



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 1 OF 2014

JOHNSTONE KASSIM MWANDI & ANOTHER.....APPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

This appeal arose from the decision of the trial court in withdrawing the criminal case.

The appellants were charged in the subordinate court at Mwingi with stealing stock contrary to section 278 of the Penal Code that he stole a bull worth Kshs. 35,000/= the property of TIMOTHY MUANDA MUUMBO. They pleaded not guilty.

On the 20/05/2013, a son of the complainant was recorded as having informed the court that he was Mwinzi Mwandu the 1st son of the complainant. That he was given a power of attorney by the complainant who was in medication and not able to travel. That he was authorized to matter as the subject matter was compensated.

Though the counsel for the appellant (who was the accused) objected to the withdrawal through a power of attorney, the trial court withdrew the case under section 204 of the Criminal Procedure Code.

Aggrieved by the decision of the trial court, the appellant has appealed to this court on several grounds as hereunder:-

1. The learned magistrate erred in law and in fact in entertaining the application for withdrawal of the case against the appellant by the prosecution when there was no basis to allow the application.
2. The learned magistrate erred in law and in fact in finding that a third party, one Mwinzi Mwandu was qualified to withdraw the case on a purported power of attorney when it was not lawful to allow such withdrawal thereby leading to a miscarriage of justice.
3. The learned magistrate erred in law and in fact in affording a stranger in the proceedings to gatecrash into the prosecution's case and cause its withdrawal against the established process.
4. The learned magistrate erred in law and in fact in not affording him an opportunity to be heard.
5. The learned magistrate erred in law and in fact in failing to address the objections raised by counsel for the accused person in withdrawing of the case, which objections were not captured in the record of the court.

6. The learned magistrate erred in law and in fact in acting partially and failed to afford all the parties present before him a fair chance of being heard and therefore arriving at a wrong decision.

7. The learned magistrate erred in law and in fact in allowing the withdrawal of the case which decision he should have known was tainted with malice and was thereby inflicting the accused person with punishment which cannot be compensated.

The appeal was heard and the counsel who appeared was Muumbo for the appellant and Mr. Orwa for the state (respondent) made extensive oral submissions. Cause authorities were cited on both sides.

This is an appeal contesting the order of the trial court to withdraw the criminal case. The matter turns on the general powers of the court, and secondly, who can request for withdrawal of the case. I will start with the entitlement of a person to withdraw the case.

The case before the trial court was not withdrawn by the complainant but by a son of his acting on a power of attorney. By law, parties or persons having interest in both criminal and civil cases can act in person or be represented by advocate.

In most cases the advocate can commit the person he represents. There are however specific issues that are directed at the party and an advocate in my view cannot purport to commit or do on behalf of a client. Such is the case with taking a plea in a criminal case. An advocate cannot plead on behalf of a client.

Powers of attorney are known in civil cases. That power operates in a case where someone donates a power on somebody to act for him specifically or generally in any civil matter, including civil proceedings. The donee of the power of attorney can commit the donor of the power. He cannot however, purport to be an advocate on behalf of the donor of that power of attorney. A donee of a power of attorney in civil cases cannot thus act as an advocate for a party see the case of **JACK K. KAAJIRA & ANOTHER VS. SAFARICOM LTD [LTD] e KLR.**

The Criminal Procedure Code [Cap. 75], and the penal code [Cap 63] do not have provisions for powers of attorney. In my view therefore a person cannot through a power of attorney purport to represent or act in the place of any party in a criminal case.

In my view therefore the son of the complainant could not come to the criminal court to purport to act for his father under power of attorney. He also had no legal basis for asking for withdrawal of the case under powers of attorney.

The court was therefore wrong in acting on the request of the son of the complainant under powers of attorney to withdraw the case.

I now turn to the courts powers with regard to withdrawal of cases. Section 87 of the Criminal Procedure Code allows a prosecutor to withdraw a case with the consent of the court. Some new sections were added in the Criminal Procedure Code under Act No. 11 of 2003 to accommodate plea bargaining under sections 137 (A) to 137 (O). The procedures provided therein are elaborate. They do not appear to have been followed in the present case. In any case, in my view in a criminal case a person holding a power of attorney can neither plead, nor compromise a criminal case on behalf of the actual complainant. The specific provisions of the written law must be followed. Criminal law is in the realm of public law and not private law like in the case with civil matters. The parties who are affected by criminal processes are the DPP on behalf of the public, the complainant and the accused. It is therefore not a private matter to be taken lightly and treated as a secret bargain. 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.

In my view, the withdrawal granted by court herein was improper. I will quash the decision of the trial court and reinstate the criminal case. The case will be heard by another magistrate with jurisdiction.

For the above reasons, I allow the appeal, set aside the learned trial magistrate decision withdrawing the case. I reinstate the criminal charges, and order that the case will be heard by a magistrate in the nearest court station to the previous trial court, with jurisdiction to hear the case.

Dated and delivered at Garissa this 20th day of April, 2015

GEORGE DULU

JUDGE