



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL APPEAL NO 420 OF 1993

JAMES KARIUKI WAHOME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The appellant herein, James Kariuki Wahome, was charged with another with the offence of Stealing contrary to Section 275 of the Penal Code before the Senior Principal Magistrate's Court, Nakuru. The matter was however, allocated to a Magistrate of the Second Class for hearing. The particulars of charge read as follows.

“1. James Kariuki Wahome. 2. Joseph Mburu Kimemia. On the night of 13th and 14th day of September, 1993, at Mwenja Garage in Nakuru District of the Rift Valley Province, jointly stole two crown wheels, two bearings and one master cylinder of Bedford lorry valued at shs 45,000/- the property of James Mwenja Ndiangui.”

The appellant and his co-accused pleaded not guilty to the charge and the case went to hearing.

The two accused were represented at the trial by Mr D.M. Kimata, Advocate.

In all the Prosecution called 5 witnesses in support of its case. It would appear from the record (including the original record) that there was some confusion towards the end of the prosecution case and that the prosecution did not close its case formally.

This is because the prosecution wished to amend the charge sheet and recall one of the witnesses (PW4). The prosecution was allowed to do both but in the end did not indicate that it had closed its case.

However, it would appear that the Counsel for the appellant went on his feet and made a submission of no case to answer. The prosecutor replied and submitted that there was a prima facie case established. There was a reply from the appellant's Counsel and the learned trial magistrate remanded the ruling on 10th December, 1993. The submissions were on 2.12.93.

What is bothering this court is the fact that there is no indication at all, as to what had become of the Ruling. Was it ready or it was not ready? After the coram had been recorded, the prosecutor made an application for withdrawal of the case under Section 87 (a) of the Criminal Procedure Code.

The appellant's Advocate objected but the court allowed the prosecution to withdraw the charge under Section 87(a) Criminal Procedure Code.

The appellant who was the first accused before the lower court has now appealed to this court. He has preferred 3 grounds of appeal all on assault on the magistrate's order / Ruling allowing the prosecution to withdraw the case under Section 87(1) Criminal Procedure Code.

When the appeal came before me for hearing, Mr Omutelema, a learned State Counsel, who appeared for the State raised a preliminary objection to the appeal. Among other things, Mr Omutelema submitted that the appellant had no right of appeal as he had not been convicted. He also submitted that the effect of the withdrawal was to remove all the proceedings from the trial court and that there were no proceedings to appeal from.

Mr Kimata, Advocate was of a different view. He submitted among other things that the appellant was aggrieved by the order of the court and was entitled to appeal. Both Counsels submitted at length and were of great assistance to the court.

The learned trial District Magistrate acted under Section 87 (a) Criminal Procedure Code. The Section reads

“In a trial before a subordinate court a public prosecutor may, with the consent of the court, or on instructions of the Attorney General, 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 would appear from the section that the accused does not have to consent to the withdrawal. What is needed is the consent of the court or instructions from the Attorney General. Be it as it may, the court gave its consent to the prosecutor in the particular case and the charge was withdrawn. The appellant had not been put on his defence and was therefore discharged. The proceedings against him terminated although he is not immune to subsequent proceedings against him on account of the same facts naturally the appellant was unhappy and aggrieved by this turn of events. He could be re-arrested and charged on account of the same facts. His case was just ending although he could not tell whether he was to be, convicted or not. But this turn of events only served to increase anxiety.

The question now is, does the appellant have a right of appeal? Part XI of the Criminal Procedure Code provides for Appeals from Subordinate Courts. Section 347(1) (a) provides as follows.

“save as is in the part provided.

(a) a person convicted on a trial held by a subordinate court of the First or Second Class may appeal to the High Court.

“A person convicted on a trial.....”

Would mean in simple language a person who has been proved or declared by court of competent jurisdiction to be guilty of a crime he has been charged with.

The appellant in this appeal as not convicted. He was discharged after the charge against him was withdraw under section 87 (a) Criminal Procedure Code.

Many authorities were quoted to me. Most of them are of little assistance if any to the court in this particular matter.

I find that the appellant herein is not “a person convicted on a trial held by a subordinate court.....”

Consequently I find that he has no right of appeal.

The upshot of this is that the State Counsel’s objection is sustained. The appeal is struck out as incompetent.

Orders accordingly.

Dated and delivered at Nakuru this 10th day of March, 1995

D.M. RIMITA

JUDGE