



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**CORAM; R. MWONGO, J.**

**CRIMINAL REVISION CASE NO. 49 OF 2019**

**REPUBLIC.....APPLICANT**

**VS**

**STANLEY KHIKO.....RESPONDENT**

**JUDGMENT**

**Background**

1. The prosecution filed this review application after the lower court declined to allow its application under **Section 87A** of the **Criminal Procedure Code** to withdraw charges against the respondent. The lower court matter is CMCR (Traffic) Case No 5867 of 2016.
2. The application is contested by the respondent who filed a replying affidavit asserting, in essence, that an accused person is entitled to a fair trial under **Article 50** of the **Constitution**; that **section 87A** does not give the DPP carte blanche powers to do as it pleases, and certainly not for the mere reason that the prosecution is encountering challenges in prosecuting its case. The court must be satisfied that there are good grounds for withdrawal.
3. The respondent also challenges as a procedural impropriety, the applicant's failure to extract the lower court order dismissing the applicant's **Section 87A** application which is sought to be reviewed. I will not spend time on this
4. The background of the matter is clear from the proceedings of the lower court, the file of which I called for and have carefully perused. The charge against the accused is that of exceeding the speed limit contrary to **section 42 (10)** as read with **section 43(1)** of the **Traffic Act**. He is alleged to have been speeding on Nairobi Naivasha road on 3<sup>rd</sup> October, 2016 in vehicle registration number KAG 385T, Mercedes Benz.
5. The accused pleaded not guilty when arraigned in court on 14/10/2016, and was released on a cash bail of 10,000/=. At the hearing on 13/12/2016 the defence raised a preliminary objection to the effect that the charge was non-existent, which was dismissed on 13/2/2017. At the hearing of 20/3/2017, the defence sought to be provided with prosecution documents, signage, photographic evidence, speed gun and a host of other items to enable him to prepare for his case. The court on 15/5/2017 ordered that witness statements and any extractable evidence to be relied on by the prosecution be given to the accused, but declined to grant orders in respect of other items sought.
6. The lower court record shows that on 13/9/2017, the accused sought an adjournment as he wished to file a petition in the High Court under certificate of urgency. The prosecution had indicated its readiness to proceed with two witnesses who were in court. The record further shows on 16/5/18 that the accused had filed a Constitutional Petition No 1 of 2017 and as it was pending in the High Court, an adjournment was granted in the matter. Further adjournments occurred in the matter for various reasons including the court not sitting, the accused's advocate unwell or absent, or the Investigating Officer attending a funeral. On 7/1/2019, the High Court matter was reported as having been determined with an order to the lower court to proceed. A hearing was scheduled for 27/3/2019, but the accused's counsel did not show up on that day as he was held up in another High Court matter.
7. The matter was mentioned on 17/4/2019, and the hearing commenced on 15/7/2019 with PW1 testifying. At the time of his re-examination, the DPP instead applied that the witness be stood down to allow him to amend the charge sheet. The application was contested, and the court granted the orders in a ruling on 29/7/2019, on which date the defence sought adjournment.
8. On 7/8/2019, the prosecution applied to withdraw the case under **section 87A** of the **Criminal Procedure Code**. The application was opposed and the lower court considered **section 87A** of the **Criminal Procedure Code** and in a short ruling, declined the application on 4/9/2019 stating:

***“Having considered the above provision and the history of this matter and several rulings made in it, the prosecution application is declined. Matter to proceed for hearing.”***

It is that ruling which the prosecution, as applicant herein, seeks to be reviewed.

9. **Section 87A** 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 or the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person and upon withdrawal –***

***(a) if 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 is made after the accused person is called upon to make his defence he shall be acquitted”***

10. This provision is a replica of **Article 157 (6)(c)** and **157(7)** of the **Constitution**. From the above provision, the following criteria for withdrawal are clear: First, withdrawal is applicable only in a magistrate’s court; Second that the right to withdraw is exercisable by the prosecutor; Third that such right of withdrawal must have the consent of the court – to be exercised at its discretion – for it to be of any effect; Fourth that withdrawal can be made at any time before judgment is pronounced.

11. From the same provision, the consequences of withdrawal depend on the stage at which the hearing has reached. If before the accused has made his defence, the discharge of the accused will not be a bar to subsequent proceedings. If the withdrawal is after the accused has been called upon to enter his defence, the withdrawal acts as an acquittal.

12. **Section 87A** of the **Criminal Procedure Code** must be read in the light of **Article 157(11)** of the **Constitution** which as seen below, circumscribes the DPPs exercise of his powers, in that constitutionally, the DPP must:

***“have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid the abuse of the legal process.”***

These additional criteria must also be taken into account by the trial court when determining applications for withdrawal.

13. The defence in this case argues that a withdrawal should only be allowed if a court is satisfied that there are good grounds for withdrawal. However, neither the statutory nor the constitutional criteria make such qualification, although it is implied that a court would only exercise its discretion to consent for good and justifiable reasons.

14. The prosecution filed two authorities: **R v Muneh Wanjiku [2016] eKLR** in which Ngugi, J held that the DPP can make an application for withdrawal in keeping with the just administration of justice, and withdrawal will not be permitted when the DPP is acting maliciously or in bad faith, or is otherwise abusing the court process. In **Republic v Leonard Date Sekento [2019] eKLR**, Nyakundi, J. revised a trial court’s refusal to consent to withdrawal if that would stifle the powers conferred by the DPP. He held:

***“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.***

***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.***

.....

***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. 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.”***

15. I have given the background information on the case at hand and highlighted the various applications and matters that transpired during the proceedings. There has been no undue delay by the prosecution in the matter. The accused is not in custody. There is no indication that the DPP has acted in bad faith, nor is there any evidence that his actions will lead to some kind of prejudice or abuse of the process of the court.

16. In other words, I do not see that the learned trial court had a good basis in citing the many applications filed, for refusing the court’s

consent and curtailing the DPP's exercise of his constitutional power. The applications were not all by the DPP nor were they found to be vexatious. It has not been shown that any of the criteria under **section 87A** of the **Criminal Procedure Code** have not been met. As such I would be hesitant to find that the trial court properly exercised its discretion as such exercise of discretion will result in inhibiting the exercise of the DPP's constitutional power under the circumstances.

17. In my opinion, where the court declines to consent to a withdrawal under **Section 87A** of the **Criminal Procedure Code**, it must have clear and cogent reasons because such declination of consent simultaneously amounts to the curtailment of the DPP's constitutional power of withdrawal under **Article 157 (6) (c) and (7)** of the **Constitution**.

18. As I am not satisfied as to the cogency and rationale for the trial court's exercise of discretion, I hereby revise the trial court's decision, and allow the said withdrawal under **section 87A** of the **Criminal Procedure Code**.

19. Orders accordingly.

**Dated and Delivered at Naivasha this 3<sup>rd</sup> Day of February, 2020.**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Tombe holding brief for Stanley Henry for the Applicant
2. Alex for the Respondent
3. Applicant - Not present
4. Court Clerk - Quinter Ogutu