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Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Isaac Lenaola
Citation:	Director of Public Prosecutions (DPP) v Nairobi Chief Magistrate's Court & another [2016] eKLR
Advocates:	Miss Mtela holding brief for Mrs. Oduor for Petitioner Mr. Obura for 1st Respondent
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
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Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.21 OF 2015**

**BETWEEN**

**DIRECTOR OF PUBLIC PROSECUTIONS (DPP).....PETITIONER**

**AND**

**NAIROBI CHIEF MAGISTRATE'S COURT..... 1<sup>ST</sup> RESPONDENT**

**JOHN NJOROGE CHEGE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 23<sup>rd</sup> January 2015 seeks orders that this Court ought to pronounce itself on the validity of the orders dated 13<sup>th</sup> January 2014 issued by the Subordinate Court in **Chief Magistrates Anti-Corruption Case No.5 of 2013** to withdraw the complaint against the 2<sup>nd</sup> Respondent who was the accused in the case; reconsider the same orders so as to accord with the fair administration of justice; and issue such other orders as are necessary to meet the demand of fair administration of justice including directing that the Prosecution's case in the proceedings be allowed to proceed to its logical conclusion.

2. These prayers are based on grounds that: the 2<sup>nd</sup> Respondent is suspected of having committed an economic crime, which is not an offence against any individual person but a crime against the collective basic tenets of democracy as it erodes the faith of people in the administration of justice; the prosecution thereof was sanctioned by the DPP, having met both evidentiary and public interest tests; the circumstances of the proceedings did not warrant any withdrawal or pardon; the withdrawal of the case and acquittal of the accused by the Trial Court was therefore unlawful, irregular and without justification whatsoever in granting a withdrawal; the grounds that the Magistrate relied upon in allowing the withdrawal are not substantial and do not merit discharge of the 2<sup>nd</sup> Respondent; and the ruling on withdrawal not only undermines the doctrine of separation of powers but also forms a bad precedent as economic crimes have a wide range of corrosive effects on the Kenyan society.

**The Factual Background**

3. The facts giving rise to the Petition are fairly simple and are not disputed. They are set out here below.

4. The 2<sup>nd</sup> Respondent was the accused in **Chief Magistrates Anti-Corruption Case No.5 of 2013**, having been charged with the offence of soliciting and receiving a bribe contrary to **Section 39 (3)** and **Section 48** of the **Anti-Corruption and Economic Crimes Act, 2003**. The complaint that led to the charges being effected against him was recorded by Mr. Abdirahman Mohamed Abdullahi and the 2<sup>nd</sup> Respondent took his plea on 4<sup>th</sup> July 2013, pleading not guilty and the matter was set down for hearing on 3<sup>rd</sup> September 2013.

5. The matter was adjourned on that day for the reason that the defence counsel was not ready to proceed and again on the 23<sup>rd</sup> October 2013 as Mr. Abdullahi, who was expected to testify on behalf of the State was not present in Court. The matter was adjourned again on 30<sup>th</sup> January 2014 as the Trial Court was not sitting and on 11<sup>th</sup> February 2014, a date on which the case had been fixed for mention, the defence counsel brought an affidavit sworn by Mr. Abdullahi, indicating his intention to withdraw his complaint against the 2<sup>nd</sup> Respondent. The Prosecutor, Mr. James Mungai Warui however informed the Court that the DPP had considered the said affidavit and had directed that the case should proceed to full hearing and therefore to its logical conclusion. The Court then ruled that the case ought to proceed for hearing on the 25<sup>th</sup> April 2014.

6. On that day, counsel for the 2<sup>nd</sup> Respondent, having informed the Court that he had filed a Constitutional Petition in the High Court, requested that the Court await the result thereof. The matter was then set down for hearing on 25<sup>th</sup> September 2014 but it did not proceed as Mr. Warui was engaged at the Court of Appeal.

7. The case proceeded on 30<sup>th</sup> September 2014 with one prosecution witness, Mr. David Kiboco Wanyoike giving evidence. The matter was then adjourned and proceeded again on 9<sup>th</sup> January 2015 but the 2<sup>nd</sup> Respondent and his counsel were not present and therefore the case was adjourned and was listed for further hearing on 13<sup>th</sup> January 2015.

