



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CRIMINAL MISC. NO. 1 OF 2015**

**IN THE MATTER OF CRIMINAL PROCEDURE CODE CAP 75**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CRIMINAL CASE NO. 1067 OF 2014 AT RESIDENT MAGISTRATE'S COURT  
AT LOITOKITOK – REPUBLIC VS. FAITH WANGOI**

**RULING**

1. The applicant brought this application by way of notice of motion filed in court on 21/11/2014 pursuant to **Section 204, 362, 363, 365 of the Criminal Procedure Code** and **Article 23 and Section 25 of the Constitution** and all the enabling provisions of the law.
2. The basis of the application and revision is that this Honourable Court do exercise its discretion in revision of the ruling by Hon. Principal Magistrate and Order for the proceedings in **Criminal Case No. 1067 of 2014** at Loitokitok.
3. That this Honourable Court do exercise its discretion in revision of the ruling by Hon. Resident Magistrate **Mary Akala** made on 5/11/2014 whether the said magistrate refused to allow an application under **Section 204 of the Criminal Procedure Code** by the accused and the complainant to withdraw the criminal proceedings against the accused in contravention of the appellants' constitutional rights.
4. The application is supported by the affidavit of Antony Mugodo legal officer of Bridge International Ltd being the accused corporate body it is opposed on the grounds contained in the replying affidavit of **J.N. Abuga** a prosecution counsel in the Office of the Director of Public Prosecution.
5. The background facts as stated in the supporting affidavit and in the ruling in court; that Bridge International Academies applied for registration of Illasit Academy to the District Education Officer Loitokitok. The application was declined. An application for judicial review was filed at Machakos High Court challenging the decision. The interlocutory order of stay was later vacated on 19/2/2014 for failure by the advocate to file the substitute motion.
6. The Quality Assurance and Standards Officer filed a complaint with Illasit Police on 18/7/2014 against Bridge International Academy.
7. A charge against the applicant was prepared with the offence of operating an unregistered private school Contrary to **Section 50(2) (b)** as read with **Section 4(a) of Basic Education Act 2013**.

8. The applicant initiated negotiations which bore fruit and the complainant wrote a letter to withdraw the complaint.
9. That the Honourable learned magistrate declined to allow complainant to withdraw the charges under **Section 204 of Criminal Procedure Code** on grounds the prosecution had not consented nor been consented for in part.
10. The record of proceedings and the ruling has been brought to my attention vide notice of motion dated 20/11/2014 filed in court on 21/11/2014.
11. The basis of the revision is that the complainant was no longer interested in the matter. Further the parties entered into a negotiation to settle the matter out of court.
12. The decision that this court is asked to revise was made by the trial court on 5/11/2014.
13. From the record on the material day applicant's counsel filed a letter dated 5/10/2014 seeking withdrawal of the complaint and have case settled out of court.
14. The prosecution counsel objected that his office had not been briefed and needed time to take instructions.
15. The learned trial magistrate considered the prosecution counsel reservations and ordered as follows:

***"I see nothing wrong if the complainant herein briefs the prosecution counsel on the progress made by parties herein before the application can be entertained by this court....."***

***The court is a neutral entity and well embraces ADR where parties are in agreement. The application is thus rejected for now. It can be revisited later."***

This is the gist of the revision orders before this court.

16. The applicant did not go back to court but preferred to file a review before the High Court to challenge the learned trial magistrate decision.
17. The application raises questions of the correctness, legality, propriety and regularity of a decision of a trial court.
18. The jurisdiction of the High Court to review or revise orders of a subordinate court or tribunal is under pinned by the **Constitution 2010 Article 165(6)** and **Section 362** as read together with **Section 364** of the Criminal Procedure Code **Cap 73** of the Laws of Kenya.
19. In the application before me the person who filed a complaint with the police has applied for a revision order of the trial court which, rejected the application by way of a letter to withdraw the charges against the accused persons under **Section 204 of CPC**.
20. I have carefully and anxiously considered the application for review and submissions by both counsels to the applicant and objections raised by prosecution counsel. In my considered view the following issues arise out of the application for this court determination.
  - a. Who is a complainant in a criminal case in our courts.
  - b. Whether the prosecution was right in objecting to the withdrawal application under **Section 204** of CPC.
  - c. Whether the learned trial magistrate discretion to decline to grant an order of withdrawal under **Section 204** of Criminal Procedure Code was proper.
21. On the first issue regarding definition of a complainant, the criminal procedure code cap 75 of the Laws of Kenya on definition of terms does not define the word complainant. However **Section 2** defines word complainant as ***"an allegation that some person known or unknown has committed or is guilty of an offence."***
22. In 2003 through **Criminal Law Amendment Act No. 5 of 2003** the legislation taking cognizance

of the omission of definition of who is a complainant amended Section 2 of Criminal Procedure Code and provided for the definition

***“As a person who lodges a complaint with the police or any other lawful authority.”***

23. That amendment of **Article No. 5 of 2003 Section 59** provided even the definition of word complainant in our criminal law in the Criminal Procedure Code.

However in an interesting turn of events parliament revisited the issue vide **Statute Law Miscellaneous Amendment Act of 2007** and deleted definition of word complainant under **Section 2 of Criminal Procedure Code** pursuant to Criminal Law Amendment Act No.5 of 2003.

24. The effect of that amendment in 2007 did away with definition of a complainant in criminal law. The nearest our Criminal Procedure Code **Cap 75** of Laws of Kenya has made an appreciation of the meaning of the word complainant is under **Section 208(1) of the Code**.

It reads as follows:”

***“(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any).”***

25. It therefore follows that on one hand the complainant is one who lodges a complaint with the police or any other lawful authority that some offence or criminal act has been committed.

