



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. 21 OF 2012

REPUBLIC PROSECUTOR

V E R S U S

ALI IBRAHIM ABDIRAHMANDEFENDANT

RULING

The criminal proceedings herein were commenced through an information dated 11th June 2012. The accused was first brought to court on 18th June 2012.

From the date the accused was first brought in court until 15th July 2015, only one witness Dr. Adan Dima of Isiolo District Hospital testified in court.

On the 15th July 2015 therefore the learned Prosecuting Counsel Mr. Orwa made a verbal application for discontinuance of the case. Counsel submitted that though the Prosecution were alive to the provisions of Article 50(2)(e) of the Constitution, the two clans of the accused and the deceased respectively, had decided to invoke Article 159(2)(c) of the Constitution to amicably settle the matter.

Counsel added that they had tried to contact civilian witnesses on phone severally who did not pick the telephone calls. When they got the father of the deceased one Muktar Mohammed Farah on the phone, he informed them that he did not intend to pursue the matter any further.

Counsel submitted that the record showed that several adjournments were granted to the prosecution due to their inability to bring witnesses to court. Counsel emphasized that under Article 50 of the Constitution of Kenya 2010 there was a requirement of speedy trial, and that due to the inordinate delay in this matter arising from the inability of the prosecution to avail witnesses, the State or Director Public Prosecution was thus requesting that the case be discontinued under section 25(1) of the Office of the Director of Public Prosecution's Act 2013. Counsel stated that he already had the concurrence of his superiors, in asking that the case be discontinued due to the reluctance prosecution witnesses to come to court to testify. Counsel urged the court to allow the discontinuance of the Criminal Proceedings herein.

In response, learned counsel for the defence Mr. Onono, submitted that indeed section 25(1) of the Office of the Director of Public Prosecution Act allowed that office to apply to court for discontinuance of a criminal case. However, the defence had a problem with the possibility of a charge lingering on the accused for days and years to come indefinitely, as discontinuance of the case meant that the prosecution might elect to commence proceedings on the same charge and facts afresh.

Counsel submitted that the learned Prosecuting Counsel had not provided any documentary evidence to show that Article 159 of the Constitution had been invoked and that reconciliation had indeed occurred. Secondly, though the Prosecuting Counsel talked of a telephone call to the father of the deceased, there

was no documentary evidence supplied to that effect, not even a letter endorsed by the area Assistant Chief. Counsel emphasized that the Provincial Administration was still in existence and witnesses could be traced through clan heads.

Counsel submitted further that litigation should not go on forever and that any criminal prosecution or possible prosecution should have a clear date of finality. Counsel submitted that, in the circumstances of the present case, the defence was not comfortable with the Director of Public Prosecution making an application under section 25 (1) of the Office of the Director of Public Prosecution Act. In counsel's view the prosecution should have closed their case to enable the court make a final decision on the guilt or otherwise of the accused.

Counsel submitted that the powers of the court under Section 25(1) of the Office of the Director of Public Prosecution Act were limited to giving permission for the withdrawal of the criminal case. Counsel emphasized that in his view, in deciding such an application the primary consideration to be taken by the court was a history of the case. Counsel pointed out that this case had been pending for three years and that as such, it was not fair to allow the discontinuance of the case after many adjournments had already been granted to enable the prosecution provide witnesses but in vain.

Counsel asked the court to acquit the accused to bring this case to finality.

In response to the defence counsel's submissions, the Prosecuting Counsel submitted that the assumption that the accused would be charged afresh in court was not supported by any facts. Counsel emphasized that the application herein was not an application under Section 87 of the Criminal Procedure Code (cap. 75).

Counsel further submitted that the case arose from Mandera which was a very remote area and that the prosecution were not able to trace witnesses since the year 2012. Counsel stated that they were informed verbally by the witnesses regarding the reconciliation done under Article 159 of the Constitution, and as such did not have documentary evidence on the same. Counsel relied on Article 157 of the Constitution and said that the Director of Public Prosecutions was not subject to direction by anybody or any authority.

This is an application by the prosecution under Section 25(1) of the office of Director of Public Prosecution Act. The section provides as follows:-

25(1)– The court may on application of the Director discontinue proceedings against any person or authority at any stage before delivery of Judgment.

(2) Pending the permission by the court in accordance with Subsection. 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 and avoid abuse of the legal process and to protect the public interest.

(3) nothing in this section prevents the Director from conducting proceedings in the names of the person or authority that instituted those proceedings.

The defence does not object to the termination of the Criminal case against the accused person. They however contend that the accused should be acquitted. According to them, that is the fairest way was for the Director to close their case after the lengthy delay so that the accused is acquitted.

This case commenced in 2012 when the accused was charged in court. He was granted bail pending trial. The prosecution, after calling only one witness a doctor who testified on 20th May 2014, now asks the court for permission to discontinue the case.

I agree with learned Prosecuting Counsel that the request for discontinuance of the case was not an application under Section 87 of the Criminal Procedure Code (cap.75). Under that section the prosecution

may ask the court for withdrawal of a case in a criminal trial in the subordinate court. It was provided that, that where the withdrawal was sought before the accused person was called upon to make his defence, if the withdrawal was allowed by the court, he would be discharged but such discharge would not operate as a bar to subsequent proceedings against him on account of the same facts. However if the request was made after the accused had been called upon to make his defence, he would be acquitted.

That section in my view does not apply to the present case. Firstly, that section was limited to withdrawal of cases with the consent of the court or on the instructions of the Attorney General in the subordinate courts. This is the High Court. Secondly that section was superseded by the Office of the Director of Public Prosecutions Act, which is a later Act of Parliament having been enacted in 2013.

It would appear also that the general power of the Attorney General (now Director of Public Prosecutions under the present Constitution) to enter a nolle prosequi in criminal cases for discontinuance of cases under section 82 of the Criminal Procedure Acts (Cap 75) was also superseded by the provisions of the Office of the Director of Public Prosecutions Act 2013.

Section 25 of the Office of the Director of Public Prosecution Act is not restricted to any particular class of courts. It relates to all criminal proceedings in the courts of this country. Indeed, when the Director or prosecution closes their case, the court is entitled to finally determine the matter and state whether an accused is guilty or not guilty.

In the present case only one witness testified and no additional witness has testified. He was a formal witness the doctor Adan Dima. It has taken several years for the Director to ask for permission to discontinue the case. The delay has been explained as failure to get witnesses testify and also consultations in the office to get authority from Senior Officers in the Directors Office on the decision to discontinue the case.

In my view, with the facts placed before me there is no justification to refuse this application. With regard to the Director choosing between availing witnesses and closing their case, that in my view is their discretion. If many witnesses would have testified already, it might be a point for consideration by this court to consider whether to refuse granting permission for discontinuance of the case, and in that case, the request by Mr. Onono would come into play.

In the present case, I find that though discontinuance of the case might mean that the accused may be charged in court anytime in the future, he does not stand to be prejudiced. Only one formal witness who was a doctor testified. No other witness testified before the Director asked for the permission to discontinue the case. The accused is always presumed innocent before he is convicted. This particular accused is also innocent now unless convicted. He thus does not have any criminal tag hanging on his neck.

The fact that there is a remote possibility of him being charged for the same offence, is neither here nor there as the law is meant to protect both the accused, the victims and the public in all criminal cases. Taking into account the facts and circumstances before me, I allow the request of the Director to discontinue these criminal proceedings against the accused person. The criminal proceedings herein against the accused are thus discontinued with the permission of this court.

Dated and delivered on 17th November 2015.

GEORGE DULU

JUDGE