8. On that day, the defence counsel brought the matter of withdrawal of the complaint to the Court's attention, stating that the complainant, Mr. Abdullahi, had indicated that he wanted to withdraw his complaint against the 2<sup>nd</sup> Respondent. The Prosecutor objected to the withdrawal and stated that the complainant in a corruption case is the State and it is only the State that can apply for any withdrawal.

9. The Trial Court decided to cross-examine Mr. Abdullahi on his affidavit, whereupon it decided that the grounds he offered for withdrawal were sufficient and permitted the withdrawal of his complaint and acquitted the 2<sup>nd</sup> Respondent under **Section 204** of the **Criminal Procedure Code, Cap. 75** of the **laws of Kenya**.

10. The above action triggered the filing of this Petition.

### **The Petitioner's Case**

11. The Petitioner alleges that the Trial Magistrate misdirected himself in holding that Mr. Abdullahi was the complainant, whereas the complainant in every criminal case is the State.

12. He also alleges that the Trial Magistrate improperly invoked **Section 204** of the **Criminal Procedure Code** and failed to consider that the DPP's position was that the case should continue to full hearing rather than be withdrawn and that the prosecution had other witnesses who were willing to testify in the case.

13. The Petitioner further contends that the Hon. Trial Magistrate, outside his mandate, purported to interpret **Article 159** of the **Constitution**, leading to a misapplication of the same to the circumstances before him.

14. The Petitioner also contends that the Hon. Magistrate acquitted the accused person when he had

no power to do so and his actions in this regard were therefore unlawful and irregular.

15. The Petitioner therefore seeks orders that:

***a. The Court urgently call for and examine the record in the Chief Magistrate Anti- Corruption Case No.5 of 2013, Republic versus John Njoroge Chege ('proceedings') so as to satisfy itself and pronounce on the correctness, legality and propriety of the orders of the Subordinate Court in the interests of fair administration of justice;***

***b. The Court be pleased to revise, vary and/or set aside orders given by the Subordinate Court on the 13<sup>th</sup> January, 2015 in the proceedings, so as to accord with the fair administration of justice; and***

***c. The Court be pleased to issue any such order as it may deem necessary to meet the demands of fair administration of justice including but not limited to directing that the prosecution's case in the proceedings be allowed to proceed to its logical conclusion.***

#### **The Respondents' Case**

16. Neither the 1<sup>st</sup> nor 2<sup>nd</sup> Respondent has in any way (written or otherwise) contested the facts alleged and evidence provided by the Petitioner in support of its position in this matter. I also see no response by either of them on the record of this Court although I note that Mr. Wandugi, appeared for the 2<sup>nd</sup> Respondent.

#### **Determination**

17. Before I proceed to determine the issues that are at the core of this matter, I will highlight the laws that sanction my deliberation of this Petition, the subject of which is the reconsideration of certain orders made by the Magistrate's Court.

18. The ***Constitution of Kenya 2010 in Article 165(6) and (7) provides as follows:***

***“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any***

*person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

*(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”*

19. The above position is also echoed in **Section 362** as read together with **Section 364** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya. These sections read as follows:

**“362. Power of High Court to call for records**

*The High Court may call for and examine the record of any criminal proceedings before any 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.”*

**AND**

**“364. Powers of High Court on revision**

1. *In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—*

a. *in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;*

b. *in the case of any other order other than an order of acquittal, alter or reverse the order.”*

20. In interpreting the above provisions, Gikonyo J in the case of **Republic vs Jared Wakhule Tubei & Another [2013] eKLR** stated thus:

***“I wish to point out that, the exercise of supervisory power of the High court, particularly under Article 165(6) & (7) of the Constitution and sections 362-364 of the CPC is so wide, and is not limited to situations where there is an error on the face of the record, or new issues having emerged. It covers incorrect, illegal, improper or irregular proceedings, order or finding of the trial court.”***

He also stated that:

***“...the supervisory jurisdiction is by its very nature aimed at ensuring that the subordinate courts operate within the law when discharging their judicial functions. There is therefore no constitutional or legal necessity that an appeal should be filed on such matters, or before the court could exercise its supervisory authority.”***

21. Further, in ***Republic vs Enock Wekesa and Another Kitale [2010] eKLR***, Koome J stated thus:

***“This Court is entitled to review the decision by the learned magistrate to determine whether it complies with legal standards”*** (The legal standards indicated were the Constitution and other law.)

