REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 50 OF 2017

REPUBLIC……....APPLICANT

VERSUS

P K M……..…….....……RESPONDENT

RULING

The revision herein was filed by the DPP vide a letter dated 22nd March, 2017. It arises from an order of the learned trial Magistrate Hon. B. Ochoi dated 15th march, 2017 allowing the withdrawal of **Kibera Cr. Case no. 4153 of 2016** under **Section 204 of Criminal Procedure Code**. The Respondent herein was the accused having been accused with three counts. In counts I and III, he was charged with threatening to kill contrary to **Section 223 (1) of the Penal Code**. It was alleged that he had threatened to kill R W M on the night of 4th October, 2016 and on 19th October, 2016 respectively. In count II, he was charged with creating disturbance in a manner likely to breach of peace contrary to **Section 95(1)(b) of the Penal Code** in that he had called the said R W M '*M***a*'. The complainant in the trial was the wife of the accused.

The trial came up for mention on 15th March, 2017 when the complainant indicated that she wished to withdraw the case under **Section 204 of the Criminal Procedure Code**. The prosecution opposed the same citing that it was the duty of the DPP under **Article 157(6)(c) of the Constitution** to discontinue any criminal proceedings.

The application was canvassed before me on 22nd May, 2017. Learned counsel for the Applicant Miss Thuguri submitted that the court erroneously allowed the withdrawal of the trial without the express mandate of the DPP and that in any case it misapplied the provisions of Article 159 of the Constitution. According to the learned counsel, the said Article could not be applied where it was inconsistent with other provisions of the Constitution such as the rights and fundamental freedoms of other persons. In this respect, she argued that although the complainant was willing to forgive the accused, the court failed to take into consideration the plight of other persons involved, more particularly the children of the couple. In that regard, the court totally ignored **Section 17(2) of the Witness Protection Act** which provides that the court can summon an expert witness to give a report on the vulnerability of any witness on a trial. She submitted that the prosecution had requested the calling of a probation officer's report so as to assess the situation on the ground having regard to the gravity of the offences before the charges were withdrawn. According to the counsel, the court ignored the request and went ahead and allowed the withdrawal. This implied that it did not also take into consideration the letter and spirit of the **Protection Against violence Act, No. 2 of 2015** which emphasizes on protection against violence of individuals. The court was referred to **Nairobi High Court Petition No. 21 of 2015** between **DPP and Nairobi Chief Magistrate's**

Court and Another.

In opposing the application, the Respondents submitted that the withdrawal of the case was a culmination of a reconciliation meeting between his family and that of his wife. In the meeting, it was noted that the offences were committed due to drunkenness and that he had since stopped drinking alcohol. He had also reconciled with his wife. The Respondent conceded that he and the complainant had three children, one aged 22 at University, the second being a married girl and the third was a niece aged 7 who lived with them. He stated that the children were involved in the reconciliation process.

I have accordingly considered application and the respective rival submissions. I take the following view of the application. **Article 157 (6)(c) of the Constitution** provides as follows;

> ***"(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-***
>
> ***(c) Subject to clause (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)."***

The above provision is subject to sub-articles (7) and (8) which provide as under:

> ***(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."***

The court recognizes the wide discretionary powers of the DPP as enshrined above to discontinue any proceedings before a judgment is delivered. However, under Sub-article (8), the powers must be applied with the permission of the court. That implies that any person who is a party to, and has an interest in, the case has a rightful duty to oppose a withdrawal of the case. The mischief sought to be cured by the provision is so as the DPP does not improperly apply his powers to discontinue a case. In the respect of the instant case, the only contestation by the Applicant (DPP) is that the learned trial magistrate failed to call for a probation officer's report which would have given the prevailing mood on the ground of the family involved which then would have informed the court whether it was prudent to withdraw the case. I entirely agree with the learned State Counsel that it was important that the court took into consideration such probation officer's report. But in allowing the withdrawal, the learned trial magistrate generally considered that both the accused and the complainant had reconciled and were staying together. In my mind, he was invoking **Article 159(2)(c) of the Constitution** which provides that:

> ***In exercising judicial authority, the courts and tribunals shall be guided by the following principles-***
>
> **"Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3)"**

Clause 3 referred to above states as follows:

> ***"Traditional dispute resolution mechanisms shall not be used in a way that-***
>
> ***(a) Contravenes the Bill of Rights;***
>
> ***(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or***
>
> ***(c) is inconsistent with the Constitution or any written law.***

Having regard to the above provisions, it is my view that notwithstanding the objection raised by the prosecution to the withdrawal of the case, courts must interpret the Constitution objectively. If interpreted in a stringent manner, the letter and the spirit of the Constitution would be mutilated to the extent that reconciliation becomes a tenet only known on the paper. This definitely would not conform to **Article 159(2)(c)**. In my mind, that is why **Section 176 of the Criminal Procedure Code** still applies and should be read together with the said **Article 159(2)(c)**. **Section 176** provides as under:

> ***"In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated."***

Although the learned trial magistrate did not specifically cite the provision of the Constitution that promotes reconciliation, it is my view that he correctly applied alternative dispute resolution mechanism envisaged under Article 159(2)(c). He did note that both the accused and the complainant were already living together even as the charges were filed and it therefore made no sense to further push their disputes by not allowing the withdrawal of the case. In view thereof, if this application were allowed, the court would vitiate the process of promoting reconciliation which has already taken effect, in any event.

It was contended by the Applicant that the learned trial magistrate failed to look at the plight of the children. But the Applicant did not reject the fact that both the accused and the complainant had adult children who were involved in the reconciliation and that the under age child was a niece to the family. The parties having continued living together after the offences meant that the dispute between them had been amicably resolved and therefore there was no need to have the case continued to its logical conclusion.

Having made the above observations, I make marked distinction between the instant case and the cited case law being **Nairobi High Court Petition No. 21 of 2015 (Supra).** The instant case is of a personal nature involving two persons who are closely connected to each other by marriage. In the event of a dispute between them where the offence is not so grave, the best that the court can do and that social justice demands is to promote reconciliation for the sake of unity of the family. Doing the contrary dismantles the family and works against a cohesive society and Nation at large. To the contrary, the latter case involved a case of corruption which in the public interest could not be withdrawn. Although this case relates to a case of threat to kill, the circumstances under which the Respondent told the complainant he would kill her were explained by him without a rebuttal by the Applicant.

I accordingly find that the application lacks merit and the same is accordingly dismissed.

DATED AND DELIVERED AT NAIROBI THIS 17th JULY, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Miss Sigei for the Applicant.

2. Respondent present in person.