



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 137 OF 2014

JEREMIAH KAILIKA.....APPLICANT

VS

REPUBLIC.....RESPONDENT

RULING.

By a Notice of Motion Application dated 28TH October 2014 and brought pursuant to the provisions of Articles 2,29,47,48 and 50 of the Constitution the Applicant has inter alia sought the following orders:

1. ...spent
2. ..spent
3. **THAT the honourable court be pleased to direct that the respondent through any of its officers, and more specifically the officer commanding Maua police Station should not arrest and/or charge appellant/applicant over the charges and/or complaint related to the withdrawal in Maua Chief Magistrate Criminal Case No. 3334 of 2012 (REPUBLIC –VS- JEREMIAH KAILIKA) pending the hearing and determination of this appeal.**
4. **THAT the honourable court be pleased to issue any further and/or better orders as will meet the ends of justice herein.**

The applicant filed an affidavit dated 27.10.2004 and a further affidavit dated 14.10.2014

The said application is also premised on the grounds that the appellant/applicant has appealed against the lower court's orders withdrawing the charges facing the appellant/applicant under Section 87A of the Criminal Procedure Code and that the Officer Commanding Maua Police Station has began hunting down the applicant immediately after the withdrawal of the charges and that the prosecution's withdrawal of charges was malafides and tailored to harass the applicant.

The application was opposed via a replying affidavit sworn by Timothy Barbari, the officer Commanding Maua Police Station who deposed inter alia that the prosecutors application to withdraw the criminal matter against the applicant herein under Section 87 (a) of the Criminal Procedure Code was procedural and available to the prosecution in cases where the accused person has not been put on his defence and that the withdrawal under section 87 (a) of the Criminal Procedure Code does not act as a bar to subsequent prosecution of the accused person on the same set of facts and as such, the police are well within their mandate to re-arrest and charge the applicant with the offence he had been previously charged with.

I have carefully looked at the Application, the supporting affidavit thereof and submissions by Counsel. It is not in dispute that the Applicant had been charged with the offence of offensive conduct contrary to section 94 (1) of the Penal Code. The said charges were later withdrawn by the prosecution under section 87 (a) of the Criminal Procedure Code. As at the time that the charges were withdrawn, the case had been on going for a period of about 2 years. Both the defence and prosecution had sought several adjournments. Before withdrawal, the prosecution had been given the final adjournments. The Applicant had not been placed on his defence. The provisions of section 87 (a) of the Criminal Procedure Code are very clear that withdrawal of charges against an accused person under the section before the accused person is called upon to make his defence shall not operate as a bar to subsequent proceedings against him on account of same facts.

There is no doubt that soon after the withdrawal of the suit. The police purported to arrest the applicant and charged him with the same offence. He has challenged the withdrawal of the case under section 87(a) in his appeal alleging that the trial court erred in granting that order and further that his right to a fair and expeditious trial has been breached. Pending the said appeal the applicant seeks an order that he should not be arrested or charged before the said appeal is heard.

Under section 87(a) CPC the magistrate has discretion to grant or deny the prosecution's application to withdraw a case under section 87(a) CPC. The section reads.

“87. 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;”

The word used is “may”. It is an exercise of discretion which must be exercised judicially and without infringing on the rights of any party. Since the applicant alleged that his rights to fair hearing has been breached, If the police went ahead to arrest and charge the accused before that appeal is heard, then he will be denied the opportunity to ventilate his right of appeal. The appeal court must be given an opportunity to interrogate whether or not the trial court's discretion was properly exercised.

For the above reason, it is only fair that the orders sought in the notice of motion be granted to the effect that the respondents and its officials and especially, the OCS Maua Police Station are barred from arresting, and/or charging the applicant with the charges or complaint relating to Maua Criminal Case No 3334/2012 Republic v. Jeremiah Kailikia pending the hearing of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF FEBRUARY 2015.

R. V .P. WENDO

JUDGE

Mr. Mutinda holding brief for Mbogo for applicant

Mr. Mulochi for State

Jane Court Assistant

Applicant present

R. P .V. WENDOH

JUDGE