



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC CRIMINAL APPLICATION NO.93 OF 2018

SAMSON K. KANIU..... APPLICANT

Versus

REPUBLIC OF KENYA.....RESPONDENT

JUDGMENT

Review of discharge order

[1] The following significant orders have been sought in the Chamber Summons dated 5th July 2018:

- 1. Review, revision and or variation of the order by the Chief Magistrate discharging the applicant under Section 87(A) of the Criminal Procedure Code and instead, direct that the applicant is acquitted under section 202 of the Criminal Procedure Code***
- 2. An order to the police to release the exhibits being held at Meru Police Station to the applicant forthwith.***
- 3. And costs be provided for***

[2] The application is expressed to be brought under section 364 of the Criminal Procedure Code. The grounds upon which the summons is premised as set out in the application and the supporting affidavit sworn by Samson K. Kaniu on 5th July 2018 are:

1. That the magistrate did not explain the reason why she preferred to discharge the applicant under Section 87(a) and not acquit him under Section 202 of the C.P.C.
2. The court erred in failing to acquit the applicant under Section 202 of the C.P.C since there were no prosecutions witnesses in court for 3 consecutive days.
3. By discharging him under Section 87 (a) the court was granting the prosecution an adjournment through the backdoor as the applicant is liable to a re-charge.

On the basis of the foregoing reasons, the Applicant prays that he be acquitted and his property under police custody be released to him.

ANALYSIS AND DETERMINATION

[3] This application has been brought under Section 364 of the CPC gives the High Court powers of revision on a subordinate court. The section states:

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may -

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

[4] I called upon the record of the trial court which I have perused. I note that due to lack of witnesses, the charges were withdrawn under 87(a) of the CPC. The Applicant argued that the trial magistrate was wrong in discharging the Applicant under section 87(a) of the CPC instead of acquitting him for non-attendance of the complainant during the hearing of the case as provided for in section 202 of the CPC. The two sections in issue, i.e. section 87(a) and 202 of the CPC are reproduced below. Section 87(a) of the C.P.C provides:

“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney- General, 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;...”

[5] And section 202 of the CPC states:

“If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.”

Of section 87(a) of CPC

[6] What are the facts of this case? In this case, the prosecution withdrew the charges under section 87(a) of the CPC due to non-availability of witnesses. The withdrawal of proceedings should be seen within article 157(6) (c) of the Constitution which confers power upon the DPP to discontinue at any stage before judgment is delivered any criminal proceedings instituted or taken over by him. See article 157(6) (c) of the Constitution which provides that DPP has power:-

(c) subject to clauses (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).

Except, in the exercise of the power to discontinue criminal proceedings, 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. These fundamentals should also inform exercise of discretion by the court. On this, see article 157(11) of the Constitution. In such application, the learned magistrate has the discretion to accept or reject the prosecution's application for withdrawal. Where the application for withdrawal of proceedings is rejected, the court may order the case to proceed and *inter alia* section 202 of the CPC may come into play. But, there is nothing in law which prevents the DPP from making an application, or the trial court from considering such application under section 87(a) of the CPC.

[7] Majanja J. in the case **GEORGE TAITUMU vs. CHIEF MAGISTRATES COURT, KIBERA & 2 OTHERS [2014] eKLR** expressed the following on section 87(a) of the CPC:

“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. In light of Article 157(11) of the Constitution 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.”

[8] Applying the test, other than stating that the Applicant may be re-arrested and charged, there is nothing to show that the Director of Public Prosecutions did not 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 in the application. The prosecutor was categorical that he was applying due to unavailability of witnesses. The trial court was careful to involve the accused and sought the submission by the defence counsel on the application for discontinuance of proceedings. Another important matter: not all discontinuance of criminal proceedings or discharge shall lead to acquittal. Only, discontinuance of proceedings after the close of the prosecution's case, that the accused shall be acquitted. See article 157(7) of the Constitution. Therefore, the provision in section 87(a) of the CPC of the withdrawal, that...*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...*is not proscribed by the Constitution. Thus, it is a misconception on the part of the Applicant that the accused ought to have been acquitted under section 202 of the CPC rather than be discharged under section 87(a) of the CPC. The discontinuance was not after close of prosecution's case. However, it bears repeating that, depending on the circumstances of the case, the

court may reject application under section 87(a) of the CPC and an acquittal may eventually be ordered depending on the course taken by the prosecution after the rejection. The latter is not the case here.

Of release of exhibits

[9] Of release of the exhibits, the trial magistrate held that

“The court cannot order release for exhibits that were never produced before it for the simple reasons that the court has not failed jurisdiction over exhibits not produced before it and I am not aware of their existence.”

[10] I note that the applicant was charged with being in possession of excisable goods affixed with counterfeit excise stamps contrary to regulations 30 (1) (g) as read with regulation 35(2) of Goods Management System, 2017. After discharge of the accused under Section 87(a) of the CPC the court cannot prevent further investigations into the subject of the trial. Counterfeit regime and laws have special provisions of how to deal with items seized. Again, the items sought to be released were not produced as exhibits and the court may not have jurisdiction over them in a revision application. Accordingly, only in substantive proceedings specifically on the items seized by the police can the court exercise jurisdiction thereto.

[11] In the upshot, the application herein is unmeritorious and is dismissed with no orders as to costs.

Dated, signed and delivered in open court at Meru this 9th day of October, 2018.

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F. GIKONYO

JUDGE

In the presence of:

Mr. Namiti for State

M/s. Rimita for Kimathi for applicant

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F. GIKONYO

JUDGE