



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.385 OF 2017

MUNAWAR SULTAN RAJPAH.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1<sup>ST</sup> RESPONDENT

AZIM SEHZAR UDEEN AZIZ.....2<sup>ND</sup> RESPONDENT

RULING

The Applicant, Munawar Sultan Rajpah is challenging the Director of Public Prosecution's decision that sought to withdraw criminal charges laid against the 2<sup>nd</sup> Respondent under **Section 87(a)** of the **Criminal Procedure Code**. The Applicant is the complainant in the criminal case. The criminal case is **Nairobi CMC Criminal Case No. 1583 of 2016**. According to the Applicant, she learnt of the Director of Public Prosecution's intention to withdraw the charges and was aggrieved that neither herself nor the investigator had been consulted before the Director of Public Prosecutions sought to withdraw the charges laid against the 2<sup>nd</sup> Respondent. The Applicant invoked the provisions of **Article 47** of the **Constitution** that requires those affected by an administrative decision to be consulted before the decision is made. The Applicant further argued that the Director of Public Prosecutions disregarded the evidence gathered by the police and the recommendation made for the 2<sup>nd</sup> Respondent's prosecution. The Applicant was of the view that the reasons given by the Director of Public Prosecutions in seeking to have the case withdrawn were not valid in light of the *prima facie* evidence already gathered by the police.

The Applicant urged the court to interfere with the Director of Public Prosecution's decision and set it aside and direct that the trial of the case do proceed to its logical conclusion. For added measure, the Applicant stated that she would be seriously prejudiced if the charges are withdrawn in the manner contemplated by the Director of Public Prosecutions because it would mean that she would have lost a colossal sum of USD120,000. It is the Applicant's application that unless the Director of Public Prosecutions presents evidence that she had been consulted before the decision to withdraw the charges is made, then this court has no option but to enforce her right to fair administrative action as contemplated under **Article 47(2)** of the **Constitution**. The Applicant urged the court to find that the Director of Public Prosecution's power to prosecute were not absolute and were subject to review by the court.

The application is opposed. The Director of Public Prosecutions argued that he acted in accordance with his mandate as provided under **Article 157** of the **Constitution** and **Section 27** of the **Office of the Director of Public Prosecutions Act**. It was the Director of Public Prosecution's submission that pursuant to his mandate, he had requested the police to provide him with further information pursuant to directions that he had given. Unfortunately, the police did not comply with the lawful direction that he had given. He noted that the evidence that the police sought to support the charges against the 2<sup>nd</sup> Respondent was not sufficient to sustain a conviction. The Director of Public Prosecutions directed the police to provide further forensic evidence before a credible prosecution could be mounted against the 2<sup>nd</sup> Respondent. In the absence of such further evidence, and due to failure by the police to comply with the directions given, he made the decision to withdraw the charges under **Section 87(a)** of the **Criminal Procedure Code** until there was compliance.

The Director of Public Prosecutions reiterated that it was not withdrawing the charges against the 2<sup>nd</sup> Respondent in bad faith but rather was withdrawing the charges to enable further evidence to be collected so that a credible prosecution can be mounted against whoever shall be found culpable. It was for the above reasons that the Director of Public Prosecutions felt that the present application was without merit and should be dismissed.

The 2<sup>nd</sup> Respondent's position was more or less the same as that taken by the Director of Public Prosecutions. He urged the court to dismiss the application.

This court has carefully considered the rival submission, both oral and written made by counsel for the parties to this application. It has also read the pleadings filed by the parties in support of their respective opposing positions. It was clear from their submission that the issue for determination by this court is whether the decision made by the Director of Public Prosecutions in regard to the facts of this case is amenable

to review by this court. **Article 157(10)** of the **Constitution** provides thus:

**“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”**

**Article 157(11)** provides as follows:

**“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.”**

Under **Article 157(8)** of the **Constitution**, the Director of Public Prosecutions may discontinue a prosecution only after he has obtained the permission of the court.

In The **Divisional Criminal Investigating Officer (DCIO) Buru Buru Police Station & Another-vs- Winnie Wanjira Kuria Exparte Emmanuel Kazungu Masha [2016] eKLR**, Odunga J held thus:

**“43. It was pursuant to the foregoing that Majanja J expressed himself in Thuita Mwangi & Anor –vs- The Ethics & Anti-Corruption Commission & 3 Others Petition No.153 & 369 of 2013 as hereunder:**

**“The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control of any authority as Article 157(10)...These provisions are also replicated under Section 6 of the Office of the Director of Public Prosecutions Act, No.2 of 2013...In the case of Githunguri –vs- Republic (Supra at p.100), the court observed ... The Attorney General of Kenya ... is given unfettered discretion to institute and undertake criminal proceedings against any person “in any case which he considers it desirable so to do ...this discretion should be exercised in quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy...”**

