



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL REVISION NO. 10 OF 2019

(FROM ORIGINAL CONVICTION AND SENTENCE IN CRIMINAL CASE NO. 1 OF 2018 OF THE CHIEF MAGISTRATE'S COURT AT CHUKA)

LAWRENCE NICHOLAS MUTEMBEI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **LAWRENCE NICHOLAS MUTEMBEI**, the Applicant herein has moved this court to revise the order made by Chief Magistrate Hon **J. M. Njoroge** on 5th August 2019 allowing the prosecution to withdraw a charge facing him under **Section 87(a)** of the **Criminal Procedure Code**. The Applicant had been charged with 3 counts of the offence of receiving a bribe Contrary to **Section 6(1) (a)** as read with **Section 18** of the **Bribery Act No. 47 of 2016**. The particulars given in the charge sheet was that the Applicant being an employee of Tharaka Nithi County Government on three different occasions asked to be with 40,000/- (13th June 2018), 20,000/- (13th June 2018) and 20,000/- (13th June 2018) from Charles Mugendi in order to assist him in prequalification to supply goods to Tharaka Nithi County Government.

2. This court did call for the lower court file (**Chuka Chief Magistrate's Court Anti Corruption Case No. 1/2018**) pursuant to the provision of **Section 362** of the **Criminal Procedure Code** and I have perused the lower court file and noted the Applicant denied committing the offence and was released on bond pending trial which was scheduled for 11th April 2019. The trial court could not proceed on the said date and the matter was set for hearing on 15th July 2019 when the State through the Director of Public Prosecution applied to withdraw the charge under **Section 87(a)** of the **Criminal procedure Code**. The basis for the withdrawal was a letter dated 12th April, 2019 from the Director of Public Prosecution informing the trial court that they had no intention of proceeding with the charges. The trial court was also made aware of correspondence between the Office of Director of Public Prosecution and Ethics and Anti- Corruption Commission which recommendation termination of proceeding owing to lack of evidence.

3. The Applicant had opposed the application by the State to withdraw the charges under **Section 87(a)** of the **Criminal Procedure Code** instead asking the trial court to withdraw it under **Section 202** of the **Criminal Procedure Code**. The trial court however allowed the prosecution to withdraw the charge under **Section 87(a)** of the **Criminal Procedure Code** and it was that ruling that is the subject of this revision.

4. The grounds upon which the Applicant is seeking the intervention by this court through revision are as follows:

i. That the trial magistrate made an incorrect decision by allowing withdrawal of the charge under Section 87(a) of Criminal Procedure Code.

ii. The impugned decision was not in accordance with the provisions of Article 157(II) of the Constitution and in particular failing to note that the State had abused court process and infringed on his fundamental right. The Applicant feels that the trial court did not exercise his discretion judiciously and contends that he should have been acquitted.

5. The Applicant is seeking vacation of the said decision and an order to have cash bail released to him. He is seeking that the charge be withdrawn under **Section 204** of the **Criminal Procedure Code**. He is also seeking orders in the alternative which is to direct that the orders be vacated and the matter be placed before another magistrate for the State to elect to either proceed or withdraw the matter under **Section 204** of the **Criminal Procedure Code**.

6. The State has opposed this application through a Replying Affidavit by Erick Momanyi learned prosecuting Counsel from Office of Director of Public Prosecution where he has deposed that their application to withdraw the case against the Applicant was based on their re-evaluation of evidence they had which they found insufficient to link the Applicant with the offence charged. He however insisted that the

investigation had revealed that the Applicant accepted monies that could have obscured his judgment in carrying out his functions thereby undermining his duties in public office and that it was on that basis that recommended disciplinary action to be taken by his employer, the County Government of Tharaka Nithi for the ethical breaches.

6. The Respondent has further deposed that they saw no need to waste judicial time by proceeding in a matter that would not promote and achieve the objectives of **Article 157 (II)** of the **Constitution**.

7. I have considered the application and the grounds upon which the matter has been placed before me. I have also considered the response made by the State.

8. The Applicant was dissatisfied with the decision made by the trial court to allow the State to withdraw a charge facing him under **Section 87 (a) Criminal procedure Code**. The grievance of the Applicant is mainly hinged on the exercise of discretion by the trial court. He says that the discretion was not exercised judiciously and that it was wrong in principle. Although **Section 364(5)** of the **Criminal Procedure Code** provide that such grounds shall be entertained by way of appeal rather than revision, I find that under **Article 159(d)** of the **Constitution** of Kenya I would not be rendering substantial justice if I direct the Applicant to go back and file an appeal which would eventually end here for determination. It is on that basis that I entertained this application and I am inclined to determine it on the merits.

9. There is no dispute that the State applied to withdraw the charge because they realized that the evidence they had was insufficient to sustain a charge and that perhaps explain why they applied to withdraw it under **Section 87(a)** of the **Criminal Procedure Code**. I have perused through the letter written to the trial court and the correspondence between the Director of Public Prosecution and the Ethics Anti Corruption Commission and looking at both letters one wonders how the decision was reached in the first place to prefer charges against the Applicant. The Respondent has correctly noted that their decisions to either charge or discontinue prosecution is guided by **Article 157(II)** of the **Constitution of Kenya 2010**. Unlike the past when the decision to prosecute or withdraw such prosecution would be made arbitrarily and following the whims of State and/or its officers, the new Constitutional dispensation provide that such decisions must be informed by public interest, interest of administration of justice and need to prevent abuse of the court or legal process.

10. This court finds that the Director of Public Prosecution should have on realizing that their case was headed nowhere, opted to exercise their powers under **Article 157(b)(c)** and discontinue the same by entering *nolle prosequi* under **Section 82 (1)** of the **Criminal Procedure Code** or he was brave enough to terminate the proceedings under **Section 202** of the **Criminal Procedure Code**.

11. It is not fair for the prosecution to act in haste and prefer charges even when it could be facing pressure from certain quarters. Their decisional independence should not be interfered by anyone because the office is insulated against such interference by **Article 157 (10)** of the **Constitution of Kenya**.

12. The trial court fell into error by allowing an easy escape route to the Respondent when it was obvious that they had not done their homework well before preferring charges against the Applicant.

In the foregoing I find merit in this application. The order made by the trial court allowing the Director of Public Prosecution to withdraw charges under **Section 87 (a)** is revised and set aside, in its place the charges against the Applicant are terminated under **Section 202** of the **Criminal Procedure Code**. He is acquitted of those charges and I direct that the cash bail deposited be returned to the depositor.

Dated, signed and delivered at Chuka this 14th day of November, 2019.

R. K. LIMO

JUDGE

Ruling signed, dated and delivered in the open court in presence of Mwangeli holding brief for Nyandieka for Applicant and Momanyi for Respondent.

R.K. LIMO

JUDGE

14/11/2019