



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION CASE NO. E027 OF 2020**

**AHMED RASHID JABRIL .....APPLICANT**

**FARAH ALI MOHAMED.....APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... REPUBLIC**

**RULING**

The applicant herein, the office of the Director of Public Prosecutions by a letter dated 12.3.2020 applied for orders of revision under Article 165(6) and (7) of the constitution and section 362 and 364 of the Criminal Procedure Code, seeking principally, that this court do exercise its supervisory power and set aside the orders issued on 4.3.2020 by the Hon. R. Aganyo, Senior Resident Magistrate, and substitute the same with orders allowing the applicant to withdraw, Milimani Chief Magistrate's court, Criminal case number 2144 of 2019, Republic Versus Ahmed Rashid Jibril and Farah Ali Mohamed, under section 87(a) of the Criminal Procedure Code.

The said petition lists the grounds for the plea for revision as follows:

- (i) THAT the learned trial magistrate erred in law in finding that a charge for a serious offence, such as those touching on property rights (land), should proceed to full hearing before a court of competent jurisdiction and should not be terminated by the applicant.**
- (ii) THAT the learned trial magistrate erred in law in holding that there are a lot of parties involved in the said case before the lower court and all of them should have been involved in making the decision by the applicant to withdraw the matter.**
- (iii) THAT the magistrate erred in holding that the applicant represents complainants in Criminal Proceedings and in that set of affair, he is not in a fitting position to compromise charges without the concurrence of the victim of the offence.**

It was maintained that the aggrieved ruling made a total disregard of the provisions of Article 157(10) of the constitution and section 6 of the Director of Public Prosecution Act, no. 2 of 2013. Whereas the 1<sup>st</sup> accused in the lower court (the Respondent) has supported this application, the interested party (Complainant in the criminal case), has vehemently opposed this application. All the parties have filed their relevant affidavits and exhibits.

While arguing this application on 3.11.2020, Ms. Akunja and Ms. Nyauncho, both for the state/Applicant, submitted that after accused 1 had taken plea before the lower court, new information came up which was not available at the time the decision to prosecute was made. It was therefore imperative for the DPP to call back the file so as to advise the Director of Criminal Investigations on what area to cover further. That this is what formed the application for withdrawal under section 87(a) of the Criminal Procedure Code, which the lower court disallowed.

That the constitution empowers the DPP to undertake all public criminal prosecutions and in doing so he is not subject to any authority (Article 157(5)). That the DPP only gives regard to public interest and abuse of the legal process and it was in consideration of this that the opinion on withdrawal was made. It was maintained that the DPP would be failing in its mandate if he fails to make an informed opinion. And that withdrawal under section 87(a) of the Criminal Procedure Code is not a bar to further prosecutions. It was further stated that the decision of the DPP was neither unreasonable nor irrational and the refusal was erroneous and against the constitution since there is no requirement that the DPP must consult the complainant.

The applicant relied on the following authorities.

- i) Mary Kinya Rukwaru versus ODPP & Another (2016)eKLR when the DPP opposed withdrawal initiated by the complainant.***

*ii) Republic versus Leonard Date Sekento (2019)eKLR, that in the interest of Justice and proper working of the Judicial system, the DPP should be allowed the discretion to discontinue or withdraw the case.*

*iii) Republic versus Simon Okoth and Another (2017)eKLR that the case should not allow the accused to stand trial in a case that is not sustainable.*

*iv) Republic versus Jack Alexander Wolf and Another (2019)eKLR where Kimaru J applauded the DPP for having the courage to acknowledge a mistake and withdraw charges.*

*v) Republic Versus Kennedy Onsarigo Sebe & 3 Others (2019)eKLR, - that the trial magistrate in exercising the discretion under section 87(a) of the Criminal Procedure Code must exercise the same Judiciously taking into account public interest and prevention of abuse of the legal process.*

Ms. Aganyo Opiyo for the interested party opposed this application. First that the ruling of the lower court was not illegal or improper and neither was it irregular. That the prosecution is under a duty to inform the complainant of the intention to withdraw which was not done in this matter. That the complainant has never been notified of the alleged new evidence. She relied on Article 157(8) that prosecution cannot withdraw a case without the permission of the court and at sub-article 11, that the DPP shall have regard to public interest, interest of justice and to prevent abuse of the legal process.

