



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL REVISION NO. 2 OF 2018

EDWIN SIRONKA OLOLCHIKE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being a revision from the original order dated 13/3/2018 in Narok Chief Magistrate's Court Criminal Case No. 1648 of 2016, Republic v. 1. Edwin Sironka Ololchike 2. Geoffrey Sankale Lilau)

RULING

1. The applicant through his counsel, Mr. Geoffrey Otieno has applied for revision of the order of the magisterial court, in which that court rejected the prosecution application to withdraw charges of conspiracy, obtaining money by false pretences and related charges, against the two accused persons therein.
2. Counsel through a notice of motion based his application under article 165 (b) of the 2010 Constitution and sections 204, 362, 363, 364 (1) (b) (2) and 365 of the Criminal Procedure Code [Cap.75] Laws of Kenya.
3. The prosecution counsel in his withdrawal application told the trial court that the matter arose out of a civil matter in Narok Chief Magistrate's court, Civil Case No. 187 of 2016 which had been adjudicated by another magisterial court presided over by Hon. Mr. Gesora. He informed the court that the parties had reconciled and that they intended to withdraw the charges under section 87 (a) of the Criminal Procedure Code.
4. Furthermore, the prosecution informed the court that the charges were to be withdrawn under section 204 of the Criminal Procedure Code.
5. Thereafter, Ms. Cheptoo who held brief for Mr. Onduso for both the applicant and the co-accused confirmed what the prosecution had informed the trial court.
6. The learned Chief Magistrate Ms. Juma considered the application. She found that the agreement between the complainant (Robert Munyai Munja) and the applicant (the 1st accused in the trial court) was intended to have the charges withdrawn under section 87 (a) of the Criminal Procedure Code, in order to enable the parties explore an out of court settlement.
7. Furthermore, she observed that: "*what if the parties fail to agree, where will whoever is aggrieved have recourse*". She further found that the intended withdraw only involved the applicant. The co-accused and the second complainant in count III (Brenda Munja) in the trial court were not involved in the intended mutual agreement to settle the criminal case out of court.
8. She then concluded that the withdrawal if allowed would be an abuse of the court process. As a result she rejected the withdrawal application.
9. The law in respect of withdrawal of charges is found in article 157 (8) of the 2010 Constitution of Kenya. The provisions of that sub-article provide that: "*Article 157 (8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.*"
10. It is clear that the constitution vests in the court the power to grant or refuse permission to an application for withdrawal by the Director of Public Prosecutions.
11. Furthermore, under section 87 of the Criminal Procedure Code [cap 75] Laws of Kenya, a public prosecutor may, with the consent of the court or on the instructions of the Attorney General (now the Director of Public Prosecutions) at any time before judgement is pronounced withdraw from the prosecution of any person, in a trial before the subordinate court.

12. It is equally clear that the above provisions require the consent of the subordinate court before a withdrawal of a prosecution in that court.
13. Furthermore under section 204 of the Criminal Procedure Code a trial subordinate court is vested with discretion to permit a prosecutor (public or private) to withdraw a complaint from it and acquit the accused thereupon.
14. It is clear from the foregoing provisions that the court has a discretion to allow the withdrawal of a complaint or prosecution from court. Where the subordinate court has exercised its discretionary properly, then such discretion cannot be faulted.
15. In *Republic v. Malek Abdulla Mohamed (1976-80) KLR 1343*, Cotran, J, recognized the existence of a discretion in the subordinate court. In that case, the public prosecutor (the Attorney General) appealed against the acquittal of the respondent following a refusal of the court to allow the withdrawal of the prosecution of the respondent.
16. In allowing the appeal and setting aside the order of acquittal, Cotran, J held that the magistrate had discretion to grant or withhold consent and in that case the magistrate rightly withheld the consent since the case had been pending in the magisterial court since October, 1977 until 26th January, 1978 when that court refused a withdrawal. The prosecutor had appealed for clarifying the law only.
17. It is also clear that the 2010 Constitution in article 157 (8) donates to the Director of Public Prosecutions (DPP) a discretionary power to discontinue a prosecution with the permission of the court. Before the 2010 Constitution the Attorney General (now DPP) could discontinue a prosecution without the permission of the court, which the DPP cannot do now without the permission of the court.
18. In the instant revision the chief magistrate gave a number of reasons for refusing a withdrawal of the prosecution. First, the mutual agreement required the withdrawal of the charges to enable the parties to explore an out of court settlement.
19. Second, the parties did not provide for an avenue for redress, should the parties not agree in the intended settlement. Third, the issue of *res judicata* in the civil case between the applicant and the complainant was found to have no connection with the prosecution.
20. Fourth, the parties to the mutual agreement were not the same in the magisterial proceedings, since the second co-accused was not involved and is not a party to the mutual agreement.
21. Fifth, the parties were free to file civil claims over the same facts and no party would plead *res judicata*. Sixth, the charges as filed were proper. Finally, seventh, the applicant could be tried without interfering with the trial of the civil case before Hon. Mr. T. Gesora.
22. I have considered the authorities cited by counsel for the respondent and I find them to be distinguishable. In the light of the reasons given by the chief magistrate and the applicable law, I find the rejection by the court of the withdrawal of the prosecution was proper.
23. It therefore follows that the court exercised its discretion properly and the application is hereby dismissed for lacking in merit. I therefore decline to revise the order.

Ruling delivered in open court this 3rd day of July, 2018 in the presence of Mr. Otieno for the applicant and in the absence of Ms. Nyaroita for the state.

J. M. BWONWONGA

JUDGE

3/7/2018