



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION 282 OF 2011

ALVIN KAMANDE NJENGA.....APPLICANT

JOBLEY CONSTANCE OYIEGE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The applicants approached this Court by way of Chamber Summons dated 13th May 2011 seeking construction of **Section 243 (d)** and **Section 95(1)** of the **Penal Code**. In the supporting affidavit the 1st applicant states that the charges against them were trumped-up and that there is inconsistency in the construction of the statute. The applicants subsequently filed several other applications essentially urging that the charges against them were wrongly preferred and thus the proceedings in the trial court should be terminated.

2. During the hearing of the application the applicants reiterated the prayers sought in the application and written submissions. The learned state counsel Mr. Mulati did not challenge the application and left it to the court.

3. The charges being referred to relate to criminal cases against the applicants, namely **Limuru CM Cr. case No. 887 of 2009, Limuru CM Cr. case 1132 of 2010 and Makadara CM Cr. case No 439 of 2000**. The provisions referred for interpretation are **Sections 243 (d)** and **Section 95(1)** of the **Penal Code**.

Section 243 provides for the offences of reckless and negligent acts. **Paragraph (d)** thereof provides,

Any person who, in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person-

d) omits to take precautions against any probable danger from any animal in his possession;

.....
is guilty of a misdemeanour.

While **Section 95(1)** provides:

Any person who –

a) *uses obscene, abusive or insulting language, to his employer or to any person placed in authority over him by his employer, in such a manner as is likely to cause a breach of the peace; or*

b) *brawls or in any other manner creates a disturbance in such a manner as is likely to cause a breach of the peace,*

is guilty of a misdemeanour and is liable to imprisonment for six months.

4. The applicants in their submissions have not put out a case on what specific issue is sought for interpretation. Conversely, the applicants' submissions seem to dwell on the merits of the criminal charges against them that are pending in the respective trial courts, by challenging the prosecution testimony and the finding of the trial court. I find no issue before this Court that requires interpretation. The cited provisions in the Penal Code are clear and unambiguous as to the offences and the elements thereof. The application of these provisions is therefore to be weighed against the evidence presented before the court. This court does not wish to go into the substance of the proceedings pending before the trial court.

5. Furthermore, the applicants have an avenue should there be any dissatisfaction with the decisions of the trial Court. They have a right of appeal to the High Court or to apply for review of the decision of the trial Court. Once a trial Court delivers its ruling on whether or not the Applicants have a case to answer, the case proceeds with the defence testimony and it's upon the conclusion of the matter and (depending on the outcome of the Court' finding) that the applicants can challenge the finding. The applicants have not taken any of the options available and instead canvassed their arguments that are essentially challenging the prosecution case and do not relate to the prayers sought. By this application, the applicants have unnecessarily halted the conclusion of the trial process.

6. The applicants have further submitted that the charges against them have been wrongly preferred thus the trial should be terminated. The applicant ought to challenge the propriety or otherwise of the charges against them before the trial court upon which an appropriate finding will be made to determine whether the trial proceeds or abates.

7. Proceedings against an accused person can abate as a result of any of the following:

a) Termination through withdrawal of complaint by the complainant under **Section 204 Criminal Procedure Code** which provides,

If a complainant, at any time before a final order is passed in a case, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw it and shall thereupon acquit the accused

b) Termination by the Director of Public Prosecutions (DPP), by invoking the powers under **Article 157 (6) (b) of the Constitution**, which gives the Director powers to

..... 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).

When such powers are invoked, the defendant shall be acquitted. However, the Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

c) Termination through plea agreement as provided for under **Section 137A. (1) of the CPC** that:

Subject to section 137B, a prosecutor and an accused person or his representative may negotiate and enter into an agreement in respect of

a)

(b) withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.

A plea agreement so entered must be recorded in court and form part of the court proceedings. No such process is indicated in the court records to have taken place. This fact has not been confirmed by the prosecution.

d) Acquittal of an accused person after a finding of no case to answer or upon a final finding of not guilty.

None of the above-cited processes have occurred in the applicants cases, and the submission that the applicants and the Director of Public Prosecutions had reached an agreement is without basis, since there is no record of such an agreement before the court.

8. The applicants referred this court to the cases of **R vs. Gould, (1968) 2QB 65** and **R vs. Taylor (1950) K.B. 368** to support the application. In the former, the appellate court departed from an earlier decision that was wrongly decided and allowed an applicant convicted of the offence of bigamy to rely on the defense of honest and mistaken belief of a fact and held that even when the statutory provisions on the offence are absolute, a new statutory criminal offence is not committed if the mind of the person doing the act in question was innocent. In the latter case, the court held that where it appears that in a previous decision of the court the law has either been misapplied or is misunderstood, and that as a result of a judge's having followed that decision, a person has been convicted and sentenced, it is the bounden duty of the court to reconsider its own earlier decision with a view to seeing whether that person was property convicted.

9. The cited authorities do not support or apply to the application at hand. There is no record to show that the trial court has misapplied the law or wrongly made a finding. This court therefore cannot accommodate the applicants' apparent attempt to frustrate the progression of the case pending before the trial court.

10. This application has no merit and is hereby dismissed. The trial is therefore to continue before the respective trial Magistrates Court.

SIGNED DATED and DELIVERED in open court this 10th day of October 2012.

L. A. ACHODE

JUDGE