



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

MISC. APPL. NO 57 OF 2013

FRANCIS NDIRITU KARURU.....APPLICANT

Versus

THE CHIEF MAGISTRATE NYERI LAW COURTSRESPONDENT

RULING

1. By an application dated 31st December 2013 under Articles 22(1),(2), 23(3)(e) and (f) and 25(a) and (c) of the Constitution of Kenya 2010 and sections 89(1)(2)(3) of the Criminal Procedure Code the applicant moved the court for an order that the Chief Magistrate Nyeri be compelled to sign the written complaint by the applicant FRANCIS NDIRITU KARURU.
2. The application was supported by the affidavit of the applicant wherein he deponed he had drawn and filed an application to compel the Chief Magistrate to sign his written complaint as per the procedure outlined in section 89 (1)(2) and (3) of CPC.
3. The application was certified urgent and fixed for interpartes hearing wherein the applicant submitted that under section 89(1) a person may make a complaint in the following terms section 89(3) CP.

A complaint may be made orally or in writing but if made orally shall be reduced to writing by the magistrate and in either case shall be signed by the complainant and the magistrate.

5. when a magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”

4. It must be pointed out at the onset that the applicant's application is not premised on section 88 of the Criminal Procedure Code which provides for private prosecution and the applicant before the court was very clear that he did not intend to prosecute privately. He submitted that once the charge has been submitted then the same be sent to the DPP.
5. The issue to my mind for determination in this application therefore is as to whether a private citizen without intending to prosecute privately can present charge before the magistrate under section 88 of the CPC.
6. Article 157 of the Constitution of Kenya 2010 creates the office of Director of Public Prosecution. The powers of that office are as outlined herein. Article 157(6) the Director of Public Prosecution 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;

b. 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. And

(c) Subject to clause (7) and (8), discontinue at any stage before judgment is delivered and criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b)....

157(10) The Director of Public Prosecutions shall not require the consent of any person or authority for commencement of criminal proceeding and in exercising his or her powers or functions, shall not be under the direction or control of any person or authority. Emphasis added

7. It is therefore clear that section 89 of CPC only deals with the making of complaint and institution of proceedings and my read of the same together with section 88 is that it is only provided for where the private citizen wants to institute private prosecution.

8. As was stated in the case of ELORY KRANEVELD v AG & 2 OTHERS PETITION NO. 2 OF 2012

“our judicial system is not one where a judge is granted such powers as to investigate criminal complaint. That power lies in “Article 157(4) of the Constitution.”.

9. Since the applicant has submitted that he does not intend to institute private prosecution under section 88 of CPC I see no purpose which will be served by the Chief Magistrate signing the complaint herein unless the same intends to institute private prosecution for which he must satisfy the condition set by Kuloba J. in FLORICULTURE INTERNATIONAL LTD & OTHERS HIGH COURT MISC. CIVIL APPLICATION NO. 114/1997 cited with approval in OTIENO CLIFFORD RICHARD v R HIGH COURT AT NAIROBI MISC. CIVIL SUIT NO. 720/2005.

10. In the final analysis I find no merit in the application herein which I hereby dismiss.

Dated, signed and delivered at Nyeri this 15th day of October 2014.

J.WAKIAGA

JUDGE

Court: Ruling read in open court in the presence of Mr. Njue for the state and Mr. Francis Ndiritu Karuru applicant. The applicant has 14 days right of appeal.

J. WAKIAGA

JUDGE