Counsel pleaded that the complainant is entitled to fair administrative action from the DPP, and that it is the DPP who wants to act beyond his powers. She argued further that there is no guarantee that if withdrawn the case shall be re-instituted. Counsel relied of the decision in Republic versus Michael B. Watah (2010)eKLR, on the issue that complainant must be given a reason for withdrawal. She prayed that this application be dismissed.

Mr. Ibrahim Adan, appearing for the Respondent, supported the application for revision. That as at the time the Respondent was arraigned in court, his evidence had not been taken. And that it is the interested party who has in fact submitted the additional evidence vide an affidavit. He alleged a collusion between the interested party and the police, adding that these are trumped up charges, which are an abuse of the process of the courts only meant to coerce the Respondent give up his property.

I have considered the submissions of the 3 parties before the court closely. I have also perused the various pleadings filed by the parties and the authorities relied on. To me, the facts of this matter are fairly straight forward. That on 24.12.2019, the Respondent Ahmed Rashid Jibril was charged together with one Farah Ali Mohamed, who is yet to appear for plea, before the Milimani Chief Magistrate's court in Criminal Case No. 2144/2019. The Respondent (accused 1) pleaded not guilty. Then on 2.3.2020, the prosecution applied to have the case withdrawn under section 87(a) of the CPC. The Respondent did not oppose the application for withdrawal. The interested party, the complainant, however, opposed the application. In a ruling delivered on 4.3.2020, the Hon. R. Aganyo, SRM disallowed the application and ordered that the case do proceed to hearing in the normal manner. It is this order and ruling that the DPP (applicant) seeks to have revised and or set aside.

I must say from the onset that I find this to be one of those causes that have paradoxical elements. I say this because in ordinary criminal proceedings one would expect the prosecution (the office of the Director of Public Prosecution) side pulling in the same direction as the complainant. In this case, the 2 seem to be pulling in different directions. Instead, the prosecution side seem to be on the same side as the accused.

Having said that, and having listened to the parties herein, I am convinced that the issues arising for determination in this application as basically the following

*i) Power of the Director of Public Prosecutions in withdrawal of cases under section 87(a) of the Criminal Procedure code.*

*ii) Whether the complainant has any part or responsibility in such application for withdrawal under section 87(a) of the Criminal Procedure Code.*

*iii) The issue of public interest.*

*iv) Whether this application for revision is meritorious.*

On the first issue on the powers of the Director of Public Prosecutions in withdrawal of cases under section 87(a) of the Criminal Procedure Code, it is imperative that we consider the general powers of the DPP in so far as withdrawal of cases is concerned.

Article 57(6) 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.*”**

To me, the above provisions simply mean that as 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. In doing so, however, the DPP must obtain permission of the court. It therefore behooves on the DPP that it must furnish justifiable reasons for such withdrawal or discontinuance. It is upon the furnishing of such justifiable reasons that the court would proceed to allow the withdrawal or discontinuance.

And the constitution (at sub-Article 11) gives the guiding principles that the DPP shall take note of in determining whether to withdraw or discontinue. 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 or discontinuance are done in good faith and pursuit of the fairness and justice. So that if the process appear to be tainted by elements of unfairness or injustice, then the DPP would be failing in upholding this constitutional principles. The court would then be reluctant to allow the intended withdrawal or discontinue.

It is the same spirit that is enshrined under section 87 of the criminal procedure code. Thus;

***“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 anytime before judgment is pronounced withdraw from the prosecution of any person.....”***

Again the element of consent of the court is noted regarding applications for withdrawal under section 87 of the Criminal Procedure Code. This can only mean that for the court to issue the consent for the 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 have been given.

The applicant herein has ably submitted on these positions and given apt authorities which I totally associate myself with.

In the Republic Versus Leonard Date Seketo (2019)eKLR case, 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.”***

In the Republic versus Siworon Okoth (2017)eKLR, the court (Judge J. Ngugi) found the reason given good enough and allowed the withdrawal. One of the reasons given therein was the dispute was of civil nature.

The other case cited of Republic Versus Kennedy Onsarigo Sebe & 3 Others (2019)eKLR largely considered the same facts as the one cited of Republic versus Sekento (2019)eKLR.

