



REPUBLIC OF KENYA

High Court at Nakuru

Revision Case 9 of 2012

PETER NJUGUNA MBURUGU.....1ST APPLICANT

FRANCIS MUTUKU MUTUNGI.....2ND APPLICANT

BENJAMIN KAPE.....3RD APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

By a Notice of Motion dated and filed 21st May, 2012 the Applicant, Francis Mutuku Mutungi sought two orders -

- (a) *That this honourable Court does revise the orders of the trial Court of withdrawal under 87A of the Criminal Procedure Code (Cap. 75 Laws of Kenya) of Nakuru Chief Magistrate's Court Criminal Case Number 1427 of 2006 between Republic -vs- Francis Mutuku Mutungi issued on the 12th day of February, 2010*
- (b) *That upon revising, this honourable court be pleased to substitute the same with an order dismissing the case in Nakuru Chief Magistrate Court Criminal Case Number 1427 of 2006 between Republic -vs- Francis Mutuku Mutungi for want of prosecution under Section 202 of the Criminal Procedure code.*
- (c) *That any other order this honourable court may deem fit and expedient to grant.*

The Motion was served upon office of the Director of Public Prosecutions Nakuru and was heard on 18th June, 2012. Mr. Maragia learned counsel for the Applicant correctly submitted that the motion raised only one issue, namely whether there was authority from either the Hon. Attorney General or Hon. Director of Public Prosecutions to withdraw the case under section 87A of the Criminal Procedure Code, (Cap 75, Laws of Kenya), Counsel therefore wanted the court to look at the matter and rule on it independently and proceed on three options-

- (a) *direct that the matter proceed from where the trial magistrate left, or*
- (b) *rule on the basis of the evidence, or*
- (c) *acquit the applicant;*

On his part Mr. Omwega learned State Counsel left the issue for determination by the court.

The Application herein is premised up the provision of Section 364(1) as read with Section 362 of the Criminal Procedure Code. The Applicant also cited Article 165(6) and (2) of the Constitution of Kenya 2010 which vests upon the High Court Supervisory powers upon the subordinate courts.

The Applicant's complaint in this matter, is that the prosecution did not produce either an authority from the Hon. Attorney-General or the Director of Public Prosecutions, or the consent of the court to withdraw the case under Section 87A of the Criminal Procedure Code. The said Section provides -

Section 87 in a trial before a subordinate court a public prosecutor may with the consent of the court or on the instruction or the Attorney General at any time before the judgment is pronounced withdrawn from the prosecution of any person and upon withdrawal:-

(a) if is made before the accused person is called upon to make his defence, he shall be discharged but the discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts,

(b) if is made after the accused person is called upon to make his defence he shall be acquitted.

The prayer of revision vested in this court under Section 362 of the Criminal Procedure Code is principally to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to regularity of any proceedings of any subordinate court.

Where the finds that the findings, sentence, or order recorded or passed by the subordinate was either not correct, lawful or proper, the remedy under Section 364 is either to reverse the sentence where there is a conviction or alter the finding while maintaining the sentence, reduce or increase the sentence as prescribed by Section 354 of the Criminal Procedure Code.

This being an application for revision and not an appeal, the courts discretion is circumscribed by Section 362 aforesaid.

The power of withdrawal of a prosecution is vested in the public prosecutor on instructions of the Attorney General or the Director of Public Prosecution, under the repealed Constitution, (*where the Attorney General was effectively also the Director of Public Prosecution, Section 26 of that Constitution*), and under the current Constitution, the Director of Public Prosecution. In the absence of such instructions, a public prosecution may still withdraw a prosecution with the consent of the court seized of the matter. The question is how does the court express its consent for such withdrawal. The court can only do so by or in a written Ruling allowing the application for withdrawal, or as the case may be declining such withdraw.

The consequences of withdrawal are stipulated in section 87 - (a) where the accused has not been called to make his defence, he is entitled to be discharged, but the discharge is not a bar to subsequent prosecution, or (b) where he has been called to make his defence he is entitled to be acquitted.

In this case, the applicant had not been put to his defence, the court acted quite properly and within the discretion conferred upon it by Section 87(a) to consent to the withdrawal of the case. It is not a condition precedent to the withdrawal of a case that instructions to withdraw be obtained from the Attorney or the Director of Public Prosecutions. The Attorney General's authority is one of the grounds for withdrawal. The other is the consent of the court, which may for good reason still refuse such withdrawal. For instance the prosecution may have so advanced that withdrawal of the case at such stage would amount to abuse of the criminal law process and in which event, the court would be within the bounds of its discretion to direct the prosecution the close its case and allow the court to rule whether or not to put the accused to his defence. This was not the situation in this case, hence the order of discharge of the accused.

There is indeed a risk that the applicant can be charged again on the same facts; but that is the law of the land. The Applicant has not been convicted, and the discretion whether or not to re-employ him lies entirely with his employer, not the court.

I am satisfied that the learned trial magistrate proceeded correctly within the law, and this being an application for Revision, there is no basis for orders for a Ruling on the basis of either evidence before the lower court, or for an order of acquittal.

The Motion dated and filed on 21st May 2012 is therefore dismissed as lacking any merit.

It is so ordered.

Dated, signed and delivered at Nakuru this 10th day of October, 2012

M. J. ANYARA EMUKULE

JUDGE