



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CRIMINAL CASE NO. 12 OF 2013

REPUBLIC..... PROSECUTOR

V E R S U S

1. HUSSEIN MOHAMED HUSSEIN..... 1ST ACCUSED

2. ABDI AHAD HASSAN..... 2ND ACCUSED

RULING

In this matter the two accused persons Hussein Mohamed Hussein and Abdi Ahad Hassan were charged in this court with murder. They first appeared in court on 19th June 2013. After a number of mentions plea was taken on 27th June 2013 wherein they pleaded not guilty.

The case was the fixed for hearing on 30th September 2013 and at the same time a request was made by the defence for release of items to the accused's persons which were taken by the police but were not expected to be used as exhibits. The accused persons were granted bail on 28th August 2013 and are still on bail.

The case was thereafter adjourned severally mainly due to the failure of the prosecution to provide witnesses. Todate no single witness has testified in the case.

Specifically, on 4th March 2015, the prosecution was given a last adjournment by the court and the case fixed for hearing on two consecutive days ie 3rd and 4th June 2015. When the matter came up on 3rd June 2015, the prosecution stated that they would proceed on the 4th of June 2015. However on the 4th of June 2015 they applied for an adjournment because witnesses were not available. The court gave the prosecution a very last adjournment and fixed the case for hearing on two consecutive days the 21st and 22nd of October 2015.

Again on the 21st of October 2015, the prosecution did not have witnesses and asked that the case be heard on 22nd October 2015. On that 22nd october 2015 they asked for an adjournment which was granted but with a warning by the court to the prosecution that the court would not entertain further request for adjournment. The case was again fixed for hearing for two consecutive days ie 2nd and 3rd of March 2016.

On the 2nd of March 2016, again the prosecution stated that they were not able to proceed and that the case should proceed on the 3rd of March 2016, when they expected to provide witnesses.

On the 3rd of March 2016, the prosecution still did not provide witnesses. The prosecuting counsel Mr. Okemwa then expressed to the court difficulties in getting witnesses whereupon the defence protested the delay in prosecuting the case.

The Prosecuting Counsel then asked this court to allow the DPP to discontinue the criminal proceedings under section 25(1) of the office of the Director of Public Prosecutions Act.

Mr. Nyasani counsel for the both accused did not oppose the request but complained that the prosecution should have asked for discontinuance of the proceedings much earlier, as they were fully aware that they were not able to provide the witnesses. The defence counsel also asked for the release of the national identity card and other items of the accused persons which had been held by the police.

I have considered the request by the Prosecuting Counsel herein on behalf of the DPP. I have also considered the submissions of counsel for the accused persons.

The application herein for discontinuance of the criminal proceedings was made under section 25(1) of the office of the Director of Public Prosecutions Act. That section allows the Director of Public

Prosecutions to ask the court for permission to discontinue criminal proceedings at any time before delivery of judgment.

The Act does not however state what considerations the court should take into account in determining whether to allow such an application. It thus means that the court has unfettered discretion to either allow or decline to allow the permission for discontinuance of the criminal proceedings. The court has to balance the broader interest of justice. The court has to consider whether the rights of the accused will be unduly infringed when the criminal proceedings are discontinued. The court also has to consider the wider public interest, as criminal proceedings combine interests of accused persons, the victims, and the public who have a genuine concern and interest in the said proceedings.

In the present case, the trial of the two accused persons has never commenced, as no single witness has testified in the case. The prosecution has made all efforts to get witnesses testify in vain. The case has taken about 3 years now and no single witness has testified. The Prosecuting Counsel has gone on record to state that they are experiencing difficulties in getting any witness to come to court to testify. In view of these considerations, and the fact that the defence does not oppose the request by the prosecuting counsel, I will allow the discontinuance of the proceedings. It does not serve any purpose to have the accused persons come to court constantly, while there are no witnesses available who can testify in support of the allegations against them. The discontinuance does not mean an acquittal, and in my view the State still has a right to commence proceedings when they are able to trace witnesses.

Learned counsel for the accused persons Mr. Nyasani has requested for release of documents and items taken by the police to the accused persons. The prosecuting counsel has not opposed that request. He has not stated that the accused persons are likely to be prosecuted in court in the near future. As such, I find it unfair for items taken from the accused person by the police to be retained by the State unless they are offensive items such as arms and ammunitions. Otherwise if this case is discontinued and the items are left with the police, the probability of their being misplaced or lost is in my view very high. I thus order the release of all items that were taken by the police from the two accused.

In conclusion, I allow and grant permission to the DPP and order that these criminal proceedings against both and each of the two accused persons be and are hereby discontinued. The effect of this order is to discharge each of the two accused persons. I also order that all items taken by the police from each of the two accused persons be forthwith released to them.

Dated and delivered at Garissa this 6th day of July 2016.

GEORGE DULU.

JUDGE