

IN THE CHIEF MAGISTRATE'S COURT AT MALINDI

EACC CASE No. E001 of 2023

REPUBLIC PROSECUTOR.

Versus

NAJIB BALALA & 16 OTHERS ACCUSED.

RULING

The accused persons were charged with various offences under the Anti-Corruption and Economics Crimes Act of 2003.

No evidence has been adduced.

By way of a letter dated 31st July 2024, the ODPP directs the discontinuation of the proceedings herein pursuant to Article 157 of the Constitution as read with section 87(a) of the Criminal Procedure Code on grounds as stated by Mr. Mwangi for the ODPP that investigations have not been completed and full disclosure made and that the period that it might take to finalize the investigations is uncertain.

The application was opposed by the 9th accused person on grounds among others that the accused has filed a petition at the High Court being petition No. 1B of 2024 in which the accused is seeking to have the charges struck out and to which application the ODPP and the EACC have responded stating that thorough investigations were conducted and they have a water-tight case against the accused.

The other accused persons while not opposing the application for withdrawal expressed their reservations on the conditional nature of the withdrawal arguing that the same should not lead to another round of them being arraigned in court with same



charges. They urged the court to consider the history of the case and the conduct of the ODPP. Learned counsel Mr. Balala for the 1st accused said the genesis for the application by the ODPP might as well have been initiated by the accused by way of correspondence to the ODPP seeking for review of its decision to charge.

Whereas the ODPP has the exclusive mandate to institute a criminal proceeding, under Article 157(8) of the Constitution and section 87(a) of the Criminal Procedure Code, it may not discontinue it without the permission of the court. The ODPP can only be granted prayers to discontinue a criminal trial upon an application to court which application must have sound grounds and must show compliance with Article 157(11) of the Constitution demonstrating that in making such application for withdrawal, it has regard to the public interest, interest in the administration of justice and the need to prevent and avoid abuse of the court process.

The ground given by the ODPP in the application herein was shallow. There was no demonstration by the ODPP on what may have made it difficult for the investigators to undertake thorough and conclusive investigations or what can be said to amount to discovery of new facts or evidence as would make the investigators and the ODPP compile a new bundle for prosecution purposes.

Whereas the withdrawal of the charges as sought by the ODPP may not be said to amount to an abuse of court process and whereas withdrawal under section 87(a) of the Criminal Procedure Code at this juncture will amount to a discharge, any decision to charge the accused persons or any of them afresh may itself easily be interpreted as or may amount to an abuse of the court process for the following reasons.

First, there's always a reasonable expectation, something akin to an obligation on the part of the ODPP that it will not arraign any one in court unless it's somewhat certain that from the investigations file by the investigators or even by both the investigators and the ODPP where the investigation is prosecution lead disclose prima-facie evidence as would not only sustain a charge but also a high threshold or likelihood of a conviction. It's not right, and the court is emphatic that this habit appears to be gaining traction with the ODPP that accused persons are arraigned in court as investigations continue.

Secondly, the accused persons have already been taken through the motions of being investigated, summoning and arrests, transportation to and arraignment in court for plea, the motions of bail/bond applications and rulings thereof and processing of their bail/bonds, the process of numerous court applications and rulings thereof, some have had their travel documents held and some have spent time in custody.

The discharge as sought by the ODPP ^{even} if when it's legally sound is tantamount to having the sword of Damocles hang above accused person's heads. It's a heart breaking and frightening specter. Its tantamount to waiting in apprehension that some disaster, which is the motions above stated might repeat themselves which wait is more painful than the disaster itself.

There's need to have finality in any legal process otherwise the ODPP will be undertaking in what I call "**round-about**" or "**circuit**" proceedings. The phrase 'litigation must come to an end' shouldn't be in vain, it should have a meaning in its application.

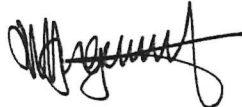
It's for the above reasoning that the court makes the following orders;

- a). **The application by the ODPP to have the case withdrawn be and is hereby allowed and the accused persons are DISCHARGED under section 87(a) of the Criminal**

Procedure Code.

b).Any cash bail deposited in court be released to the depositors and any security documents deposited in court be released back to the sureties and the sureties be and are hereby relieved of their obligations.

I wish to wrap up the ruling by reiterating what I have stated, that whereas the withdrawal of the charges as sought by the ODPP cannot be said to amount to an abuse of court process, the reason why it has been allowed by the court and whereas that withdrawal amounts to a discharge, any decision by the ODPP to institute subsequent proceedings against the accused persons or any of them on account of the same facts may itself easily be interpreted as or may amount to an abuse of the court process for the reasons stated elsewhere above.



Hon. JAMES N. MWANIKI.

Chief Magistrate

31st July 2024