decision in (a) or (b) is reached to discharge or acquit the accused person.

34. In my view a trial court exercising discretion under **Section 87(a) or (b) of the Criminal Procedure Code** is to ask itself whether in the trial construing of the provisions the prosecutor has acted beyond his constitutional powers. If the application passes the test set by the legislature, then it would not be of the business of the court to control the prosecutor acting in accordance with his constitutional role and enabling provisions of the code.

35. The essential character of the office of the Director of Public Prosecution under **Article 157 of the constitution** is that in exercise of its power the principle of independence is guaranteed and availed to the office. In fact, the Article reads that in exercise of his powers or functions the Director of Public Prosecution is not under the direction or control of any person or authority. So in deciding the operation of **section 87(a) (b) of the Criminal Procedure Code** and its propriety in a particular case one has had to be concerned whether the reasons selected is in conflict with the constitution.

36. However, there are exceptional circumstances on the courts ability to regulate the Director of Public Prosecution jurisdiction. In other words, when he acts improperly, not for the interest of justice, acts beyond the powers vested by the constitution or carrying out some arbitrary objective under the guise of discharging the functions of the office of prosecution.

37. Placing reliance on the above provisions and the powers of this court on revision under **section 362, of the Criminal Procedure Code** and supervisory jurisdiction under **Article 165 (6) and (7) of the constitution**, I make the following observations:

38. This is a case where the respondent had been investigated and found to be culpable for serious offences as pointed out in the charge sheet. The role of the court is clearly defined under **Article 50(1) of the constitution** solely to decide fairly and independently on the cases brought and filed by respective parties including the state. The jurisdiction of subordinate courts is well defined in the respective statutes and must therefore act within the bounds of that authority.

39. As regards the ambit of **section 87(a) (b) of the Criminal Procedure Code** the trial magistrate in the situations lost sight on the provisions to grant relief by the prosecution. The Learned Magistrates delved into the wrong interpretation of the law in order to withdraw consent to permit the prosecutor to withdraw the charges.

40. My reading of **section 87(a) and (b) of the Criminal Procedure Code** in its language is meant to advance the administration of criminal

justice and not to frustrate it. It is apparent from the impugned orders in this case the approach taken by the Learned Magistrates was a stringent interpretation denying both parties right to a fair hearing.

41. In the case at hand there is no ambiguity to the applications sought to be considered by the court in respect to the language of **section 87(a) of the Criminal Procedure Code**. To consider the application, the trial court was under a duty to appraise the provisions of **section 87(a) subject to Article 157 (6), (7), (8) and (10) of the constitution**, on the power conferred upon the Director of Public Prosecution to commence, continue or discontinue any proceedings pending before a court of law.

42. That the spirit and tenor of judicial discretion is to advance the objects and principles of a right to a fair trial under Article 50 of the constitution. The fact that **Article 157** empowers the Director of Public Prosecution to prosecute all criminal cases, the trial court on receiving the request under **section 87(a) (b)** has the power to judiciously consider the elements of the provisions and proceed to give effect in the manner stated in the code.

43. Very rightly the Learned Magistrate was bound to set the machinery under **section 87** in motion and not to rigidly decline consent. The importance of the right for the prosecutor to be allowed to withdraw the charge at any stage of the proceedings before final judgment should not be denied merely on grounds of prejudice on the part of the accused.

44. More importantly, where either of the sub-sections under **sections 87(a) and (b) of the code** are invoked an aggrieved party has sufficient avenues to further his rights under the bill of rights. The act of a likelihood to re-open the case against an accused person should not be a bar to decide to withhold consent under **section 87 (a) of the Criminal Procedure Code**.

45. The constitutional provisions of **Article 50** engraves fair trial rights until final Judgement is pronounce by the court. It's therefore immaterial for the court under **section 87(a) of the Criminal Procedure Code** to prohibit withdrawal on grounds that the accused would suffer prejudice if fresh charges are to be filed by the state.

46. It is in the interest of justice and proper working of a criminal justice system that the Director of Public Prosecution should be accorded the discretion to discontinue or withdraw charges at any time before Judgment.

47. In the new justice dispensation under the 2010 Kenya Constitution, the court is enjoined to dispense justice fairly to all parties through a fair hearing – **Article 50 and 159 2(d)**-and without regard to technical and procedural flaws that do not go into the merits of the suit. Thus the court makes the following orders;

i. The orders of Hon Susan Mwangi SRM and proceedings thereof of 11th and 12th July 2019 are set aside and matter is to be heard by any other magistrate except Susan Mwangi SRM to be allocated by The Chief Magistrate Ct 1 Head of the station from where it had reached or Ct 1 itself at liberty to hear the matter.

ii. The prosecution to elect whether to call the witness who was to produce documents in issue or to pursue the withdrawal of the charges under Section 87(a) CPC.

Dated, Signed and Delivered at NYAHURURU this 13th day of May, 2021.

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CHARLES KARIUKI

JUDGE