



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI

CRIMINAL REVISION NO. E 087 OF 2020

ALI AHMED TAIB & 2 OTHERS.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

RULING

1. **Ali Ahmed Taib, Faiz Ali Omar, and Africa Polysack Limited** were charged with manufacturing in the course of trade, counterfeit goods contrary to Section 32(b) as read with Section 35(1) (a) of the Anti-counterfeit Act, 2008, laws of Kenya. Particulars being that, the accused persons, a director of Africa Polysack Limited, Manager and a limited liability company respectively, on the 24th day of May, 2019 at 1130hrs, in your business premises located at Plot No. 209/12962/7, along Masai Road, Viwandani area within Embakasi constituency in Nairobi County, manufactured in the course of trade counterfeit goods to wit 7900 of pieces 1 Kilogram packaging pouches valued at Ksh.89,847 and 6 printing cylinders valued at Ksh 240,000 with a total value of Kshs. 329,847 without the authority of BENEX KENYA COMPANY LIMITED the registered owner of the mark “P WATERPROOF” registered under trademark number 98303 which goods imitated the protected goods in such manner and to such a degree that those counterfeit goods are substantially similar copies of the protected goods.

2. At the outset, when the matter came up for purposes of taking plea on the 20/8/2019 the accused persons were not in court. Learned Counsel Mr. Hassan appearing for the accused persons informed the court that the person who was informed of the charges was the operation manager and not the accused persons, he alleged that the accused persons were out of the jurisdiction of the court and sought time to engage them. In the result the court adjourned and directed that the accused appears before court on 26/8/19.

3. On the 26/8/19 the court was informed by counsel for the accused that they had visited the agency and negotiations were ongoing, he sought to be given 30 days within which to settle the matter, an application that was not opposed by Mr Odek, the Prosecuting Counsel for the Anti-Counterfeit Agency and it is notable that the accused persons were not in court. The matter was adjourned and slated for mention on 30/8/19.

4. On the stated date the accused persons did not attend court but were represented. Their counsel promised to avail them and also indicated that they were negotiating with the complainant/ Anti-Counterfeit Agency; the prosecuting counsel protested as they had not received a letter to that effect and he found the time proposed lengthy. Nevertheless, the plea was deferred to 4/10/2019 when there was a further request for more time; On 15/11/19 the court was advised that the complainant was to give its report and a mention date was granted. Thereafter there was an indication of a partial agreement having been reached. After a series of mentions, on 1/10/2020 a notice of preliminary objection was filed by HMS advocates LLP representing the accused persons.

5. The stated preliminary objection dated 29/9/2020 was brought pursuant to **Order 32 Rule 15** of the Civil Procedure Rules, 2010. The contention of the accused persons was that the complainant was a person of unsound mind who had no capacity to sue or defend a suit. That there was no cause of action against the accused and there was no relationship between the accused and the complainant. Lastly that the objectors have never seen, known or interacted with the complainant during the business. The application was scheduled to be heard on the 16/11/2020, and on the respective date the prosecution sought to withdraw the matter under **Section 87(a)** of the Criminal Procedure Code (CPC) on the grounds that the Anti-Counterfeit prosecutor had been degazetted. There having been no objection by Counsel for the Accused, the court allowed the withdrawal; accordingly, the accused persons were discharged.

6. Through a letter dated 18/11/2020, the firm of Meshack Odera & Company Advocates approached this court arguing that it was improper for the trial court to have applied the provisions of **Section 87(a)** of the Criminal Procedure Code as the plea had not been taken. That there were no grounds informing the withdrawal therefore it was incorrect for the court to allow the application. That a counterfeit offence contravenes intellectual property rights owner who was not consulted prior to the application for dismissal being allowed, acts that contravened principles espoused under **Section 4(2) (b)** and the provisions of **Section 9(2) (a) and 21 (1)(a)** of the Victim Protection Act.