The second limits of the word complainant and application of the meaning has been clearly restated by Judges of the High Court in Kenya.

In the case of **REPUBLIC VS. MWAURA 1979 KLR 209** the High Court held that a complainant included the public prosecutor.

Further in **RUHI VS. REPUBLIC 1985 KLR 373** the High Court held as follows;

***“We must state at the onset that we are satisfied that the term complainant in Section 208(1) of the Criminal Procedure Code includes; The prosecution as well as the person so described in the particulars of the charge.”***

26. The word complainant in Criminal Proceedings seems sometimes to cause misunderstanding in our courts as to exact meaning and application.

In the case of **ROY RICHARD ELIMMA & ANOTHER VS. REPUBLIC CR. APPEAL NO. 67 OF 2002**. The court of appeal in considering **Section 202 of Criminal Procedure Code** dealt with the issue of complainant and stated:

***“The parties named in Section 202 for example, are all complainants and the accused person if the complainant is aware of the hearing date and is absent without explanation, the court may acquit the accused person, unless the court sees some other good reason for adjourning the hearing. The “complainant” in this contest has been interpreted to mean the “Republic” in whose name all Criminal Prosecutions are brought and not the victim of the crime who is merely the chief witness on behalf of the Republic.”***

27. There is no dispute that all criminal proceedings are commenced and initiated by the “Republic” against a particular person or authority or legal entity. The accurate interpretation as provided for herein by the Court of Appeal is correct.
28. In respect to the law our courts in Kenya and the Office of the Director of Public Prosecutions are Constitution 2010 and statutory creations.

Their functions and powers are clearly defined by the written law. The essential function of a court is to adjudicate, that of the Director of Public Prosecutions is to control all criminal proceedings. A judge or magistrate has full control of his court but he must carry out the procedure as laid down by law.

29. That brings me to the second question whether the prosecution was right in objecting to the withdrawal lodged by the chief witness’ Article 157(1) of the Constitution creates the office of the Director of Public Prosecutions.

**(6) The Director of Public Prosecutions 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) To take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority or to discontinue at any stage before judgement is delivered any such criminal proceeding instituted it undertaken by himself or any other person or authority.**

30. The law therefore empowers the Director of Prosecutions to discontinue any proceedings at any stage before judgement is given. The specific power is to initiate, control and undertake criminal proceedings against

any person is under the Director of Public Prosecutions.

31. The issue here is simply that the prosecution counsel at the trial court was right in seeking time to consider carefully nature of the letter by their ‘chief witness’ to withdraw the complaint.

32. From the record and letter of withdrawal accused had other pending criminal cases which Director of Public Prosecutions needed to familiarize and understand their nature and status.

**Under Article 157 (II)** the Constitution enjoins the Director of Public Prosecutions to exercise powers under **Article 157** with due regard to public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process.

33. Thirdly the issue for determination is whether the learned trial magistrate erred in law rejecting the withdrawal application under **Section 204 of C.P.C.** Section 204 of the Criminal Procedure Code provides:

**“If a complaint, at any time before the final order is passed in a case under this part, 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.”**

35. The section stipulates that it is the complainant who can make an application to withdraw the

complaint from court.

36. Secondly the court in exercising discretion to grant the request has to be satisfied that there are sufficient grounds for permitting the withdrawal. The definition as to who is complainant in criminal proceedings has been dealt with earlier in this ruling.

37. I have considered and evaluated the record and an order by learned trial magistrate subject matter for review.

38. I am of the conceded view and in applying the law that the form the instructions should have taken in withdrawing a complaint is through the prosecutor. In practice the courts have always acted on the word of the prosecuting counsel or public prosecutor who controls and guides criminal proceedings.

39. Before making an order Section 204 would apply where the learned trial magistrate is satisfied that there are sufficient grounds for permitting a withdrawal.

40. In the case before me the letter dated 5/10/2014 stated the reasons for withdrawal as mutual agreement and a sign of good faith. It is not possible to deduce whether that was sufficient to enable exercise of discretion under **Section 204 of CPC** by the learned trial magistrate. It was necessary to place before court nature of the agreement between the complainant and accused to facilitate a withdrawal. The reasons are not set out in the letter. In particular the charges facing accused person were in respect of operating unregistered Private School Contrary to **Section 50(2) (h)** as read with **Section 4(1) of Basic Education Act 2013**. This case therefore has a public interest under Article 157(II) of the Constitution which the DPP shall have regard to avoid abuse of legal process.

41. Further in this review application counsel for the applicant in his submissions mentioned **Article 159 2(c)** of the Constitution of Kenya. The Article obligates the court to promote alternative dispute resolutions including reconciliation as a principle of justice.

42. As far as the learned trial magistrate was concerned she was alive of the provisions of **Article 159 2(c)** in administration of justice. She was therefore right in holding that the matter could have been resolved by way of reconciliation but with a rider that consent of parties was necessary. The necessary party being office of the Director of Public Prosecutions.

43. In the instant case the record does not indicate that prosecution had been involved in the mode of alternative dispute resolution adopted by the accused and victim of the offence. In view of the foregoing I agree with the trial court entirely for not granting the prayer of withdrawal at that stage of the proceedings.

44. The proper course in the circumstances of the case was to file the letter of withdrawal with the prosecution. This could have given an opportunity to the prosecutor to participate in discontinuation of proceedings before court under Section 204 of C.P.C.

45. The applicant has not impugned the legality, correctness and propriety of an order by trial court. I hereby dismiss the same and remit the file back to Senior Principal Magistrate to proceed to dispose off the matter accordingly.

***Dated and delivered at Kajiado this 16<sup>th</sup> November, 2015.***

**R. NYAKUNDI**

## JUDGE

In presence of Mr. Akula for State

Mateli Court Assistant



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