22. I agree with the Learned Judges and this Court is therefore enjoined to probe if the action that the Trial Court took in allowing withdrawal of the case before it was proper and legal. In the strictest of terms, this will constitute a reconsideration and revision of the decision to permit withdrawal, which, this Court based on the above authorities, is mandated to carry out and if need be reverse the decision of the Trial Court under the Constitution and despite the proviso in **Section 364 (b)** of the **Criminal Procedure Code**.

23. In that context, at the core of this Petition is the issue of the correctness, legality and propriety of the order of the Trial Magistrate to allow withdrawal of **Chief Magistrates Anti-Corruption Case No.5 of 2013** and acquit the accused therein following the complainant's application to withdraw his complaint. As earlier noted, the Respondents in this matter have not made any arguments, written or otherwise in opposition to the allegations of the Petitioner.

24. I note in that regard that **Section 204** of the **Criminal Procedure Code** on withdrawal of a complaint by a complainant provides as follows:

**“Withdrawal of complaint**

***If a complainant, at any time before a 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.***

25. This Section calls for further enquiry in order to ascertain whether or not the subject complaint in this matter was appropriately withdrawn.

26. According to the facts of the case before me, the complainant, Mr. Abdullahi, registered a complaint with the Ethics and Anti-Corruption Commission (EACC) against the 2<sup>nd</sup> Respondent and following investigations based on the said complaint, he was charged with 3 counts of bribery contrary to **Sections 39 (3) and 48** of the **Ethics and Anti-Corruption Act, 2003**.

27. The first issue that arises for determination is whom the Court should consider as a complainant in the context of the present Petition. The contention by the defence counsel at the Trial Court was that a complainant is the person who reports a crime to the police, as is reflected in the charge sheet and that therefore, Mr. Abdullahi was the complainant in the case. The prosecution on the other hand contended that the DPP was the ultimate complainant, on behalf of the State, and Mr. Abdullahi was only a compellable witness.

28. In that regard, the **Criminal Procedure Code** does not offer a definition of the word "complaint" and the word "complainant" was deleted by **Act No.7 of 2007** but case law has provided some guidance on the same.

29. *Indeed, in the proceedings at the Subordinate Court the Trial Magistrate referred to the case of **Republic vs Pattni [2005] 1 KLR 310** quoting the definition that the High Court gave for a complainant. It was thus:*

***"The term complainant indicated the prosecution as well as the person so described in the particulars of the charge. It is clear from section 26(3) of the Constitution that the State, through the Attorney General, is or can become the complainant in every criminal proceeding."***  
***(Emphasis added)***



30. Further, in the case of **Republic vs Mwaura 1979 KLR 209, Cotran J, quoting the Court of Appeal of Tanzania** acquiesced that the word “complainant” includes a “public prosecutor.”

31. I also note that in the case of **Roy Richard Elirema & Another vs Republic, Cr. Appeal No.67 Of 2002**, the Kenyan Court of Appeal in considering **Section 202 of the Criminal Procedure Code** (where a prosecutor fails to appear at a hearing) dealt with the issue of a complainant by stating that:

***“The parties named in Section 202 for example, are all complainants and 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 context 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.”***

32. Although the facts underlying the above dicta are somewhat dissimilar to those before me, I agree with the primary holding of the learned Judges in so far as the prosecutor is referred to as the complainant in whose name all criminal prosecutions are brought, and I therefore find that the same would aptly apply to the facts before me. The Trial Court’s decision therefore, in excluding the prosecutor from its definition of a complainant in a criminal case is unusual, as without the prosecutor in a criminal case, there would no longer be a case. If a prosecutor were available however, other witnesses, other than the witness who reported a complaint, and other evidence, may well be relied upon by the prosecutor to prosecute the case.

