



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL REVISION NO 253 OF 2018

REPUBLIC

VERSUS

MUTUA MBALUACCUSED

(Being a Revision from the Orders in Kitui Chief Magistrate's Court Criminal Case (SOA) NO. 61 of 2013 of by Hon. F. Nekesa (RM) on 22/10/18

RULING

1) This file has been placed before me pursuant to provisions of **Section 363** of the **Criminal Procedure Code** that provide that:-

“1) A subordinate court of the first class may call for and examine the record of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.

(2) If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, it shall forward the record with its remarks thereon to the High Court”.

2) This is a matter that was terminated under **Section 87(a)** of the **Criminal Procedure Code** by **Hon. F.Nekesa (RM)**. **Hon. Murage (CM)** perused the proceedings of the court and was of the view that the case was improperly terminated for the reason that witnesses had testified hence forwarded the record to this court for revision.

3) **Section 87(a)** of the **Criminal Procedure Code** provides thus:-

“87. Withdrawal from prosecution in trials before subordinate courts-

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;

4) That provision of Law gives the court a wide discretion in dealing with an application for withdrawal. However, **Section 40** of the **Sexual Offences Act** Provides thus;-

“40) Attorney-General to decide whether police investigations should be discontinued. The decision as to whether the prosecution or investigation by any police officer of a complaint that a sexual offence has been committed should be discontinued shall rest with the Attorney-General”.

Currently those powers are excised by the **Director of Public Prosecution** who derives the powers from **Article 157 (b) (7) (8)** of the **Constitution** that provides thus;-

“(1) there is established the office of Director of Public Prosecutions.

(2) *The Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President.*

(3) *The qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court.*

(4) *The Director of Public Prosecutions shall have power to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector-General shall comply with any such direction.*

(5) *The Director of Public Prosecutions shall hold office for a term of eight years and shall not be eligible for re-appointment.*

(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 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).*

(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".*

5) The prosecuting officer who applied for withdrawal is a State Counsel from the **Office of Director of Public Prosecution**. However, looking at what transpired the records reads as follows:-

"22/10/18

Before – Hon. F. Nekesa (RM)

Gesire for State

Court Assistant –Muluvi

Accused

Prosecutor - file has not been forwarded from Itoleka Police Station. I seek adjournment today to proceed on another date.

Accused – I was told I have been given a last adjournment.

Prosecutor - In that regard, we do not have a choice but to withdraw the matter.

Accused –no objection.

Court- sufficient notices were issued to police stations to have these old matters concluded by the end of the year. I will consider the application. The matter is withdrawn under Section 87 (a) of the Criminal Procedure Code. Surety is discharged.

Hon. F. Nekesa (RM)"

6) A perusal of the case shows that all witnesses in the matter, an investigation officer inclusive had testified. The only remaining witness was the arresting officer. In the case of *Kiruingi versus Republic [2009] KLR 638*, the court stated that:

"... the effect of failure to call police officers involved in a criminal trial, including the investigating officer, is not fatal to the prosecution unless the circumstances of each particular case so demonstrate. We have examined the circumstances of this case and we are satisfied that the evidence of the investigating officer and the arresting officer would not have been prejudicial to the prosecution's case as it was established beyond doubt that the appellant was involved in the crime with which he was charged".

7) A court is mandated to consider evidence adduced by the complainant and her witnesses and depending on the nature of evidence may convict without evidence of an arresting officer for the charge sheet *per se* has evidence of the accused having been arrested and arraigned in court.

8) When the matter came up for hearing the Prosecuting officer found himself in a predicament as no file had been availed by the police. Therefore when the accused alluded to a last adjournment having been granted, which indeed was not the case, he expressed his lack of any other option than seeking to withdraw the case. Had the learned magistrate considered the fact that he had no instructions from their office, namely, **Office of the Director of Public Prosecution (ODPP)** to withdraw the charge as the complainant did not have an imput in it she should have declined to grant the application where the officer could have been compelled to close the case.

9) This is a matter where the complainant and her witnesses testified in 2014. The police were to blame for not availing the remaining witnesses. Even if I directed the police to ensure the accused is arrested as required by **section 87(a)** of the **Criminal Procedure Code** they may not act immediately. As a result, no substantial justice will be done.

10) In the premises the propriety of what transpired is questionable. Therefore I quash the order of the learned magistrate terminating the case under **section 87(a)** of the **Criminal Procedure code** and direct her to issue Warrant of Arrest for the accused for purposes of hearing and determining the case on priority basis.

11) Mention on the **21/1/19** before the trial court.

DATED, SIGNED and DELIVERED at KITUI this 9th day of JANUARY, 2019.

L. N. MUTENDE

JUDGE