



REPUBLIC OF KENYA

High Court at Busia

Miscellaneous Criminal Application 13 of 2013

REPUBLICAPPLICANT

VERSUS

WYCLIFFE WANDERARESPONDENT

ORDER

1. In the course of preparing my judgment in Busia High Court Criminal Appeal No.105/2012 Aloisy Nyongesa –vs- Republic, I would not help but notice some unusual orders of 30th October 2012 made in the Subordinate Court file.

2. I reproduce the proceedings and orders of that day,

30/10/12

Before: I.T. Maisiba, SRM

C/P Muhaya

CC: Opoty

Inter: English/Kiswahili

Accused 1 present

Prosecutor: I pray to withdraw case against accused 1 under section 87(a).

I.T. MAISIBA, SRM

Court: Case against accused 1 is withdrawn under section 87(a) CPC pending arrest.

I.T. MAISIBA, SRM

3) The application by the prosecutor and the order of the Court would be curious because these came after a judgment had been delivered convicting accused 1. Section 87(a) of The Criminal Procedure Code provides:-

“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, 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;”

It is most doubtful that these provisions can be invoked after a judgment has been pronounced. Secondly the order would lead to an absurd situation of “discharging” an accused person who had just been convicted.

4) On the face of it the Court order of 30/10/2012 may be improper and would invite a revision. But I am minded of the provisions of Section 364 (2) of The Criminal Procedure Code in respect to this Court’s powers on revision. The law requires that:-

“(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence;

Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.”

As the case against Accused 1 was withdrawn by the Order of 30/10/2012 a revision may prejudice him. For this reason I will hear him before making any orders on revision.

5) For now I order that

a) The file and proceedings in Busia CM.Cr.914 of 2011 Republic –vs- 1) Wycliff Wandera 2) Aloisy Nyongesa shall be placed before me.

b) Warrants of arrest against Accused 1 (Wycliff Wandera) be issued and that he shall be arrested forthwith and brought before this Court.

c) Upon appearing before me, Wycliff Wandera shall make his representations as to why this Court should not revise and set aside the Orders of Learned magistrate.

DATED, DELIVERED AND SIGNED ON THIS 15TH DAY OF APRIL, 2013

F. TUIYOTT

J U D G E

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