

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.394 OF 2012

CHRISTOPHER AMASAVA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Christopher Amasava was aggrieved by the decision of the trial court which allowed the prosecution's application to terminate the criminal case facing the Applicant under **Section 87(a)** of the **Criminal Procedure Code**. In his application to this court dated 6th August 2012, the Applicant requested the court to invoke its jurisdiction under **Section 362** of the **Criminal Procedure Code** and find that the trial court should not have accepted the prosecution's application to withdraw the charges under **Section 87(a)** of the **Criminal Procedure Code** but instead should have ruled that the charges brought against him were fatally defective for failure to comply with **Section 35** of the **Anti-Corruption and Economic Crimes Act (2003)**. The Applicant was of the view that the criminal proceedings brought against him were null and void and should have therefore been dismissed by the trial court.

The court gave directions for the application to be heard. During the hearing of the application, this court heard oral rival submission made by Mr. Wanyanga for the Applicant and by Ms. Aluda for the State. Mr. Wanyanga submitted that the Applicant should have been acquitted of all the charges instead of the court allowing the prosecution to withdraw the charges under **Section 87(a)** of the **Criminal Procedure Code**. He explained that before the Anti-Corruption Commission charged him in court, it had not obtained consent to prosecute him from the Attorney General. He referred specifically to **Section 35** of the **Anti-Corruption and Economic Crimes Act** which requires consent to be sought from the Attorney General before anyone is prosecuted for offences under the **Act**. Learned counsel submitted that the Anti-Corruption Commission had acknowledged this fact hence this decision to withdraw the charges under **Section 87(a)** of the **Criminal Procedure Code**. The Applicant submitted that he ought to have been discharged instead of being subjected to the possibility that he may later be charged. The Applicant was of the view that his right to fair trial is being infringed. In particular, he stated that he has been in the court corridors since 2006 when he was charged. He had been suspended from employment and cannot take any legal action against his employer if a definitive determination is not made by the court. The Applicant urged the court to make a finding that failure to comply with **Section 35** of the **Anti-Corruption and Economic Crimes Act** rendered the charges brought against him fatally defective and therefore he ought to have had the charges brought against him dismissed.

In response, Ms. Aluda for the State opposed the application. She submitted that the delay in hearing and determination of the case facing the Applicant was as a result of a case that the applicant had filed in the High Court. She explained that after the hearing commenced, the trial proceeded uneventfully until the Applicant was put to his defence. Unfortunately, the magistrate who heard the case ceased to have jurisdiction. The case was listed before a new magistrate. Learned counsel submitted that the Applicant exercised his right under **Section 200 (3)** of the **Criminal Procedure Code** and requested the trial to start *de novo*. She explained that by the time the new trial commenced, the Director of Public Prosecutions had granted consent for the Applicant to be prosecuted. She submitted that the prosecution was within its right to have the case against the Applicant withdrawn under **Section 87(a)** of the **Criminal Procedure Code**.

She cited **Article 157(8)** of the **Constitution**. She urged the court to take into account the fact that it was the Applicant who caused the delay in the case. The Applicant cannot therefore turn around and cry foul claiming that the case had been delayed. She submitted that the court should look at both side of the case and reach a decision that is just.

This court has carefully considered the rival submission made by the parties to this application. As stated earlier in this Ruling, the Applicant was aggrieved by the decision made by the trial court in which he allowed the prosecution to withdraw the criminal case facing him under **Section 87(a)** of the **Criminal Procedure Code**. The Applicant wants the court to revise that decision under **Section 362** of the **Criminal Procedure Code** because he was of the view that the charges brought against him ought to have been terminated because consent to prosecute him had not been sought under **Section 35** of the **Anti-Corruption and Economic Crimes Act**. He relied on the case of **Esther Theuri Wairuru & Another –Vs- Republic Criminal Appeal No.48 of 2008** (unreported) where the court held that the Anti-Corruption Commission had no powers to prosecute him without due consent from the Attorney General (and later, after the promulgation of the 2010 Constitution, the Director of Public Prosecutions).

Ms. Aluda for the State conceded that indeed the earlier charges were brought against the Applicant without due consent being obtained from the Attorney General. However, she submitted that when the case started *de novo*, the Director of Public Prosecutions gave the requisite consent. This fact was not disputed by the Applicant. Indeed, in the submission made in opposition to the withdrawal of the charges under **Section 87(a)** of the **Criminal Procedure Code** before the trial court, the Applicant did not raise the issue. This court is of the view that the reason advanced before this court is therefore an afterthought.

As regard whether the Applicant was prejudiced by the delay in the prosecution of his case, this court is of the view that what the prosecution sought was termination of the proceedings albeit with a caveat that the Applicant may later be prosecuted. *What prejudice has the Applicant suffered when the case against him has been terminated?* If the Applicant is prosecuted again on the same charges, he is at liberty to raise the question of prejudice as a result of the five (5) years that his case remained pending before the trial court. Further **Article 157(8)** of the **Constitution** provides that:

“ The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.”

The prosecution sought the permission of the court and was allowed to withdraw the charges. The prosecution discharged its mandate under the **Constitution**. This court does not see any illegality that would necessitate it to invoke its jurisdiction under **Section 362** of the **Criminal Procedure Code**.

The upshot of the above reasons is that the application of the Applicant lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2015

L. KIMARU

JUDGE