7. That the Director of Public Prosecution neither sought the consent of the complainant nor the authority of the Anti-Counterfeit Authority

as envisaged by **Article 157(2)(b)** of the Constitution. And that the court failed to comply with the mandatory provisions of **Section 28(3)** of the Anti-Counterfeit Act. That following the irregularity, it has not been determined if the goods are counterfeit, therefore the Authority indefinitely remains in custody of the suspected counterfeit goods.

8. It is therefore urged that there was an irregularity that this court should enquire into and review.

9. The State filed grounds of opposition where it was stated that a withdrawal under **Section 87(a)** of the CPC is not absolute bar to prosecution; the mandate to prosecute criminal cases is solely on the Director of Public Prosecution and should be exercised without control of any party; that the application which is unsubstantiated is an abuse of court process.

10. The jurisdiction to review the subordinate court order is provided by the provisions of by **Section 362** of the Criminal Procedure Code (CPC) that empowers the court to call for proceedings of the subordinate court for purposes of satisfying itself of the regularity of the same.

11. The gist of the applicant's argument is that a criminal case cannot be withdrawn before the trial begins. In the applicants view the processes taken during arraignment and prior to taking plea are not part of the trial.

12. Although the term "trial" is not defined in the criminal procedure code, the first step of a criminal trial is the arraignment of the accused person in court or a formal complaint being filed before a judicial officer in the form of a charge sheet and formally admitted. (**Also see Section 89(1)** of the CPC)

13. The Victim Protection Act on the other hand provides that:

" 'trial' includes a proceeding in which a person is sentenced;"

14. The impugned withdrawal was pursuant to **Section 87(a)** of the

CPC that provides thus:

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;

15. When the matter was placed before the judicial officer, the

accused persons were absent. The court took note of Counsel Hassan who was indicated as representing the suspect. The court that was seized of the matter did not endorse the charge sheet as it was not read out because parties sought to negotiate. The plea having not been taken, the issue of there having been a trial does not arise.

16. According to **Section 87** of the CPC, a public prosecutor has power to withdraw charges at any time before judgment as long as the court consents or if the instructions emanate from the Director of Public Prosecutions.

17. In the instant case, at the outset a prosecution counsel who was authorized to prosecute Anti- Counterfeit matters was the one seized of the matter. The court was informed that he had been degazetted therefore, Counsel from the office of Director of Public Prosecution took over the matter and made a relevant application. **Article 157(c) of the Constitution states as follows:**

(6) 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 clauses (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).

(7) If the discontinuance of any proceedings under clause (6)(c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

18. It is the contention of the applicant that the complainant /victim was not consulted. In **Roy Elirema & Another vs Republic (2003)e klr/ Cr. Appeal No. 67 of 2002** the Court of Appeal in considering **Section 202** of Criminal Procedure Code stated thus on the issue of

complainant:

“The parties named in section 202 for example, are all complainants and the accused person if the complainant is aware of the hearing date and is absent without the explanation, the court may acquit the accused person, unless the court sees other good reason for adjourning the hearing. The “complainant” in this context 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.”

Therefore, the victim may not take any directions that would influence the trial unless he acts with the consent and /or advice of the prosecutor.

When it comes to withdrawal of charges, Director of Public Prosecutions exercises functions without any external influence. The power to withdraw charges cannot be declined on the ground that the complainant did not give consent.

19. The Applicants who are aggrieved have advanced the argument that there was no trial therefore orders made to withdraw the charges were null and void. Then, in the same vein, the court cannot set aside an order that was null and void. Any order made to that effect would be a nullity.

What transpired was not prejudicial to the complainant. It was in its best interest that the matter be prosecuted by a gazetted prosecutor, this would be in the interest of a fair trial. On the question of exhibits, the trial court did not address it, therefore, this court cannot review the same.

20. In my considered opinion, the Applicants’ recourse lies in a demand from the authority holding the goods (if any) to release them. If there is no compliance, then, the enforcement of their right lies in a different division of the High Court. In the premises, I find no basis for orders sought because quashing of the alleged irregular orders will serve no purpose.

21. The upshot of the above is that I decline to grant orders sought. Therefore, the application fails and is accordingly dismissed.

Dated, signed and Delivered virtually, this 14th day of July, 2021.

L. N. MUTENDE

JUDGE