



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT LODWAR

MISCELLEANOUS CRIMINAL APPLICATION NO. 15 OF 2018

JOSHUA MARETE.....APPLICANTS

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENTS

RULING

1. By a Notice of Motion dated 2/11/2018. The applicant who is an accused in LODWAR SENIOR RESIDENT MAGISTRATE'S COURT CRIMINAL CASE NO. 490 of 2018 moved the court for ORDERS;

- 1. That the instant application be certified urgent and service thereof be dispensed within in the first instant**
- 2. That the honourable court be pleased to revise/review and set aside the order of the trial magistrate court denying the request for withdrawal of the complaint by the complainant in Lodwar Senior Resident Magistrate's court Criminal case No.490 of 2018**
- 3. That the honourable court be pleased to declare the charges against the Applicant (the accused) in Lodwar Senior Resident Magistrate's Court criminal case Number 490 of 2018 as withdrawn.**
- 4. That in granting the above prayers, the honourable court be pleased to grant the request for withdrawal of the complaint by Dalmas Ekai Esinyen the Complainant in Lodwar Senior Resident Magistrate's Court Criminal Case Number 490 of 2018 and consequently acquits JOSHUA MARETE KIOGORA the Applicant (the accused)**
- 5. That in the alternative, if the prayers sought above cannot be granted, this Honourable Court to admit the Applicant to bond/bail on such terms as the court may deem reasonable.**

2. The said application was supported by on the grounds annexed thereof together with a supporting affidavit sworn by the applicant in which he deponed that he was charged with the offence of obtaining money by false pretence contrary to section 313 of the penal code, forgery contrary to section 349 of the penal code and uttering false document contrary to section 353 of the penal code.

3. He deponed that when the matter came up for hearing on 12/10/2018 the complainant requested the trial court to withdraw the complaint which was not opposed by the prosecution only for the court to decline to grant request for withdrawal by a ruling dated 17/10/2018 and directed that the matter proceed for full trial.

4. It was stated that he had negotiated a settlement with the complainant and executed an agreement to that effect and that the court should have given effect to the alternative dispute Resolution reached by the parties herein and that the end of justice should have been met by allowing the application.

5. When this matter came up for hearing before me the prosecution was represented by Mr. Mong'are who conceded to the withdrawal of the charge against the applicant on the count of obtaining by false pretence but maintained that this two other charges were the presume of the ODPP and therefore stated that the two counts should proceed for hearing. He further conceded to the grant of bond to the applicant on sufficient terms.

6. Ms Emanikor for the applicant agreed with the contentions by the learned public prosecutor that the two charges should proceed for hearing on merit.

7. The complainant who was present in court stated that he had entered into an agreement with the applicant who had refunded to him his

money and had therefore decided to pardon him.

8. In rejecting the application for withdrawal by the complainant the trial court had this to say

“ in criminal proceedings, the state is presumed to be the complainant and the applicant ordinarily also serves as the witness of the state although this application has been made with regard to the main charge of obtaining by false pretence, it is evident from the record that the accused is facing two other counts of forgery contrary to section 345 as read with section 349 of the penal code and uttering a false document contrary to section 353 of the penal code being the 2nd and 3rd counts respectively. I find that the above offences are linked to the main charge, to the effect that the complainant herein is the main witness in all of them. Allowing this application will amount to a miscarriage of justice especially with regards to the 2nd and 3rd counts herein. Secondly the reason advanced is that an agreement has been entered to by both the accused herein and the applicant who has been paid some money and the rest would be paid in installments, it is evident from the above that he has attached some conditions to the discharge yet the acquittal is absolute. The applicant submits that he would seek legal redress in the event that the rest of the money is not paid. To my mind there still unsettled issues thus making this application premature”.

9. Section 362 of the criminal procedure code clothes the high court with powers to call and examine the record of any criminal proceeding before any subordinate court for the purposes of satisfying itself as to the correctness legality or propriety of any finding sentence of order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

10. section 364(1) provides for a case which has been reported to court for orders or which has otherwise come to the courts knowledge. These provisions have been given constitutional underpinning in Article 165 (6) and (7) which provides as follows;

(6) The high court has supervisory jurisdiction over the subordinate courts and over any person body or quality exercising judicial or quasi judicial function.

(7) for the purposes of clause (6) the High Court may call for the record of any proceedings before the subordinate court or person body or authority referred in clause (6) and may make order or give any directions it considered appropriate to ensure the fair administration of justice.

11. With those principles in mind I therefore find and hold that this matter is properly placed before the court.

12. The final issues for determination in this matter is whether the conditions for withdrawal of a complaint were met in this matter? Whenever the trial magistrate held that in criminal proceeding the state is the complainant, she did not take into account the definition thereof which includes the person who lodges a complaint with the police. Section 204 of criminal procedure code provides that a complainant may withdraw the complaint before the court makes a final order in the matter and that the court has discretion as to whether to allow or reject the withdrawal when satisfied of the existence or otherwise of sufficient grounds for permitting such withdrawal.

13. Whereas the court has discretion in allowing or rejecting the application for withdrawal from the records herein it is clear that the court did not exercise her mind or the provision of section 176 of the criminal procedure code which allows the court to promote reconciliation and further the court did not take into account the fact that Article 157 of the constitution give the DPP the powers to determine whom to prosecute and for what offence and in this matter it is clear that the office of the DPP did not object to the withdrawal of the first count.

14. I have looked at the grounds advanced by the trial court in rejecting the application for withdrawal and whereas the same had discretion, I find that the said discretion was not exercised judiciously thereby making her decision subject to revision by the court. Having taken into account the constitutional injunctions to courts to facilitate alternative dispute settlement resolution and section 176 of the criminal procedure code which provides reconciliation I hereby allow the application herein and reverse the decision of the trial court herein in rejecting the application and substitute the same with an order allowing the withdrawal of count one of obtaining by false pretence.

15. The other two counts shall proceed from full hearing unless otherwise withdrawn by the office of DPP as the evidence to be tendered to prove the same has no link with count one as held by the trial court in her decision under revision.

16. Having disposed of the issue of withdrawal of the first count herein I am of the considered view and hold that the applicant ought to be admitted to bail and therefore further reverse the trial court determination on bail issued on 30/7/2018 are substitute the same with an order granting the applicant bail on the following terms;

a) Bond of Kshs.300,000/= (three hundred thousand) with one surety of similar amount.

b) In the alternative cash bail of Kenya shillings one hundred and fifty thousand (150,000/=) with two sureties of similar amount.

c) This matter shall be heard by the trial court on priority basis as directed and the accused person shall not cause any adjournment thereof during the period of trial.

c) Should the accused cause any unmerited adjournment, then the bail herein shall be cancelled forthwith.

Dated and delivered at Lodwar this 9th day of November, 2018

J WAKIAGA

JUDGE