



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO. 10 OF 2019**

**BETWEEN**

**WILFRED MARIGA NYAMU NYAM.....PROSECUTION**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**CORAM: LADY JUSTICE RUTH N. SITATI**

**RULING**

**Introduction**

1. This matter came before me by way of a written request filed in court on 21.6.2019. The same is not dated. The applicant prays that this court may, by dint of *section 362 of the Criminal Procedure Code*, call for and examine the records of proceedings before the subordinate court in Kapenguria SPMC Cr. Case no. 670 of 2018 for purposes of satisfying itself as to the correctness, legality and/or propriety of the findings and orders recorded and as passed by the trial court on 16.4.2019 with a view to setting aside the said findings and/or orders, and to declare that there were no reasonable grounds for the trial court's findings/orders. From the record, the case against the applicant was withdrawn under *section 87(a) of the Criminal Procedure Code*. The applicant contends that the case against him should have been terminated either under *section 176 of the CPC* or the applicant should have been acquitted under *section 202 of the CPC* or alternatively, the learned trial magistrate should have allowed the case to go to full trial

**The Law**

2. For the avoidance of doubt *section 362 of the CPC* which clothes this court with revisionary powers provides as follows:-

*“362. The High court may call for and examine the record of any criminal proceedings of a subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”*

3. On the other hand, *section 87 of the CPC* generally deals with withdrawal from prosecution in trials before subordinate courts. The section allows a public prosecutor, with the consent of the court, or on the instructions of the Director of Public Prosecution, at any time before judgment is pronounced, to withdraw from the prosecution of any person and upon withdraw:-

*a) if it is made before the accused person is called upon to make his defence, he shall be discharged but discharge of an accused*

*person shall not operate as a bar to subsequent proceedings against him on account of the same facts.*

4. Depending on what the High Court finds on perusal of the lower court record, the High Court may determine the matter in accordance with either *section 364 or sections 354, 357 and 358 of the CPC*, only bearing in mind the fact that it should not make an order that would result in prejudice to the applicant, unless of course the applicant is given an opportunity to be heard either by himself or through his advocate. In this regard, see *Republic versus Mohamed Rage Shide – High Court at Garissa, Criminal Revision No. 9 of 2016*.

#### **Background**

5. The applicant herein was arrested on 24.4.2018 and placed in cells until 27.4.2018 when he was produced in court for orders extending his stay in cells until 30.4.2018. He took plea on 30.4.2018. The applicant was eventually released on bond. Apparently and despite a request for the same, the prosecution did not supply witness statements and other related documents to the defence. In the meantime also, there were some private conversations going on between the applicant's counsel and the complainant's counsel to the effect that the complainant was willing to withdraw the complaint against the applicant.

#### **Withdrawal of the charge**

6. On 16.4.2018, the prosecution withdrew the charge against the applicant under *section 87(a) of the CPC*. From the record of the 16.4.2019, the proceedings were as follows:-

**“16.4.2019**

**Coram: Before V. O. Adet (SRM)**

**Mr. Thuo – state counsel**

**Adan – Court assistants**

**Accused – present**

**Interpretation – Kiswahili**

**Mr Barongo for accused – absent**

**M/S Chebet**

**M/S KIPTOO**

**The case has issues. We have not been able to gather some evidence. We wish to withdraw the same under section 87(a) CPC to enable the ODPP and investigator to look into some issues before we decide on way forward.**

**M/S CHEBET**

**I have been able to talk to Mr. Barongo. He opposed. The accused and the employer are negotiating settlement and withdrawing the matter under section 87(a) CPC will prejudice the accused. They pray for more time for parties to sought the issue before withdrawal.**

**V. O. ADET**

**SENIOR RESIDENT MAGISTRATE**

16.4.2019

**M/S KIPTOO**

**On 8.1.2019, I indicated to court that we had to do further investigation. The parties negotiation is not an issue. We are doing our part to ensure that both parties have justice. Our application is not in bad faith. The complainant is not interested. We pray the court to withdraw to pave way for further investigation.**

**V. O. ADET**

**SENIOR RESIDENT MAGISTRATE**

16.4.2019

**COURT**

**From the submission it's clear that parties are not interested in pursuing the matter. I do order allow the application for withdrawal to issue under section 87(a) of CPC. Accused is discharged forthwith. Suit is discharged."**

7. From the applicant's submissions, the negotiation for an amicable settlement with his employer fell through when he demanded to be paid his salary arrears and the amount of Kshs.90,000/- being legal fees and Kshs.13,200/- being other costs incurred. The applicant opines that the case was withdrawn under the said section due to lack of evidence. The applicant also complains that failure to agree on an out of court settlement has resulted in his remaining unemployed with loss of income. The applicant also doubts the State's sincerity in withdrawing the case under *section 87(a) of the CPC*. The applicant relied on a number of authorities being *Titus Koome Kubai & 2 others versus DPP, Petition no. 1 of 2014 – at Meru High court*. In the said case, there had been six adjournments, and the court ruled that it would not be fair for the prosecution to be allowed to withdraw the case under *section 87(a) of the CPC*. It was further held that an application under *section 87(a) of the CPC* should be premised on the need to protect the public and the need to protect the interests of justice and to prevent abuse of the legal process. The applicant also relied on *Republic versus Jacob Bundi & another High court at Meru Criminal Revision no. 24 of 2018*. In the case, the court held that the order for withdrawal under *section 87(a) of the CPC* could not stand because the victim in the case was not heard.

