



1. Criminal Practice and procedure
2. Murder charge:-
  - a. Suspect arrested without a warrant of arrest on 31.8.09 and brought to the High Court of Kenya on a charge sheet described as a holding charge (14.9.09) (DR)
  - b. On 16<sup>th</sup> September, 2009 no plea is taken. State notifies court charge is a holding one. Plea differed for a week 23.9.09 then 5.10.09.
  - c. On 5.10.09, the state counsel (with no delegated powers, prays to withdraw the charge of murder, written on a charge sheet).
  - d. State counsel's intention is to withdraw the holding charge of murder and substitute a charge of manslaughter.
  - e. Claims to derive powers to do so under Section 26 of the Constitution. No objection by the defence advocate.

### 3. Issue

“Whether the state counsel has powers to withdraw the holding charge or any charge before the High Court”

#### **I: State counsel in reply**

- i. That any reference to the High Court is referred to “an information”.
- ii. This cannot be withdrawn unless the Attorney General does so in writing or delegates to such persons.
- iii. The holding charge on the other hand is not a charge. It can be withdrawn by the state counsel as he is the Attorney General's subordinate.
- iv. Advocate for the suspect supports the arguments.

### 4. Held

- i. Charge is an illegality and cannot be withdrawn.
- ii. Charge struck out.
- iii. Charge is drawn up by the police or the magistrate
- iv. The charge concerns the subordinate court and never the High Court.

- v. The High Court is approached by way of information in murder trials.
- vi. Once an information is filed, it can only be withdrawn by the Attorney General and his subordinates who are authorized through a Kenya gazette to do so.

5. **Case Law** -Nil

6. **Advocate**

P. Kiprop state counsel instructed by the Attorney General for the State – present

W.R. Kiprono advocate instructed by the firm of M/S W.R. Kiprono & Co. advocates for the accused - present

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CRIMINAL CASE 31 OF 2009**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**PAUL KIPKEMOI KORIR .....ACCUSED**

**RULING**

**Criminal Practice and Procedure**

**I. Holding Charge**

1. Paul Kipkemoi Korir a male adult was arraigned to this court on the 14<sup>th</sup> September, 2009 before the Deputy Registrar. He appeared before the Hon. Judge on the 16<sup>th</sup> September, 2009. In the file was contained a charge sheet prepared by the officer in charge Bomet Police Station. The charge being that of murder contrary to **section 203** as read with **section 204** of the Penal Code.

The particulars of offence being

***“On the 2<sup>nd</sup> February, 2009 at Bingwa village in Bomet District within the Rift Valley province murdered David Byegon”.***

2. The state counsel requested for more time to confirm the holding charge. This court granted his request. On 5<sup>th</sup> October, 2009 when the said Paul Kipkemoi Korir appeared to Court, he was assigned an advocate, W.R. Kiprono to represent him.

3. The state then asked the court to be permitted to withdraw the charge sheet. The issue therefore arose

***“Whether the state counsel has powers to withdraw the holding charge or any charge before the High Court?”***

## **II: Explanation**

4. In his arguments the state counsel submitted that the police are only permitted to hold a suspect for fourteen days. In order to beat this deadline the police would draw up a charge sheet of murder in order to have the suspect formally arraigned to court.
5. The normal procedure though, would be to first forward their files to the state counsel. That thereafter the state counsel would draw up an information to the High Court for the offence of murder.
6. The issue therefore was, that before this High Court, there was no information. It was the police who prepared their own charge sheet which the state counsel described as a “*holding charge*” but there was no such indication on the charge sheet itself.
7. It was therefore the explanation of the state counsel that he was withdrawing the holding charge as the suspect had not been charged.
8. The advocate for the suspect supported these arguments.

## **III: Opinion**

9. “A charge is a formal written accusation of an offence drawn by a magistrate or by a police officer and signed as required by law for purpose of use in preliminary proceedings or in a proper trial” a handbook on Criminal Procedure in Kenya P.L.O Lumumba 1998 edition at page 70.
10. An information is drawn by a state counsel to be placed before the High Court. Both are provided for under **Section 137** of the Criminal Procedure Code.
11. It is therefore admitted by the state counsel that the charge sheet before this court was so filed and brought without the state counsel first perusing the file and framing his information. To all extent, the filing of a charge sheet by the officer in charge of the Kenya Police Station to the High Court is irregular and illegal.
12. The other issue is, whether the state counsel may withdraw the charge sheet. To my mind you cannot withdraw an illegality. Further the state counsel is a representative of the attorney general but has no powers to withdraw any information once filed to court.
13. Only state counsel who have been duly gazetted by the attorney general to hold special powers including that of withdrawing an information may be permitted to withdraw an information.
14. The state counsel herein is not a gazetted officer and thus has no powers to withdraw any information before court.

### **III: what should the police do in finding themselves in the predicament of having a suspect but the state counsel has not framed an information?**

15. The charge of manslaughter may be framed by the police. It is this charge that could be used to have the suspect appear in the subordinate courts. The information would then be referred on the withdrawal of the offence of manslaughter.
16. An information for murder and not manslaughter, if so filed by the state, may be withdrawn by an authorized state counsel so delegated and an offence of manslaughter substituted.
17. Until recently plea bargaining was not in any statute books. In any case such procedure is elaborate and is based on there being an information. There is no information before this court.

## **IV: Conclusion**

18. The state counsel has no powers to withdraw an illegality. The charge sheet before me is struck out. The suspect is set at liberty unless otherwise lawfully held.

**DATED** this 8<sup>th</sup> day of October, 2009 at **KERICHO**

**M.A. ANG'AWA**

**JUDGE**

**Advocate**

P. Kiprop state counsel instructed by the Attorney General for the State – present

W.R. Kiprono advocate instructed by the firm of M/S W.R. Kiprono & Co. advocates for the accused - present