



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL REVISION NO. 47 OF 2016

LIVINGSTONE MELOMPUKI LENCHIRO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The question before this court is whether an order issued by the Chief Magistrate Kajiado in Criminal Case No. 329 of 2016 to discharge the applicant under section 87 (1) of Criminal Procedure Code was regular or legal or appropriate.

The applicant under certificate of urgency dated 30/11/2016 made an application by way of a notice of motion under Article 25(c) and 50 (2) (a) of the Constitution of Kenya, section 169(3), 210, 364 (1) (b) and (2), 366, 367, 382 and 383 of the Criminal Procedure Code Cap 75 of the Laws of Kenya seeking from this court the following orders:

- That this honourable court be pleased to cause revision of the orders and or judgement of the Chief Magistrate Court delivered on 3/8/2016 by correcting the errors, irregularity, and omission of withdrawing the charges against the applicant supposedly under section 87 (1) of the Criminal Procedure Code which ideally do not exist in the statutes.
- That in the alternative have this honourable court be pleased to cause revision of the orders of the Chief Magistrate Court delivered on 3/8/2016 withdrawing the charges against the applicant assumingly made under section 87(a) of the Criminal Procedure Code which does not exist to instead then have the applicant discharged and acquitted under section 35 (1) and (2) and or section 210 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

The application has been supported by the affidavit of Livingstone M. Lenchiro which has deponed as follows:

- That he is conversant with the facts of the application.
- That before being acquitted purportedly under section 87 (1) of the Criminal Procedure Code on 3/8/2016 he was then the 2nd accused person in Criminal Case No. 329 of 2016 at Kajiado Law Courts.
- That the applicant was an employee of the defence Olkejuado County Council under the Local Government Authority Act Cap 265 of the Laws of Kenya designated as the deputy clerk and later absorbed by the County Government of Kajiado.
- That while performing his duties of general administration and management he executed land transfer documents and assessment of rates payable.
- That this matter became a subject of investigations by the C.I.D. Kajiado alleging that the document in question was stolen or unlawfully obtained in respect of LR. Number 283/Noonkopir

Trading Centre.

- That when the charge sheet was prepared for the offence of forgery an application was made to have the charges withdrawn for reason that the records and the register had not been forged as alleged.
- That pursuant to the application for withdrawal the learned trial magistrate acquitted him under section 87 (1) of the Criminal Procedure Code which is erroneous as the same does not exist in the statute books of the Law of Kenya.
- That the record should be revised to have the order of discharge substituted under section 35 (1) of the Criminal Procedure Code.
- That the order under section 87 (1) of the Criminal Procedure Code has placed a yoke over his head and his rights to fair trial and fundamental rights violated infringed, threatened or denied.

The 1st respondent filed the grounds of opposition dated 14/3/2017 to the effect that:

The application is hopelessly incompetence and lacks merit. The applicant is guilty of laches. The revision application is vexatious, or incompetence and otherwise an abuse of the court process.

The applicant aggrieved by the said order by the learned trial magistrate preferred a revision under section 362 of the Criminal Procedure Code. section 362 of the Criminal Procedure Code vests power to the High Court to call and examine the record of any criminal proceedings before any subordinate court for purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed or regularity of proceedings if any such subordinate court. Section 364 invests in the High Court revisionary jurisdiction over subordinate courts and tribunals within their jurisdiction. It is this jurisdiction which allows any party aggrieved like the applicant to approach this court to exercise the revisionary jurisdiction over the order which was passed by the Chief Magistrate Court.

It is trite that Article 165 (6) and (7) of the Constitution gives the High Court power to exercise supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi judicial functions. The supervisory jurisdiction being a creature of the constitution to me should be exercised sparingly in view of the fact that subordinate courts and tribunals are also created by the same constitution. That is the reason Article 165 (7) provides the manner in which the powers of the High Court are to be exercised by calling for the record of any proceedings before inferior court or tribunals to make an order or give discretion considered appropriate to ensure the fair administration of justice. Under section 364 this court in exercising that supervisory jurisdiction and call for the records or proceedings the other party should be given an opportunity to show cause as to the order or proceedings being challenged before a final order is made.

The general function of the High Court under section 362 as read together with the corresponding jurisdiction of revision can be seen in the legal of the constitutional provisions under section 165 (6) and (7) to enable the superior court to monitor and ensure quality control of the subordinate courts and tribunals. The quality control and revision can be seen in the legal of the phrases in section 362 couched in the manner of the court satisfying itself as to the correctness, legality or propriety of the order or proceedings.

