

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL REVISION NO. 5 OF 2017

JACOB KIPLAGAT KUTTO.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

1. In his Notice of Motion dated 23rd February 2017, the applicant *Jacob Kiplagat Kuto* requested this court to revise the orders made by the lower court on 9th February 2017 in Eldoret Chief Magistrate's Criminal Case No 2578 of 2013 discharging him Under *Section 87(a)* of the *Criminal Procedure Code* (CPC). The applicant prayed that upon revising the order, this court should order that his trial should proceed to its logical conclusion and in the alternative, that this court acquits him under *Section 210* of the *Criminal Procedure Code*.

2. The application is made under *Section 362, 364 (1), (b) (2)* and *Section 365* of the *Criminal Procedure Code*.

3. The applicant contends that he was an employee of Kenya Commercial Bank at the time he was charged with the offence of stealing by servant in Eldoret Criminal Case No. 2578 of 2013; that he was discharged when two out of five witnesses failed to attend the court; that owing to the said discharge, his employer has refused to reinstate him to his earlier position on grounds that his case was still under investigation and the police have refused to hand over to him Ksh 84,000/= which was recovered from him saying that it was proceeds of the crime in respect of which the charge was withdrawn. These matters are deponed to in length in the deposition made by the applicant on 23rd of February 2017 in support of the application.

4. I have considered the application. I have also read the proceedings before the lower court. They confirm that the applicant was the accused person in Eldoret Chief's Magistrate criminal case No. 2578 of 2013 and that the charges facing him were withdrawn on 9th February 2017 under *Section 87(a)* of the CPC when the remaining two prosecution witnesses failed to attend the court.

5. In deciding whether or not to grant the prayers sought, this court must remind itself of its mandate in the exercise of its revisionary jurisdiction.

Section 362 when read together with *Section 364* of the *Criminal Procedure Code* leaves no doubt that this court's powers on revision are supposed to be exercised to correct an illegality, mistake or irregularity that may be contained in any order or judgment passed by the lower court.

6. In this case, the trial court withdrew the charges against the applicant Under *Section 87(a)* of the *Criminal Procedure Code* following an application made by the prosecution.

Under *Section 87* of the C.P.C, the trial court has power and discretion to either allow or disallow an application by the prosecution for withdrawal of a charge provided that it was made before judgment was pronounced.

7. In this case, the withdrawal was allowed before the prosecution had closed its case and therefore, the withdrawal amounted to a discharge of the applicant. The trial court in this case exercised its discretion and decided to allow the application. It has not been suggested that in allowing the application, the trial court abused its discretion or made an error of law. On my part, I do not find any indication from the court record that the trial court wrongly exercised its discretion in allowing the withdrawal. I am unable to find any illegality or irregularity in the orders made by the trial court.

8. The fact that the applicant's employer refused to reinstate him in his employment had nothing to do with the legality or propriety of the impugned order. The letter annexed to the applicant's supporting affidavit marked JKK 2 shows that the applicant's employer made a decision to dismiss him from its employment for gross misconduct. This was an independent decision by the bank and it cannot be made the basis of revision of a lawful order issued by the trial court.

9. In the premises, I do not find any merit in the Notice of motion dated 23rd February 2017. It is accordingly dismissed.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 7th day of June 2017