



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. 8 OF 2013

REPUBLIC PROSECUTOR

V E R S U S

ABDIRASHID HUKOW GULIE ACCUSED

RULING

On the 4th of June 2015 after the court declined a further request by the prosecution to adjourn the case, learned Prosecuting Counsel Mr. Okemo made an application to withdraw the case Under Section 25(1) of the Office of the Director of Public Prosecutions Act No. 2 of 2013 together with Section 87(1) of the Criminal Procedure Act (cap. 75).

Learned counsel for the accused Mr. Nyasani submitted that they did not have any objection over the withdraw of the case under Section 25(1) of the Office of the

Director of the Public Prosecutions Act (DPPA). Counsel however stated that they objected to the application of Section 87(1) of the Criminal Procedure Code because his clients would be liable to be arrested. Counsel urged this court to apply Section 202 of the Criminal Procedure Code instead, as witnesses had been summoned and they had failed to come to court, and acquit the accused.

I have considered the position taken by the prosecution and that taken by the defence.

Indeed under Section 25(1) of the Office of the Director of Public Prosecutions Act, the Director is empowered to request the discontinuance of criminal proceedings with the consent of the court at any time before judgment. Since the Director of Public Prosecutions had indicated that he had a problem availing additional witnesses, this court finds that the request to discontinue the case was justified. I will thus discontinue the criminal proceedings against the accused.

The learned Prosecuting Counsel has asked this court to apply the provisions of Section 87(1) of the Criminal Procedure Code and discharge the accused. The defence has asked me to apply Section 202 of the same Act and acquit the accused. In my view Section 202 of the Criminal Procedure Code is not applicable in the present case. That section applies where the complainant has failed to come to court. This is not the situation in our present case. A witness has already testified. The reason for the request for discontinuance of the case was due to failure to bring additional witnesses rather than the failure of the complainant to come to court, in which case the accused would have to be acquitted.

Section 87 of the Criminal Procedure Code also does not apply to this case. It states as follows:-

“87- In a trial before a subordinate court a Public Prosecutor may, with the consent of the court or on the instructions of the Attorney General at any time before judgment is pronounced, withdrawal 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 the accounts of the same facts;

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

It is clear from the above that section 87 of the Criminal Procedure Code only applies to proceedings in subordinate courts. It does not apply to proceedings in the High Court. The prosecuting counsel cannot therefore rely on that section in these criminal proceedings.

The powers of entry of a nolle prosequi under Section 82 of the Criminal Procedure Code do not appear to be operational anymore after the passage of the Constitution and subsequent laws. The Office of the DPP Act does not confer nolle prosequi powers on the DPP.

Coming back to section 25 of the office of the Director of Public Prosecutions Act, it provides as follows:-

25(1) The Director may, with the permission of the court discontinue a prosecution commenced by the Director, any person or authority before delivery of judgment.

(2) Pending the permission by the court in accordance with subsection (1), the Director may apply orally or in writing to the court for a stay of proceedings with a view that such proceedings may be taken over by the Director to prevent abuse of legal process and to protect the public interest.

(3) Nothing in this section prevents the Director from continuing to conduct proceedings in the name of the person or authority that instituted those proceedings.

As can be deduced from the above provisions of Section 25 of the ODPPA, the only jurisdiction of the court is either to give permission or deny such permission. The court, in my view has no further function after granting permission to the Director to discontinue criminal proceedings. It cannot go further to determine whether the accused is acquitted or discharged. From the provisions of subsection (2) and (3), it is in my view the function of the Director to determine what further course of action, if any to take.

Thus since this court has decided to grant permission to the Director for discontinuance of the criminal proceedings under section 25(1), it cannot either discharge the accused under section 87(1) of the Criminal Procedure Code, which applies to subordinate courts, nor acquit under section 202 of the Criminal Procedure Code, as the court was not moved under any of those sections.

To conclude, this court grants permission to the Director to discontinue the prosecution herein as requested.

Dated and delivered at Garissa this 18th day of June 2015.

GEORGE DULU

JUDGE