**44. In my view, the discretion to be exercised by the DPP is not to be based on the recommendations made by the investigative bodies. Therefore, the mere fact that the DPP’s decision differs from the opinion formed by the investigators is not a reason for interfering with the constitutional and statutory mandate of the DPP as long as he/she believes that he/she has in his/her possession evidence on the basis of which a prosecutable case may be mounted and as long as he takes into account the provisions of Article 157(11) of the Constitution as read with Section 4 of the Office of the Public Prosecutions Act, Act No.2 of 2013.**

**45. Conversely, the mere fact that the investigators believe that there is a prosecutable case does not necessary bind the DPP...”**

Majanja J in **George Taitumu –vs- Chief Magistrate’s Court Kibera & 2 Others [2014] eKLR** held thus in regard to the Director of Public Prosecutions’ powers to discontinue a case before a trial court:

**“The petitioner’s argues that the prosecutor did not have instructions to withdraw the case against him as provided in the chapeau to Section 87 of the CPC. Under Article 157 (9) of the Constitution, the powers of the DPP may be exercised in person or by subordinate officers acting with general or special instructions. In the matter at hand, there is no dispute the prosecutor had authority to exercise the power of the DPP and no objections has been raised by the DPP in that regard. In accordance with the long standing maxim *Omnia praesumuntur rite et solemniter esse act: all acts are presumed to be done rightly and regularly and in this case there is no basis to doubt that that the prosecutor had authority to withdraw the case. The argument in my view, lacks merit.*”**

In the present application, it was the Applicant’s case that the investigator and herself ought to have been consulted before the Director of Public Prosecutions made the decision to withdraw the case under **Section 87(a)** of the **Criminal Procedure Code**. This court understood the Applicant to say that she was supposed to have a say or input before the Director of Public Prosecution made his decision to withdraw the charges under **Section 87(a)** of the **Criminal Procedure Code**. For added measure, the Applicant invoked **Article 47** of the **Constitution** as regards the requirement of fairness before an administrative decision is made. On the other hand, it was the Director of Public Prosecution’s case that he had perused the evidence provided by the police and reached the conclusion that without further evidence being gathered, the threshold to mount a successful prosecution would not be reached hence his decision to temporarily withdraw the charges facing the 2<sup>nd</sup> Respondent until further evidence is collected.

This court has carefully evaluated the facts of this case. That the Director of Public Prosecutions has exclusive powers to prosecute is without doubt. That power is donated to him under **Article 157** of the **Constitution** and the **Office of the Director of Public Prosecutions Act**. In exercise of his prosecutorial powers, the Director of Public Prosecutions shall not act under the direction of any authority. In the course execution of his duties, the Director of Public Prosecutions has powers to direct the police to undertake investigations to close gaps he observes in the files that have been sent to him for directions (see **Section 27** of the **Office of the Director of Public Prosecutions Act**).

In the present application, this court was satisfied that the Director of Public Prosecutions properly executed his mandate when he made the application before the trial court to withdraw the charges facing the 2<sup>nd</sup> Respondent. The reason for this action was clear. The Director of Public Prosecutions had directed the police to collect further evidence to seal some gaps that he had observed after going through the file that had been forwarded to him. Unfortunately the police, in utter disregard of this direction, neglected or ignored to conduct further investigations. The Director of Public Prosecutions made the decision to withdraw the charges because, without that further evidence, there

was likelihood that the 2<sup>nd</sup> Respondent's prosecution would be an exercise in futility. The Applicant disputes that the Director of Public Prosecutions acted in good faith when he sought to have the charges withdrawn.

This court is not persuaded that the position taken by the Applicant has basis on the facts presented to this court. It was apparent that the Applicant was disappointed that the Director of Public Prosecutions did not seek her advice before making the decision to withdraw the charges. There is no legal requirement in law that the Director of Public Prosecutions consults a complainant before he makes a decision to prosecute or to withdraw charges. This is especially so where the Director of Public Prosecutions acts in good faith as he has established in this case. It was clear to this court that the Director of Public Prosecutions was conscious that he must act in the public interest as required of him under **Article 157(11)** of the **Constitution** in not having an accused charged for the sake of it even where he is convinced that there is no sufficient evidence to sustain a conviction. If the Director of Public Prosecution was to prosecute without being satisfied that the threshold to secure, at the very least a *prima facie* case, has been met then he would be acting in abuse of the powers granted to him under **Article 157** of the **Constitution** and the **Office of Director of Public Prosecutions Act**.

It is clear from the foregoing, the Applicant's application lacks merit and is hereby dismissed. It is ordered.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JULY 2018**

**L. KIMARU**

**JUDGE**