



**REPUBLIC OF KENYA**

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

**CORAM: A.K NDUNG'U J.**

**CRIMINAL REVISION NO. 154 OF 2019**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**KENNEDY ONSARIGO SEBE .....1<sup>ST</sup> RESPONDENT**

**VANE NYAMBUNE MARUBE .....2<sup>ND</sup> RESPONDENT**

**WINFRIDA MONGINA JUMA ..... 3<sup>RD</sup> RESPONDENT**

**JULIUS ANGWENYI MOSE ..... 4<sup>TH</sup> RESPONDENT**

*(From the original conviction and sentence in Criminal Case No. 2113 of 2019 of the Chief Magistrate's Court at Kisii)*

**RULING**

1. The application before court is premised under **S 362, 364(b)** and **365** of the **Criminal Procedure Code**. The same seeks the revision of the order made by **Hon. E. Obina (PM)** in regard to the applicant's application seeking to withdraw **Kisii Chief Magistrate's Court Criminal Case No. 2113 of 2019** ('the case') under **S 87(a)** of the **Criminal Procedure Code** which application was declined.

2. The application is supported by the affidavit of **Morande James**. The gist of the application as gleaned from the supporting affidavit is that on the 18/11/2019 the trial court disallowed the State's application to withdraw the case under **S 87(a)** of the **Criminal Procedure Code**. That application was founded on a need to allow the DCIO Kisii to conduct further investigations pursuant to alleged new information that had come to the fore.

3. Annexed to the affidavit in support is a letter from one **Martin Kerongo SCCIO Kisii Central** to the Office of the Director, Public Prosecutions Kisii. That letter reads in part;

*"It has emerged that there are (sic) new information coming up and which need further investigations. In light of the above, it is prudent to have more time to conduct further investigations. Please move the court to have the matter withdrawn under S 87(a) of the Criminal Procedure Code unless otherwise advised."*

4. It is on the strength of this letter that the application to withdraw the matter under **S 87(a)** CPC was made and denied.

5. It is urged that no prejudice will be occasioned upon the accused persons if the matter is withdrawn under **S 87(a)** to allow for further investigations.

6. The application was canvassed through oral submissions.

7. **Mr. Morande for the State** submitted that there was wind of other suspects being traced and investigations were necessary. It was indicated that the suspects were being tracked through mobile numbers. There were some documents that needed to be examined by the document examiner. Counsel indicated that the matter has been fast tracked. The material exhibit is sugar. There is no delay.

8. It is submitted that the investigations could go both ways. Some of the accused could be released. Other suspects could be charged.

9. The application is opposed. **Mr. Okemwa for the 1<sup>st</sup> respondent** has submitted that only one witness remains to testify. He urges that

the DPP should not use the Court to clean their dirty work. The court should not be used to investigate. A withdrawal under S 87(a) will be used to arrest and harass the accused.

**10. Mr. Kaba for the 2<sup>nd</sup> respondent** opposes the application and has submitted that S 87(a) CPC is not mandatory. There are conditions and the consent of court is required. Secondly, the application should be brought upon directions of the director of public prosecutions. In our instant case, it is upon direction by the DCIO. A letter from the DCIO is the one filed addressed to the DPP. The letter is not an official one. It has no letter head to show that it is from the purported office. It cannot be used as evidence. The information in the letter is not revealed. Reliance is placed on **Article 157** of the **Constitution** which provides that among the conditions for termination, the court will be satisfied that there is no abuse of judicial process.

**11.** Reliance was placed on the decision in **Criminal Case No. 56 of 2007 R –Vs- Izlam A. Omar** where it was held that the Court cannot be reduced to merely endorsing the decision by the Attorney General. The trial court has a duty to ensure justice is done.

**12. Mr. Mageto for the 4<sup>th</sup> respondent** has submitted that the accused were charged on 27/8/19. The prosecution had done thorough investigations. They had amended the charge on 14/10/2019. They had lodged an application to sell the exhibit.

**13.** It is urged that 4 witnesses have testified. The prosecution is now having a second thought. They are abusing the court process. The accused are liable to be re-arrested. The other suspects mentioned have not been charged. The accused should not be made to wait for imaginary suspects.

**14.** Counsel submits that as per **Article 159** of the **Constitution**, Justice should not be delayed. Counsel has relied on the decision in **Helmuth Rame –Vs- R [2014]eKLR**.

**15.** In reply Mr. Morande has stated that the application has been brought in utmost good faith. The State has considered the interests of the accused and the complainants. It is necessary to allow the DCIO an opportunity to conclusively investigate the matter.

**16.** I have considered the application, the affidavit evidence and the submissions by counsel.

**17.** Of determination is whether in the circumstances of the case the trial magistrate properly exercised discretion in disallowing the withdrawal of the relevant charges under **S 87(a)** of the **Criminal Procedure Code (CPC)**.

**18.** Section 87(a) of the CPR provides;

**S 87 (a)** *“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”*

**19.** Under the provision, the power to allow or refuse a withdrawal of a case is discretionary.

**20.** Under **Article 157(6) (c)**, the Director of Public Prosecutions shall exercise State powers of prosecution and may subject to clauses (7) and (8), discontinue at any stage before judgment is delivered in any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

**21.** Under **Article 157 (11)** it is provided;

**Article 157(11)** *“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.”*

**22.** The application before me before me is brought seeking the exercise of the court’s supervisory powers over subordinate courts, powers vested in the High Court by **S 362** and **364** of the **Criminal Procedure Code**. Under the said powers, I have dutifully called for and examined the record of the criminal proceedings in CM Criminal Case No. 2113 of 2019 at Kisii presided over by E. Obina (PM).

