REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NOS.75 & 64 OF 2019

REPUBLIC.....APPLICANT

VERSUS

JACK ALEXANDER WOLF MARRIAN.....1ST RESPONDENT

ROY FRANCIS MWANTHI.....2ND RESPONDENT

RULING

The Respondents, Jack Alexander Wolf Marrian and Roy Francis Mwanthi were charged before the **Kibera Chief Magistrate's Court Criminal Case Nos.3285 and 3287 of 2016** with the offence of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act**. The particulars of the offence were that on 29th July 2016, at Kilindini Port in Mombasa County, the Respondents, jointly with others not before court trafficked by conveying a narcotic drug namely cocaine to wit 99,721.8 grammes valued at Kshs.598,330,800/- concealed in a container in contravention of the provisions of the said **Act.** When the Respondents were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. The prosecution has adduced its evidence. After the close of the prosecution's case, the trial court ruled that the prosecution had established a *prima facie* case to entitle the court place the Respondents on their defence.

On the day the case was scheduled for defence hearing, the prosecution made an application to withdraw the case under **Article 157(6)** of the **Constitution** and **Section 87(b)** of the **Criminal Procedure Code**. The Applicant explained his decision to the court. The Applicant told the court that it had received information which pointed to the fact that the Respondents may have been victims of circumstances in the sense that they were victims of an international criminal drug trafficking network. The Applicant explained that from the information received, it became clear that it would be unfair, oppressive and contrary to the principles and tenets enshrined in the **Constitution**, the **Office of Director of Public Prosecutions Act** and the **National Prosecution Policy** to continue with the prosecution. Hence, the decision by the Applicant to seek the trial court's permission to terminate the proceedings. The Respondents did not oppose the application. In fact, the Respondents supported the application. However, in its ruling delivered on 31st January 2019, the trial court (D. Kuto – SRM) declined the Applicant's application to withdraw the case.

In the material part of its ruling, the trial court had this to say:

> ***"This court placed the two accused persons to their defence. To their credit, the accused persons told the court that they were ready to proceed. Clearly, the accused persons should be allowed to proceed and defend themselves. The court should then have an opportunity to write a final judgment in this file. With a lot of respect to the DPP, the timing of the application is suspicious. The reasons advanced by the DPP do not persuade me to exercise my discretion to have the proceedings terminated. I find the same to be an abuse of the court process and does not serve the interest of administration of justice. In the upshot, the application by the DPP is hereby declined. The court was told that the accused persons are ready to proceed and in line with Article 159(2)(b) of the Constitution I direct that the defence hearing be done on priority for the court to make a final decision in the file."***

Both the Applicant and the Respondents were aggrieved by this decision. They filed separate applications seeking to invoke this court's jurisdiction under **Section 362** and **364** of the **Criminal Procedure Code** to have the said decision revised. In summary, the position taken by the Applicant and the Respondents is captured in the grounds put forward by the Applicant in seeking to have the decision revised. A verbatim reproduction of the said grounds is important:

> ***"It is the position of the Director of Public Prosecutions that the refusal to allow the Director of Public Prosecution's application was wrong, erroneous, illegal, improper and irregular on the following grounds among others:-***

(i) The Constitution of Kenya, the Criminal Procedure Code and the Office of the Director of Public Prosecutions Act do not expressly require the DPP to give reasons for the application to terminate any criminal proceedings before any court other than the Court Martial.

(ii) Under the Article 157(6)(c) and Section 87(b) of the CPC and Section 5(i)(b)(iii) of the Office of the Director of Public Prosecutions, the Director of Public Prosecutions may terminate any criminal proceedings before any court other than the court martial at any stage before judgment.

(iii) The Learned Magistrate erred in law and fact by holding that the accused persons were desirous to proceed when all they said was that they were ready to proceed if the DPP had not applied to terminate the proceedings.

(iv) By holding that by terminating the proceeding at that stage was to deny the court an opportunity to write a final judgment in the file implying that the courts have an inherent interest in criminal proceedings.

(v) By holding that the timing of the termination was suspicious, when the Constitution, the CPC and the ODPP Act clearly stipulate that proceeding may be terminated at any stage before judgment.

(vi) By alleging that the Director of Public Prosecutions had offered unconvincing reason when the Director of Public Prosecutions was not in fact, asked to give reasons for declining the application.

(vii) That if indeed the learned Magistrate desired to know the detailed reasons for termination of the proceedings, nothing would have been easier to do than require the DPP to give reasons for the termination.

(viii) The learned Magistrate considered extraneous issues/matters as reasons for the application.

(ix) That in directing the matter to proceed against the wish of the accused, the complainant and the prosecution, the court was in essence directing a prosecution against accused persons against the wish of the prosecution, without a complainant and a prosecutor.

(x) That the judicial authorities relied on by the Learned Magistrate to deny the application were clearly off the mark as they are distinguishable and do not apply in the circumstances of this case."

During the hearing of the application, Mr. Wadabwa and Mr. Maru for the Respondents and Ondari for the State made more or less similar submission reiterating the above contents of the Applicant's application. This court has carefully considered the said submission. The decision by the trial court essentially questions the authority of the Director of Public Prosecutions to terminate or discontinue cases that have been brought before court. **Article 157(6)** of the **Constitution** provides thus:

"The Director of Public Prosecutions shall exercise the power of prosecution and may –

(a) Institute and undertake criminal proceedings against any persons before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) …

(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)."

Article 157(7) of the **Constitution** states that:

"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."

Article 157(8) of the **Constitution** provides that:

"The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court."

