



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 47 OF 2017**

**MOHAMED HASSAN MAHAMUD.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From the conviction and sentence in Wajir Senior Resident Magistrate Case No. 225 of 2017 by Hon. Mugendi Nyaga (RM))**

**JUDGEMENT**

1. This appeal arises from a ruling delivered by the Wajir Magistrate's Court dated 4<sup>th</sup> September, 2017 wherein the trial magistrate refused a request by the complainant (victim) to withdraw a criminal case. Consequent upon that ruling this appeal was filed by Counsel, Stephen Gakonyo Wanyoike, in September, 2017 on the following grounds;-

**(1) The learned trial magistrate erred in law and fact by failing to consider the letter presented to court by the prosecution drawn by the complainant and the oral application made therefrom by the prosecutor asking the court to withdraw the charges against the accused.**

**(2) The learned trial magistrate erred in law and in fact by failing to consider the fact that the complainant had expressly indicated her intention to withdraw charges against the accused in a letter which was directed to the office of the Director of Public Prosecutions and which gave reasons thereof.**

**(3) The learned trial magistrate erred in law and in fact by failing to take into cognizance the fact that the complainant letter seeking to withdraw her charges against the accused person was furnished to court by the prosecutor signifying the fact that he had no objection to the contents and prayers sought by the complainant in her letter.**

**(4) The learned trial magistrate erred in law and in fact by failing to consider the provisions of Article 157 (7) of the Constitution of Kenya read together with section 40 of the Sexual Offences Act, that allows the prosecution to withdraw charges against accused *suo moto* by asking for a court to discontinue proceedings and provisions of section 204 of the Criminal Procedure Code that allows the complainant to withdraw charges at any time before the court issues final orders.**

**(5) The learned trial magistrate erred in law and in fact by reading the law selectively thus denying the prosecution and the complainant the opportunity to withdraw charges against the accused.**

**(6) The learned trial magistrate erred in law and in fact by failing to investigate further the intention of the complainant's withdrawal of her charges and by failing to direct the appearance of the complainant to appear before the court to confirm the same.**

**(7) The learned trial magistrate failed to disclose his interest in the suit so as to deny the complainant the right to withdraw the charges against the accused. As a neutral arbiter the learned trial magistrate erred in law and fact by failing to disclose, if any, his underlining interest in the suit, by insisting that the matter should continue in complete disregard to the intention of the parties and in particular the complainant.**

2. Counsel for the appellant filed written submissions in the appeal which Mr. Wanyoike relied upon on the hearing date. He stated that the complainant is an adult person who had the ability to make binding decisions in law and that the prosecution by presenting the letter in court had made an application to withdraw the case.

3. Counsel submitted further that a Criminal Procedure Code under section 204 was relevant, though the complainant herein was an adult and not a minor. Counsel thus faulted the learned magistrate for relying on that section of the law.

4. Mr. Okemwa Principal Prosecuting Counsel for the State confirmed that the Director of Public Prosecutions (DPP's) Office had received the letter but insisted that the DPP's representative did not make application in court to withdraw the case and merely produced the letter which confused the magistrate. Counsel suggested that the matter should be taken back to the trial magistrate for the prosecutor to make a formal application. Counsel urged this court to disallow the appeal.

5. In response to the Prosecuting's Counsel's submissions, Mr. Wanyoike stated that though the prosecution did not make the application for withdrawal of the case, they had received the request for withdrawal in writing. Counsel agreed to go back to the magistrate's court to address the issue further.

6. Having considered the appeal herein, and the arguments on both sides, in my view, this appeal cannot succeed and I will dismiss the same.

7. Since the promulgation of the Constitution of Kenya, 2010, the Supreme Law of the land is the Constitution and its provisions take precedence over any other provisions of law whether made before it or after it. Article 157 of the Constitution addresses the issue of discontinuance of criminal proceedings by the DPP, and the relevant part of which states as follows:-

**“157 (1) There is established the office of Director of Public Prosecutions.**

**(6) The Director of Public Prosecutions shall exercise state powers of prosecution and may;-**

**(c) Subject to clause 7 and 8, discontinue at any stage before judgement is delivered any criminal proceedings initiated 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 close of the prosecution case, the defendant shall be acquitted.**

**(8) The Director of Public Prosecutions may not discontinue prosecutions without the permission of the court.”**

8. The above are the overriding principles with regard to the powers of discontinuing of criminal proceedings which are prosecuted by the Director of Public Prosecutions.

9. For one, it is clear that the Director of Public Prosecutions is the entity to apply for discontinuance of the criminal proceedings where the said Director of Public Prosecutions is the prosecutor. Secondly, such discontinuance has to be done with the permission of the court, which means that the court may or may not grant such permission.

10. From the proceedings herein, and the submissions of the counsels on both sides, it is clear to me that the Director of Public Prosecutions did not make an application either orally or in writing to the trial court for discontinuance of the criminal proceedings. The DPP's representative merely brought to the attention of the court a letter written by the complainant (victim). In my view therefore, the learned magistrate was correct in not permitting withdrawing the case as the Director of Public Prosecutions who was the only entity entitled to make the application, had not made the application to prompt the court consider whether it could grant permission for the discontinuance of the criminal proceedings. The magistrate cannot thus be faulted for the position he took.

11. It is unfair for counsel for the appellant to suggest on appeal that the magistrate had a personal ulterior motive in the matter.

12. Obviously, in a private prosecution where the Director of Public Prosecutions is not the prosecutor, other provisions will apply for discontinuance of criminal prosecutions. However in all cases where the Director of Public Prosecutions is the prosecutor or his representative is the prosecutor, then the application for discontinuance of the criminal proceedings has to be made by the Director of Public Prosecutions which in this case was not done.

13. I thus find no merits in the appeal and the same is hereby dismissed. However, if the Director of Public Prosecutions or his representative wants to make an application for discontinuance of the criminal proceedings, he is still at liberty to do so. The fact that the complainant has sent a letter to the DPP's Office requesting such withdrawal does not mean that the Director of Public Prosecutions is obliged to make an application for such withdrawal of the criminal proceedings, as the Director of Public Prosecutions under the Constitutional provisions has ultimate discretion in the matter.

14. The trial court file is hereby returned to the Wajir Magistrate's Court for further action by the trial court.

**Dated, Signed and Delivered at Garissa this 12<sup>th</sup> June, 2018.**

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**George Dulu**

**JUDGE**