

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO. 3 OF 2016

REPUBLIC.....APPLICANT

VERSUS

HIBO ABDULLAHI DUBO.....RESPONDENT

(From the decision in Garissa CM Criminal Case No. 305 of 2015

– M. Wachira CM)

R U L I N G

This matter was brought to this court through a letter dated 3rd February 2016 filed by the applicant Hibo Abdullahi Dubo. Her complaint was in respect of action taken by the Director of Public Prosecution in asking the Chief Magistrate's court at Garissa in Criminal Case No. 305 of 2015 Republic Vs. Yussuf Mohamed Pad, Rashid Mohamed Badil, and Hussein Mohamed to be granted permission to discontinue criminal proceedings.

The complaint of Hibo Abdullahi Dubo is that she was the complainant in an assault case and that, without being consulted the Director of Public Prosecutions asked for permission of the court to withdraw the criminal case, and the case was thus withdrawn after the court granted permission. It is her position that she was unfairly treated as the three accused persons were discharged without her consent or knowledge.

The application or letter does not cite any section of the law or the Constitution granting the High Court powers to review a decision of a magistrate's court to discharge an accused after allowing the prosecution or Director of Public Prosecutions to withdraw criminal proceedings.

I have perused the Constitution of Kenya Article 157, as well as section 25 of the Office of the Director of Prosecutions Act. Under both the Constitution and the Director of Public Prosecutions Act, the Director of Public Prosecutions may with the permission of the court withdraw any criminal proceedings which the Director has instituted or which the Director has taken over from any other person or authority. Under Article 157 (7) of the Constitution, if the discontinuance of criminal proceedings is done after the close of a prosecution case, the defendant must be acquitted. In the present case, the three accused persons were discharged as the hearing of the criminal case had not commenced.

The reasons why the Director of Public Prosecutions asked for permission of the court to withdraw the criminal proceedings herein, was that there were three related files. One was this matter criminal case No. 305 of 2015. Another was Criminal Case No. 1046 of 2014, and yet another was 1085 of 2014. In 1085 of 2014 the applicant herein is the accused. In 1046 of 2014, the accused is one Hussein Mohamed. In 305 of 2015 the applicant is the complainant.

In my view, this request for review of the magistrate's order allowing the withdrawal of the criminal proceedings has no merits. Firstly the magistrate acted within the law when the court allowed the request by the Director of Public Prosecutions to discontinue the charges. Secondly, this court cannot force the Director of Public Prosecutions to institute criminal proceedings or continue with criminal proceedings. In my view such action by the court will violate the provisions of article 157 (10) of the Constitution of Kenya 2010.

The door is not closed on the applicant Hibo Abdullahi Dubo. The law allows her to institute private prosecution if she so desires. The only challenge is that the same Director of Public Prosecution still has the powers to take over that prosecution and ask for discontinuance of the same. Otherwise this court in my view cannot fault the magistrate for allowing the Director of Public Prosecutions to discontinue the criminal proceedings in Chief Magistrates Criminal Case No. 305 of 2015, as the magistrate was within the law in doing so.

I find the request for revision by Hibo Abdullahi Dubo to be without merits. Same is dismissed.

Dated and delivered this 2nd day of September 2016

GEORGE DULU

JUDGE