



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 67 OF 2016**

**HAJI IBRAHIM ALI HUSSEIN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the acquittal of the accused in Wajir SPM Criminal Case No. 135 of 2010 – C. Cheronno SPM)**

**JUDGEMENT**

This matter arises from criminal proceedings in Wajir Senior Principal Magistrates criminal case No. 135 of 2016, wherein Elyas Mohamed Osman (the accused) was charged with forgery contrary to section 345 as read with section 349 of the Penal Code, in that on or about 19th November 2012 at Wajir Town within Wajir County, with intent to defraud or deceive, forged a certain document namely Malab Building's Tenancy Agreement, purporting it to be a genuine tenancy agreement, signed by Haji Ibrahim Ali Hussein (the appellant), the land lord of the said Malab building, and was acquitted by the trial court under section 206 of the Criminal Procedure Code (cap. 75), when the prosecution asked the court for permission to withdraw from case under section 87 (a) of the same Act.

The complainant Haji Ibrahim Ali Hussein not being satisfied with the trial court's decision in acquitting the accused, then approached this court through a memorandum of appeal filed by Dola, Magani and Company Advocates on the following grounds:-

- 1. "The learned trial magistrate erred in law and in fact in acquitting the accused person under section 206 CPC.**
- 2. The learned trial magistrate erred in law and in fact in expeditiously acquitting the accused person under section 206 CPC due to adjournment to the prosecution when the same section states that acquittal and or dismissal of charge may arise due to non appearance of parties after adjournment and not specifically and technically due to non appearance by witnesses after adjournment.**
- 3. The learned trial magistrate erred in law and in fact in expeditiously acquitting the accused person under Article 159 of the Constitution of Kenya which contravened Article 22, 47 and 50 of the Constitution of Kenya.**
- 4. The learned trial magistrate erred in law and in fact in not taking into consideration that the complainant was physically present in all court mentions and hearings."**

This is an appeal against acquittal. In ordinary circumstances, such appeal is the preserve of the State or

Director of Public Prosecution (DPP) under section 348A of the Criminal Procedure Code which states as follows:-

**“348 (A) when an accused person has been acquitted in a trial before a subordinate court, or where an order refusing to admit a complaint or charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney General (now DPP) may appeal to the High Court from the acquittal or order made on a point of law”**

This appeal was however filed by the complainant, and Mr. Okemwa for the DPP stated that though the decision in the lower court violated the rights of the complainant, and that it should have been the DPP to file an appeal, due to time that it would require for consultations in the DPP's office before taking over the appeal, he was comfortable with Mr. Dola Indidis proceeding with the appeal.

Mr. Dola Indidis learned counsel for the appellant, then asked the court to peruse the record and the grounds of appeal and make a decision on the matter. Counsel urged the court to allow the request of the appellant, which was not opposed by the DPP.

The history of the matter is that the prosecution called 2 witnesses and asked for an adjournment on 11th July 2016, which was granted by the court and a fresh hearing date fixed for 13th September 2016. On that day the prosecutor asked the court for another adjournment because the expert (handwriting expert) witness had attended the hearing of another case at Shanzu court. The request for adjournment which was opposed by the accused but the court reluctantly allowed the adjournment as the last to the prosecution, and rescheduled the case for hearing on 13th of October 2016.

On 13th of October 2016 the prosecutor asked the court for yet another adjournment stating that the expert witness had not been facilitated to travel to Wajir. The accused again opposed the application for adjournment and the court rejected the request and observed that under Article 159 of the Constitution the court was required to determine disputes between parties expeditiously.

The prosecutor then sought to withdraw the case under section 87 (a) of the Criminal Procedure Code (Cap. 75). In consequence to this request the trial court decided as follows:-

***“The application to withdraw the case under section 87 (a) CPC is mischievous. The application to have this case withdrawn under section 87 (a) CPC is rejected and the accused is hereby acquitted under section 206 of the CPC. The cash bail deposited to be refunded to the depositor.”***

It is from the above order that the present appeal was filed.

Ordinarily, an appeal from an acquittal such as the present would have emanated from the DPP. The DPP has however not appealed, but the Principal Prosecuting Counsel Mr. Okemwa for the DPP has agreed that the matter be prosecuted by Mr. Dola Indidis, for the complainant, as the DPP would not within the urgency required be able to take over and prosecute the appeal. I will thus treat this as a valid appeal, conceded to by the DPP who is entitled to bring the same.

Even if I am wrong on my above decision, in my view this is matter in which this court can invoke its criminal revision jurisdiction under section 362 of the Criminal Procedure Code (cap. 75), since the alleged irregularity of the trial court has been brought to the attention of the court, by the complainant who does not have a right of appeal. Therefore in my view, under section 362 and section 364 of the Criminal Procedure Code, this court can still consider the record of the trial court, and the complaints raised in the memorandum of appeal, and decide on the correctness, legality or propriety of the findings or orders made by the trial court.