Having considered the position as above, I move to the 2<sup>nd</sup> issue herein. The issue of whether the complainant has any responsibility in such an application made under section 87 of the Criminal Procedure Code. On this, this court takes the position that in criminal proceedings, justice must be done to both the accused and the complainant, both being prime participants in the process. And that for the prosecution to succeed in their application, both the accused and the complainant ought to appreciate that the determination of the prosecution to withdraw the case is aimed at ensuring that Justice is done. If the process is unfair and unjust, as observed above, the consent to withdraw would not issue.

Of the case relied on by the parties, I find the one of Republic Versus Enoch Wekesa and Michael B. Watah (2010)eKLR, cited by the interested party clearly on the point. Ruling on the issue, the Hon. Koome J, observed:

***“For the foresaid reasons, I do not think I should exercise my powers to set aside the orders of the learned trial magistrate. I .... Justice is open, transparent and should be responsible and accountable. These are not fashionable terms any more, but a reality under the constitution of Kenya 2010. If the state wants to exercise the power of entering whatever writes no one will stop them as long as they meet the threshold of public interest, interest of justice and ensure non abuse of the court process.”***

In the same case, the learned Judge poised the question of whether the court in such a situation should be a mere rubber stamp or whether the complainant is entitled to be given a reason. The Judge held that for the trial magistrate to seek reasons so as to justify herself that there is no abuse of the process cannot be said to overstep the powers of the Director of Public Prosecutions. I stand guided by this authority of the Hon. M. Koome J. (as she then was).

On the 3<sup>rd</sup> issue of public interest, I have already analyzed same. Suffice to add that the action of withdrawal must clearly be seen to be in the public interest devoid of bias.

Lastly, on the merits of this application, this court notes that it is an application for revision under section 362 of the Criminal Procedure Code. It states;

***“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 orders recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.***

To determine this, it is important to note the following:

- i) It is obvious that the interested party (complainant) was never advised by the prosecution on the application for withdrawal. This remains the position to date. Before the trial court, and indeed before this court, the interested party has vehemently opposed the withdrawal.**
- ii) Before the trial court, apparently, no good reason was given for the withdrawal except that there were orders from above. No specifics were given of the same. The court was therefore not persuaded by this explanation.**
- iii) This court notes the seriousness of this matter. The matter revolves around land. Attached to the affidavits filed herein are copies of pleadings and orders from the Environment and Land court, related to this matter.**
- iv) It is therefore clear that there is immense public interest in this matter.**
- v) Before this court, the applicant has not shown any incorrectness, illegality or impropriety in the orders of the lower court issued on 4.3.2020. It is only upon proof of these or any thereof that an order of revision can issue.**

The applicant is constitutionally bound to exercise its power of withdrawal of criminal cases having regard to the 3 elements of public interest, interest of administration of justice and the need to avoid abuse of the legal process. Taking into account the circumstances of this case as above, I am not convinced that the action of the applicant of withdrawing the criminal case before the subordinate court are in furtherance of these 3 constitutional objectives. Justice can only be done and be seen to be done if the criminal case before the lower court is allowed to proceed in the normal manner.

I am in all, not convinced that there is any merit in this revision application dated 12.3.2020. I accordingly dismiss the same wholly.

**HON. JUSTICE D. OGEMBO OGOLA**

**6<sup>th</sup> November 2020**

Court:

Ruling read out on-line in the presence of Mr. Adano holding brief for Mr. Ibrahim for the accused, Ms. Akunja for the applicant and Ms. Opiyo for the interested party.

**HON. JUSTICE D. OGEMBO OGOLA**

**6<sup>th</sup> November 2020**

Ms. Akunja:

We pray for copies of the ruling.

**HON. JUSTICE D. OGEMBO OGOLA**

**6<sup>th</sup> November 2020**

Mr. Adano:

We also pray for certified copies of proceedings and ruling.

**HON. JUSTICE D. OGEMBO OGOLA**

**6<sup>th</sup> November 2020**

Court:

Certified copies of the proceedings and ruling to be made and supplied to the parties as requested.

**HON. JUSTICE D. OGEMBO OGOLA**

**6<sup>th</sup> November 2020**