In **Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another [2018] eKLR,** Mureithi J stated thus:

"17. As I understand his role, The DPP is the constitutional custodian, enforcer and defender of public interest in criminal justice which is the due administration of justice so that the offender is punished or otherwise dealt with, as appropriate, for deterrence and rehabilitation, the victim is assuaged and compensated as appropriate, and the society benefits from prevention of crime. In addition, the DPP ensures the criminal justice system is not abused to persecute the innocent, achieve collateral civil purpose or avoid due punishment for crime, among other improper use of the criminal process. This is the mandate of Article 157 of the Constitution, which only the DPP can discharge and, consequently, his involvement in any proposed compromise in criminal cases is indispensable."

In **Republic v Chief Magistrate, Milimani Criminal Division & 4 others Ex-parte John Wachira Wambugu & another [2018] eKLR,** Mativo J held thus:

> ***"37. The architecture and design of the above provision leaves no doubt that the DPP is not only required to act independently in the exercise of his functions, but also ought not to be perceived to be acting under the direction or instructions or instigation of any other person. More fundamental is the fact that the decision to institute or not institute criminal proceedings is a high calling imposed upon the DPP by the law and must be exercised in a manner that leaves no doubt that the decision was made by the DPP independently. Differently stated, the prosecutor is required to act with diligence and promptness to investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and rights of the accused, victims, and witnesses. The reverse is that where the DPP's does not act independently, the decision cannot be allowed to stand."***

Regarding the Director of Public Prosecution's power to discontinue proceedings Ngugi J in **Republic -vs- Simon Okoth [2017] eKLR** stated as follows:

> ***"15 This tripartite test stipulated in Article 157(11) must be viewed together with the other principles laid out in Article 157. Seen as such, I have derived at least five principles which the Court should evaluate in considering an application to withdraw criminal charges. These are:***
>
> ***(a) The rule of law principle underpinning the discretion of the DPP to prosecute criminal cases without undue influence, direction or control by any other authority;***
>
> ***(b) The need to protect accused persons from violation of their fundamental rights and freedoms through unwarranted criminal prosecution;***
>
> ***(c) The need to ensure that the criminal process of the court is not abused to further or defeat private interest which are, or should be, the subject of civil proceedings or for other improper purposes;***
>
> ***(d) The public interest in either the continuation or discontinuation of the criminal prosecution including consideration of whether criminal prosecution is a proportionate response to the facts at hand;***
>
> ***(e) Wider interests in the administration of justice including considerations of the impact of the prosecution on the community and the precedential effects of the decision to continue or discontinue the prosecution."***

In the present application, it was both the Applicant's and the Respondents' contention that the trial magistrate misapprehended his jurisdiction when he declined the Applicant's application to withdraw the charge. They argued that the reasons advanced by the trial magistrate in declining to allow the Applicant's application to withdraw the charge were not tenable in light of the information that the Applicant had provided to the court. The Applicant and the Respondents concurred that the Applicant was acting in public interest and was not abusing his powers or the due process of the court when it sought to withdraw the charge against the Respondents.

This court has evaluated the facts of this application and the cited authorities. It was clear to this court that the trial court erred when it failed to consider the merits of the Applicant's application. **Article 157(6)(c)** of the **Constitution** grants the Director of Public Prosecution power to discontinue any criminal proceedings at any stage before judgment is delivered. **Article 157(8)** of the **Constitution** grants oversight jurisdiction to the court to determine whether the reasons advanced by the Director of Public Prosecutions in seeking to terminate the criminal proceedings are in the public interest and are not in abuse of legal process. This oversight jurisdiction however should not supplant the powers of the Director of Public Prosecutions as provided under **Article 157** of the **Constitution**. It is only the Director of Public Prosecutions who has the power to determine whether or not to continue or to discontinue criminal proceedings. In the present application, the Director of Public Prosecutions explained to the court that in the course of the trial, it came across information which pointed to the fact that the Respondents were victims of circumstances. The Respondents were caught up in a web of international drug trafficking network. The Director of Public Prosecutions formed the opinion that it would not be in the public interest to continue with the prosecution.

That being the case, and although the prosecution had already closed its case and the Respondents placed to their defence, nevertheless, the Director of Public Prosecutions sought to terminate the proceedings. In the considered view of this court, the trial court erred when it unreasonably questioned the exercise by the Director of Public Prosecutions of its powers to withdraw the charge. This court agrees with the Applicant and the Respondents that the trial court exhibited an unusual interest in the case that clouded it from appreciating the information placed before it by the Director of Public Prosecutions which was to the effect that the Director of Public Prosecutions no longer believed the Respondents were criminally liable for the charges that were brought against them. This court does not agree with the conclusion reached by the trial court that the Director of Public Prosecutions acted in abuse of due process of the court. Indeed, this court applauds the Director of Public Prosecutions for having the courage to acknowledge his mistake even after it had called all his witnesses. He sought to do the right thing even at that later stage of the proceedings.

In the premises therefore, this court will invoke its jurisdiction under **Article 165 (7)** of the **Constitution** and **Sections 362** and **364** of the **Criminal Procedure Code** and will call the decision of the trial court made on **31st January 2019** for the purposes of revising the same. That decision is accordingly set aside and substituted by a decision of this court allowing the Director of Public Prosecutions to discontinue the criminal proceedings against the Respondents. Pursuant to **Article 157(7)** of the **Constitution**, since the prosecution had closed its case, the Respondents are hereby acquitted of the charge that was brought against them. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF MARCH 2019

L. KIMARU

JUDGE