8. M/S Kiptoo for the respondent made oral submissions and also relied on the sworn affidavit of no. 80205 PC Evans Waguda dated 25.9.2019. In the affidavit, PC Waguda avers that from the investigations carried out so far, there is sufficient evidence to enable the prosecution to proceed with the case against the applicant if the decision to re-arrest the applicant is made. M/S Kiptoo further submitted that their application to withdraw the case was made in good faith, and that in any event, the negotiations alluded to by the applicant's counsel between the parties were not binding on the prosecution.

9. The applicant however contends that once there was no indication from the prosecution that there were plans to re-arrest the applicant, then the order remains prejudicial to the applicant, hence the instant application.

**Analysis and Determination**

10. The issue for determination is whether the applicant is entitled to the orders sought. In exercising its power of revision, the court is subject to the provision of *section 364(5) of the CPC* which provides that :-

***“When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”***

11. This court is also under a duty to consider whether this application has been brought in the public interest, in addition to the interests of administration of justice. Wendoh J in the *Titus Koome Case* (above) was guided by the provisions of *Article 157(11) of the Constitution* which provisions behove the Director of Public Prosecutions to have regard to the public interest, the interests of administration of justice and the need to prevent and avoid abuse of the legal process in deciding on the option of withdrawal of a case under *section 87(a) of the CPC*. The learned judge also placed reliance on the case of *Crispus Karanja Njogu versus AG Ur*

*Criminal Application no. 39 of 2000 (HC)* where the court held generally that the powers of the Attorney General to enter a *nolle prosequi* were subject to the scrutiny of the court where the discretion of the Attorney General did not meet the test of Constitutionality by virtue of *section 123(8)* of the former Constitution.

12. In the instant case, the applicant took plea on 30.4.2018 by which he denied stealing the sum of Kshs.2.5 million the property of Khetia Wholesalers Company which came into his possession by virtue of his employment. The case was fixed for hearing on 9.7.2018. on the 9.5.2018 the same day the applicant was released on bond, Mr. Barongo applied for witness statement. The court granted the request. When the case came up for hearing on 9.7.2018, M/S Chebet who held brief for Mr. Barongo informed the court that Mr. Barongo was not ready to proceed since he was yet to be supplied with witness statements. On the next hearing date on 3.10.2019, the trial court was not sitting so the case was adjourned to 19.11.2019. On 19.11.2018, the case was adjourned to 8.1.2019, since the trial court was not sitting. Again on 8.1.2019, the case could not proceed because the trial court was attending to other official duties. Fresh hearing was fixed for 6.3.2019 but on that day, the trial court was away on official duties. The case was fixed for mention on 16.4.2019. It was on that date that the prosecution applied to withdraw the case under *section 87(a) of the CPC*. Apart from 9.7.2018, the record does not show any concerns of the defence counsel about witness statements. The only reason why the defence opposed the prosecution's application for withdrawal was that there were ongoing negotiations to settle the matter out of court.

13. In granting the order for withdrawal, the court noted that the parties did not appear interested in pursuing the matter. He accordingly allowed the application and discharged the applicant. The applicant who was represented knew or ought to have known that withdrawal of the case under *section 87(a) of the CPC* did not bar the prosecution from re-opening the case against him on the same facts. At that point, the defence was free to appeal the trial court's order, but did not do so until this application was filed on 21.6.2019, roughly two months down the line since the making of the order. It appears to me that the instant application was filed after the negotiations for an out of court settlement failed. This, in my considered view, is not a reason for questioning the discharge orders made under *section 87(a) of the CPC*.

14. Taking all the circumstances of this case into account, I do not find that the order for withdraw was unreasonable. Except for 9.7.2018 when the trial court was available to conduct the case, on all the other days when the case came up for hearing, the trial court was not sitting for one reason or another. It is about one and a half years since the applicant was first arraigned in court. There is no prejudice that would accrue against the applicant if he is re-arrested and charged afresh. I am satisfied that, the trial court exercised its discretion properly, considering the position taken by the applicant on 16.4.2018.

### **Conclusion**

15. In light of all the above, I dismiss the applicant's application for revision of the trial court's order dated 16.4.2019. I find that the applicant's complaint is not made in good faith. He is out to abuse the legal process.

16. It is so ordered.

**Ruling delivered, dated and signed in open court at Kapenguria on this 5<sup>th</sup> day of November, 2019**

**RUTH N. SITATI**

**JUDGE**

**In the presence of**

M/S Chebet for Barongo – present for applicant

M/S Kiptoo – present for respondent

Mr. W. Juma – court assistant



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