Having perused the record, the complainant Haji Ibrhaim Ali Hussein testified as Pw1. In addition Pw2 Hussein Ali a businessman testified. The prosecution then informed the court that they remained with the evidence of the handwriting expert or examiner, when they sought an adjournment.

The court after allowing two adjournments sought by the prosecution, refused to grant a third adjournment, and the prosecutor then requested to withdraw the case under section 87 (a) of the Criminal Procedure Code, and the court on refusing the request, acquitted the accused.

Section 87 of the Criminal Procedure Code reads as follows:-

**“87 In a trial before a subordinate court a public prosecutor may, with the consent of the court or on instructions of the Attorney General (now DPP) at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal-**

**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;**

**b) if it is made after the accused person is called upon to make his defence, he shall be acquitted.”**

The above section of the law existed before the coming into effect of the Constitution of Kenya 2010, which under Article 157 provides as follows:-

**“157 (6) The Director of Public Prosecutions shall exercise state power of prosecution and may -**

**(C) subject to clause (7) (8), 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 under paragraph (b).**

**(7) if the discontinuance of any proceedings under clause 6 (c) takes place after the closure of the prosecution’s case, the defendant shall be acquitted.**

**(8) The Director of Public Prosecution may not discontinue a prosecution without the permission of the court.”**

Subsequent to the promulgation of the Constitution of Kenya 2010, the Office of the Director of Public Prosecutions Act 2013 was enacted. Section 25 thereof provides the statutory procedure for discontinuance of criminal proceedings by the DPP in line with the Constitutional provisions above.

The above provisions of the Constitution of Kenya 2010 on discontinuance of criminal proceedings are clear, on the powers of the DPP to request for discontinuance of criminal proceedings, and the powers of the court there under.

In my view, section 87 of the Criminal Procedure Code, was replaced by section 25 of the Office of the Director of Public Prosecutions Act of 2013. However both sections are in line with the Constitution of Kenya 2010 in that ultimately the court is the institution with powers to grant permission to the DPP for discontinuance of criminal proceedings. It also means that the court can decline to grant such permission. When the request for discontinuance is allowed by the court before closure of the prosecution case, the accused is to be discharged. If the discontinuance is allowed after the closure of the prosecution case the accused shall be acquitted.

In the present case, the court rejected the request by the prosecution to discontinue the case. It went ahead and acquitted the accused under section 206 of the Criminal Procedure Code which reads as follows:-

**“206 (1) if, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with a felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the**

**court may dismiss the charge with or without costs.**

**(2) if the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.**

**(3) A sentence passed under (1) shall be deemed to commence from the date of apprehension, and the person effecting apprehension shall endorse the date thereof on the back of the warrant of committal.**

**(4) If the accused person who has not appeared is charged with a felony, or if the court refrains from convicting the accused in his absence, the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court.”**

In my view, the powers conferred on the magistrate under section 206 (1) were only for dismissal of the charge, if the magistrate was convinced that the complainant did not appear in court. The learned magistrate did not have power to acquit the accused under section 206 of the Criminal Procedure Code. In my event, the learned magistrate could only dismiss the charge, if the complainant did not show up in court, which was not the case herein as the complainant had already appeared in court and testified as PW1, and was cross examined by the accused. The acquittal of the trial court was thus an error which requires correction.

The second reason why the decision of the learned trial magistrate was an error was that after refusing the prosecutors request for withdrawal of the case under section 87 (a) of the Criminal Procedure Code or even under section 25 of the ODPP Act, the court was bound to proceed with the hearing of the case unless the prosecutor informed the court that it was not possible to proceed. The prosecutor would then either choose to close the prosecution case or opt to call no further evidence. It would be at that point that the trial court would decide the case on the evidence on record, on whether a case has been made against the accused person. The acquittal flowing directly from a refusal to discontinue the criminal case was thus a mistake of law on the part of the trial court.

This court is entitled to correct the situation, whether through appeal or through the criminal revision jurisdiction of this court under the Criminal Procedure Code, which I have mentioned above.

I thus set aside the orders of the trial court in acquitting the accused under section 206 of the Criminal Procedure Code, and order that a fresh trial be conducted against the accused Elyas Mohamed Osman by a magistrate with jurisdiction at Wajir based on the same charge and facts, other than the magistrate who conducted the criminal proceedings herein at Wajir.

It is so ordered. The matter will be mentioned before the magistrates court at Wajir on 23<sup>rd</sup> May to comply with the above orders for retrial.

**Dated and delivered at Garissa this 16th day of May, 2017**

**GEORGE DULU**

**JUDGE**