33. The principle to be gleaned from the above decisions is therefore that the person reporting the case is a complainant as he “complains” about the crime in the real sense of the word and that the DPP on behalf of the State is also a complainant as the case is commenced in and subsequently sustained in his name. Ultimately then, interpretation of the word complainant to exclude the DPP would be, in this and other cases, detrimental to the ends of justice for the public whom the DPP represents. In this respect, such an interpretation is insupportable in law and I so find.

34. The second issue that comes to mind in unraveling **Section 204** aforesaid is what grounds a Court of Law would consider sufficient and satisfactory to allow a complaint to be withdrawn by a complainant.

35. In the present case, Mr. Abdullahi stated that he was sick and frail, wanted to go abroad for treatment and had also forgiven the 2<sup>nd</sup> Respondent. That he was due for an operation on 16<sup>th</sup> January 2015 and that the case had made him suffer a lot of loss, medically and financially. He added that his religion preached pardon, and that he wanted peace of mind and that he had therefore pardoned the accused. He concluded by stating that he wanted the 2<sup>nd</sup> Respondent to be released and in so praying, he had not been coerced to pardon him.

36. **Section 204** above requires that the Court should be satisfied that there are sufficient grounds on which the complainant is relying to withdraw a complaint before permitting such withdrawal. This means that at the time a complainant makes an application to withdraw a complaint, the Court ought to establish the grounds on which the application is made and assess their sufficiency for that purpose.

37. Sufficiency of the grounds that are offered by a complainant to withdraw a complaint will differ from case to case and therefore have to be considered on the basis of the facts and evidence before a Magistrate. The Magistrate must therefore apply his discretion in so deciding and for good measure, provide the reasons underlying the decision that he reaches.

38. Applying myself to the facts and the relevant legal provisions, I find that the first reason that Mr. Abdullahi offered for wishing to withdraw the complaint; that he was seriously ill, almost disabled by his illness and ready to travel to the United States for an operation; constitutes an otherwise generally allowable ground for withdrawal. However, I note that Mr. Abdullahi had attended Court on several occasions (at least three times) and had sufficient time to offer his testimony before he could travel for treatment, a fact that the prosecution brought to the attention of the Trial Court but was ignored.

39. It is also evident that several adjournments had been sought and the time for Mr. Abdullahi's medical travel therefore drew near. Thus, this reason ceases to be one that, in its entirety, I would consider allowable. Since he was in Court to give testimony on his wish to withdraw the case, in the presence of all other Parties, this Court is not convinced that Mr. Abdullahi could not have provided testimony for the prosecution on that date or on another date preceding that one, when he was also present in Court.

40. As for his second reason for wishing to withdraw the complaint, Mr. Abdullahi specified that his religion preached pardon and he therefore decided to pardon the 2<sup>nd</sup> Respondent.

41. In that regard, and based on what I stated earlier, I am of the view that the crime complained about was not perpetrated against Mr. Abdullahi individually. The nature of corruption and bribery is that they are indeed crimes against the entire population in Kenya. Similarly, the crimes complained about do not have an effect only on Mr. Abdullahi, but on the entire Kenyan population as they consist of non-delivery of public services without a payment and a loss of public trust in the Government's structures. It is for these reasons that I find, that Mr. Abdullahi did not possess the capacity to pardon the 2<sup>nd</sup> Respondent to the ends that the bribery charges brought against him should be withdrawn.

42. In light of the circumstances that prevailed, I do not therefore find that the grounds Mr. Abdullahi offered were sufficient to justify the withdrawal of a complaint of such significance.

43. The last issue on withdrawal is the lawful procedure thereof, especially in light of the fact that, as I have found above, both the person who reports a crime and the prosecution are to be considered as complainants.

44. In that regard, I note that the Trial Court allowed the affidavit indicating that Mr. Abdullahi wished to withdraw his complaint against the 2<sup>nd</sup> Respondent and even when the DPP objected, the Court proceeded to examine him on the same and accepted his testimony.