Having carefully considered the application, the grounds of opposition and rival submissions made by both counsels in this matter, I am of the conceded view that the application by the applicant to invoke revisionary jurisdiction is not an abuse of the court process as submitted by the respondent counsel. The issue for this court to ponder is whether the applicant has made out a case under the provisions of section 87 of the Criminal Procedure Code to warrant this court exercise the power of revision under section 364 of Criminal Procedure Code by calling the record and subject to it to examination to satisfy itself as to the legality, regularity or correctness of the order. The impugned order was issued under section 87(1) of the Criminal Procedure Code. The applicant complaint is to the effect that section 87(1) of the Criminal Procedure Code invoked by the learned trial magistrate does not exist in our Criminal Procedure Code. The order of discharge in favour of the applicant was made without any anchor to the provisions of the law.

The general formulation of the provisions of section 87 of the Criminal Procedure Code will shed some light. Section 87 provides as follows:

“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 judgement 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;

(b) If it is made after the accused person is called upon to make his defence, he shall be acquitted.”

It is not lost of this court that the Director of Public Prosecutions has immense powers provided for under Article 157(1) as read with section 157 (6) of the Constitution. Article 157 (6) (a) provides as follows:

“The Director of Public Prosecutions shall exercise state powers of prosecution and may

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

(2) Take over and continue any criminal proceedings commenced in any court other than a court martial (that have been instituted or undertaken by another person or authority with the permission of the person or authority.

(c) Subject to clause 7 and 8 discontinue at any stage before judgement is delivered any criminal proceedings instated by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions.”

Clause 7:

“If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.

(8)The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(11) In exercising the power 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.”

The provisions of section 87 are therefore crafted in line with Article 157 (7) and (8) of the Constitution as regards to criminal proceedings in any court of law. Section 87 vests in the court wide discretion to accept or reject an application on discontinuation or withdrawal of proceedings by the Director of Public Prosecutions or his designated prosecutor. Under section 87 two limbs exist in the manner the subsequent orders are to be issued subject to the stage of the proceedings in the court an application under section 87 is being made.

The first consideration is where the application for withdrawal is being made before an accused adduced his defence at the trial. In this category of applications for withdrawal the accused person is entitled to a discharge. Secondly, where it involves an application for withdrawal being made after the accused has been called upon to his defence. The trial court will be obligated to acquit the accused.

From the record of the trial court the Director of Public Prosecutions made an application to discontinue the proceedings before the applicant was called upon on his defence. The learned trial magistrate

consented to the withdrawal of application by discharging the applicant under section 87(1) of the Criminal Procedure Code. The constitution under Article 157(8) and section 87(a) mandates the court to grant permission for such a discontinuation or withdrawal. In this case the learned trial magistrate properly exercised her discretion and consented to the application for withdrawal. The only error on the face of the record is anchoring the discharge order under section 87(1) of the Criminal Procedure Code.

It is not in dispute that my reading of section 87 of the Criminal Procedure Code has no subsection indicative of as section 87(1) of the Criminal Procedure Code. The substantive provisions as legislated by parliament under section 87 remain intact. The provisions invoked by the Director of Public Prosecutions and consented are in line with the record of proceedings pending before the trial court. The applicant has not demonstrated prejudice or any injustice by the error on the face of the record which can be best described as an error arising from accidental slip by the learned trial magistrate. The fear contemplated by the applicant on the discharge order is clearly insulated under Article 50 of the Constitution on the right to a fair hearing. I must assure the applicant that in the event the Director of Public Prosecutions comes knocking at his door he will not suffer injustice if the case is reopened pursuant to the discharge order under section 87(a) of the Criminal Procedure Code. In my considered view the constitutional and statutory safeguards in our criminal justice system would be legal tools at his disposal to ensure his fundamental rights including right to a fair trial are protected.

In conclusion I find no illegality, irregularity, impropriety and incorrectness to the order made on 3/8/2016 save for the slip on the provisions of section 87(1) of the Criminal Procedure Code the same being subsection (1). The correct provisions in congruence with the nature of the proceedings for withdrawal could have been section 78 (a) of the Criminal Procedure Code.

It is necessary in the circumstances of this case to undo the error by setting aside the slip error of section 87(1) of the Criminal Procedure Code and substitute it with section 87(a) of the Criminal Procedure Code. All other aspects of the order remain undisturbed.

Dated, read and signed in open court at Kajiado on 15th day of May, 2017

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Naikuni for the applicant

Mr. Akula for Director of Public Prosecutions

Mr. Leonard Court Assistant