**23.** I have specifically had regard to the proceedings of 18/11/2019 which gave rise to the impugned order.

**24.** In those proceedings, the prosecution made an application to withdraw the case under S 87(a) on the basis that there was new information that necessitated further investigations.

**25.** The application was opposed by the defence on the basis that it would be prejudicial to the accused persons. It is urged that at the time of charging, the State had all the evidence or had had enough time to investigate and that they should not have commenced the prosecution, if they were not ready.

**26.** In his ruling the learned magistrate expressed himself thus;

***“The application to withdraw under S 87(a) CPC is hereby disallowed.”***

27. The statement of the Law set out earlier in this ruling clearly shows that the DPP has the power to, under **Article 156(6) (c)** discontinue at any stage before judgment is delivered any criminal proceedings instituted by that office or taken over by that office. This power is subject to **Sub-Article 7 and 8** which provide that if discontinuance is after the close of the prosecution case, the accused shall be acquitted and such discontinuation must be with the permission of the Court.

28. Can that permission be arbitrarily denied? I am of the view that the exercise of discretion here in those circumstances must, like all other discretionary powers be exercised judiciously. I will add that the exercise of discretion must factor in the need to do justice to all the parties.

29. Behind a charge sheet containing criminal charges are accused persons on the one hand and a complainant(s) on the other. The duty of the Court must of necessity be to balance the rights of the parties in a case.

30. I agree with Nyakundi J who in the case of **Republic –Vs- Sekento [2019]eKLR** had this to say at page 4 of his ruling;

*“To consider the application, the trial court was under a duty to appraise the provisions of section 87(a) subject to Article 156 (6), (7), (8) and (10) of the Constitution, on the power conferred upon the Director of Public Prosecution to commence, continue or discontinue any proceedings pending before a court of law. That the spirit and tenor of judicial discretion is to advance the objects and principles of a right to a fair trial under Article 50 of the Constitution.”*

31. The Judge at page 5 proceeds to state;

*“The importance of the right for the prosecutor to be allowed to withdraw the charge at any stage of the proceedings before final judgment should not be denied merely on grounds of prejudice on the part of the accused.....*

*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 S 87(a) of the Criminal Procedure Code. The Constitutional provisions of Article 50 engraves fair trial rights until final judgement is pronounced by the Court. It is therefore immaterial for the Court under S 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.”*

32. The Court, however, must guard against abuse of the court process. The court must cast its eyes keenly on whether the DPP has had regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

33. In a situation where a matter has been before the court for a considerable long time, it would be a travesty of justice to allow a withdrawal under S 87(a) for purposes of investigations. This is the scenario the court had in mind in the **JR Case No. 104 of 2015, R –Vs- DPP and 2 Others** where W. Korir J had this to say at paragraph 17 of his judgement;

*“A keen look at the facts of the matter before me shows that the Applicant’s criminal case has been in Court for close to four years. It had been adjourned many times at the request of the prosecution. In a scenario where the trial court had found that the application for adjournment was not merited, the trial court ought to have rejected an application for discontinuation under Section 87(a) CPC and asked the prosecution to close its case on the evidence on record. It does not serve any purpose to deny the prosecutor an adjournment and then proceed to allow withdrawal under section 87(a) CPC as this amounts to an application for adjournment through the backdoor as the accused person is likely to land in court again.”*

34. It however needs to be noted, that there is no bar to the DPP or and the police continuing with investigations or even receiving new evidence once the accused has been charged and put to trial. Majanja J in **George Taitimu –Vs- Chief Magistrate’s Court Kibera & 2 Others [2014]eKLR** stated;

*“I would also add that DPP and the Police are not prevented from continuing investigations or even receiving new evidence once the accused has been charged and in the course of trial. The duty of the prosecutor is bring the new information and evidence to the attention of the accused and for the court to give the accused the opportunity to interrogate the new evidence and adequate time to prepare his defence. Likewise, after discharge of the accused under section 87(a) of the CPC, the court cannot prevent further investigations into the subject of the trial.”*

35. The Judge proceeded to state;

*“Section 87(a) of the CPC gives the learned magistrate broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. Such discretion has to be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interests of administration of justice and the need to prevent and avoid an abuse of the legal process.”*

36. In our instant case, there is no evidence that the application to withdraw the charges under S 87(a) was brought in bad faith or was an abuse of the court process. The charges herein were instituted on 22/8/2019. The DPP intimates that new information has been found which requires further investigations. The DPP cannot possibly be allowed to do prosecutions on a trial and error basis. He cannot be allowed to conduct a trial by ambush. However, if all the rights under Article 50 are enforced, I find no prejudice that would be suffered by the accused persons even if they were to be re-arrested and charged.

37. The trial magistrate gave no reasons for the refusal of the withdrawal of the charges herein.

38. I appreciate that both parties were heard on the application for withdrawal of the charges under S 87(a). The trial magistrate simply stated that ***“the application to withdraw under S 87(a) is hereby disallowed”***. The exercise of discretion herein appears whimsical and capricious.

39. In the end, I find that the exercise of discretion by the trial magistrate was not proper. The refusal to allow a withdraw of the case under S 87(a) was irregular.

40. With the result that the application herein is successful and I make the following orders;

**(1) The order refusing withdrawal of the charges in CM Criminal Case No. 2113 of 2019 is hereby set aside and substituted thereof with an order allowing the DPP to withdraw the said charges.**

**(2) Each party is to bear its costs of the proceedings.**

**Dated and delivered at Kisii this 10<sup>th</sup> day of December 2019.**

**A.K NDUNG’U**

**JUDGE**