45. Regarding the proper procedure for withdrawal of a complaint therefore, case law has also provided a particular direction. Dulu J in **Johnstone Kassim Mwandu & Another vs Republic [2015] eKLR** stated in that regard:

***“The court has no power to withdraw a criminal case on the direct request of the complainant,***

***unless he/she is the prosecutor. Such request has to pass through the DPP. “***

46. Similarly, Nyakundi J in **Republic vs Faith Wangoi [2015] eKLR** held:

***“I am of the considered 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.”***

47. I agree with the Learned Judges' dispositions on the subject and I dare add that it only makes sense that although a person who reports a crime may seek to withdraw his complaint, the DPP, in whose name the criminal proceedings began and could be sustained, must be a part of the withdrawal process in a considerable manner. Indeed, the Constitution grants the DPP powers to institute, undertake, take over, continue and discontinue proceedings in **Article 157** of the **Constitution** which provides thus:

***“.....(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.”***

48. The power to continue proceedings must emphatically include the powers to rightfully oppose applications for withdrawal of complaints as such applications, if unopposed, may cause proceedings to be improperly discontinued.

49. **The DPP's powers are however not absolute in that regard because Article 157(8) of the Constitution provides that:**

***“The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.”***

50. The same position and provision is reflected in the Act that governs the actions of the DPP, i.e **The**

**Office of the Director of Public Prosecutions Act, No.2 of 2013**, which in **Sections 5 and 25** provide that:

***“[the DPP may] 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”***

**AND**

***“The Director may, with permission of the court discontinue prosecution commenced by the Director, any person, or authority at any stage before delivery of judgement.”***

51. Even considered from a variant perspective, the same indication prevails and that is why in **Republic vs Fahmi Salim Said [2013] eKLR**, Muya J, asked:

***“Was the magistrate’s court supposed to be a rubber stamp” Ought not the magistrate interrogate the reasons given by the DPP as to satisfy himself as to whether they answer to the threshold set by the Constitution and in particular Article 157(11)”***

52. That is a valid question and although permission must be sought by the DPP to discontinue a prosecution, the Court, in my view, must never grant permission for withdrawal of any complaint by a complainant under circumstances in which the prosecution wishes to proceed therewith. Such action, as was taken by the Trial Court, directly amounts to interference with the work of the DPP. This position has found approval in case law and that is why Odunga, J in **Nairobi High Court Misc. Civil Application No.249 of 2012, Republic vs The Director Of Public Prosecution Ex-Parte Victory Welding Works Limited And Another** categorically stated:

***“The office of the Director of Public Prosecutions is an independent constitutional office which is not subjected to the control, directions and influence by any other person and only subject to the control by the Court based on the aforesaid principles of illegality, irrationality and procedural impropriety.”***

53. Further, under **Article 157 (11) of the Constitution**, the DPP is to exercise his powers with due regard to public interest, the interest of administration of justice and the need to prevent and avoid abuse of the legal process. Only if the DPP applies to withdraw or oppose withdrawal in contravention of these tenets, illegally, irrationally or improperly, should the Trial Court disallow such an application.

54. I will now turn and address the Trial Magistrate's other dispositions on the matter before him and I note that he permitted the withdrawal of the complaint against the accused due to reasons surrounding **Article 159 (2) (c)** of the **Constitution** and **Section 176** of the **Criminal Procedure Code**.

Article 159 (2) (c) reads:

***“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); ”***

The clause 3 referred to above reads as follows:

***“(3) Traditional dispute resolution mechanisms shall not be used in a way that—***

***(a) contravenes the Bill of Rights;***

***(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or***

***(c) is inconsistent with this Constitution or any written law.”***

55. **Section 176** then reads:

***“In all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.”***

56. Interpretation of the Constitution is the mandate of the High Court and the Magistrate's Courts have a mandate only to apply the Constitution as interpreted by the Higher Courts. That position is firmly entrenched in the Constitution as under **Article 165 (3) (d)** which reads thus:

***“There is established the High Court, which has—jurisdiction to hear any question respecting the interpretation of this Constitution”***

57. It is however also clear that while the High Court has the power to interpret the Constitution, the Magistrates' Courts, being guided by the Constitution, as are all Courts in Kenya, have a mandate to apply the Constitution as it is and as appropriately interpreted by the mandated Courts.

58. In his efforts to interpret the Constitution therefore, the Hon. Trial Magistrate correctly referred to the provisions on alternative dispute resolution (ADR) but in my opinion, wrongly applied these provisions to circumstances which, in the interests of fair and complete administration of justice call for resolution of the matter by way of appropriately determining the criminal charge against the 2<sup>nd</sup> Respondent in a complete and fair criminal trial process.

59. Although ADR serves as an avenue for resolution of contentious matters, including criminal matters, reconciliation cannot possibly apply to circumstances whereby the crimes that an accused has been charged with affect more than the person who reported them. In this case, reconciliation between the two persons does not engender effective and just resolution of the matter. More importantly, such resolution goes against the **Constitution**, which espouses integrity, accountability and social justice.

60. Secondly, the Trial Magistrate allowed withdrawal of the matter after the first prosecution witness had testified and declared the accused acquitted. The law with regard to acquittal resulting from a withdrawal is as follows:

**Article 157 (7)** of the **Constitution** states:

***“If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution’s case, the defendant shall be acquitted.”***

**Article 157 6 (C)** concerns criminal proceedings instituted by or taken over by the DPP.

61. In that context, Gikonyo J in **Republic vs Jared Wakhule Tubei & another** (supra) stated as follows:

***“Constitutionally, in deciding whether the discontinuance will be an acquittal or not, the trial court should start by looking at the stage at which the proceeding has been discontinued. If discontinuance is after the prosecution has closed its case, the accused shall be acquitted under Article 157(7) of the Constitution, and Article 50(2)(o) will apply to shield the accused, on the principle of double jeopardy, from being charged again on similar charges.”***

**Article 50(2)(o)** provides:

***“A person shall not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted.”***

62. The law above is clear and requires no ancillary analysis. The withdrawal of the complaint should not have led to a declaration by the Trial Magistrate that the accused is acquitted. This is palpably contrary to the law and is only made worse by the fact that the effect of such a declaration would prevent the accused from ever being charged again on similar charges.

### **Conclusion**

63. The conclusion of my determination above is that the withdrawal was unjustified; the term “complainant” was misconstrued and the grounds upon which the withdrawal was permitted were at most insufficient or at least questionable. In addition, a flawed withdrawal procedure that excepted the contributions of the DPP, and an acquittal of the accused prior to the close of the prosecution case added to the illegitimacies. Also, rather than applying the **Constitution**, the Trial Court, essentially usurping the powers of the High Court to interpret the Constitution, arrived at an interpretation of **Article 159(2)(C)** that, applied to these circumstances, would yield untenable results.

64. The fight against corruption, including being tried for corruption related acts such as bribery is a public interest issue; prosecution of those investigated for corruption and economic crimes is undeniably a matter concerning the administration of justice.

65. After reviewing the facts and the evidence before me therefore, this Court is inclined to concur with the DPP's position that the Learned Trial Magistrate exercised his discretion wrongly, illegally and improperly in withdrawing **Chief Magistrate Anti-Corruption Case No.5 of 2013** under the circumstances that were before him.

### **Disposition**

66. Accordingly, I am satisfied that the Petition is merited and I therefore grant the following orders:



a. I hereby set aside the Learned Trial Magistrate's decision withdrawing **Chief Magistrate Anti-Corruption case No.5 of 2013**.

b. I hereby reverse the order for acquittal of the accused Mr. John Chege, the 2<sup>nd</sup> Respondent.

(c) I reinstate the criminal charges in the said case.

(d) Let the case be heard by any Magistrate, other than the Hon. P.M. Ndwiga, with jurisdiction to hear the case where it shall resume from where it was stopped by the order of 13<sup>th</sup> January 2015 and shall proceed to its logical conclusion.

(e) Each party shall bear its own costs.

67. Orders accordingly

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF MARCH, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kazungu – Court clerk

Miss Mtela holding brief for Mrs. Oduor for Petitioner

Mr. Obura for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

**Order**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**



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