REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL APPEAL NO. 50 OF 2016

REPUBLIC..APPELLANT

VERSUS

DOMINIC MUSYOKA KYENZA...1ST RESPONDENT

ABDULLAHI SHARIF AHMED..2ND RESPONDENT

(Being an appeal from the orders and ruling of Chief Magistrate Margaret Wachira dated 12/7/2016, 13/7/2016 and 19/7/2016 in Garissa ACC No. 10 of 2015 Republic vs Dominic Kyenza Musyoka & Abdullahi Shariff Ahmed)

JUDGEMENT

1. Before me is a Petition of Appeal dated 22nd July, 2016 filed by the appellant through the Senior Assistant Director of Public Prosecution and filed on even date against the ruling of Hon. Margret Wachira dated 12/7/2016, 13/7/2016 and 19/7/2016 in the Chief Magistrates Court at Garissa ACC No. 10 of 2015 where the court acquitted the Respondents under section 202 of the Criminal Procedure Code and dismissed the charges that faced them under section 206 of the Criminal Procedure Code. They raised the following grounds THAT: -

1) The Learned trial magistrate erred in law in refusing to grant the prosecution an adjournment yet no order of last adjournment had been made.

2) The learned magistrate having appreciated that PW2 had been stepped down and informed to attend court during the next hearing erred in law in holding that no reason had been given for non-attendance of the witness who had also been bonded despite having personal knowledge of the hearing date.

3) The learned trial magistrate while considering the fact that the prosecution was always available to proceed erred in failing to give the prosecution an opportunity to trace the witnesses pursuant to the reasons explained by the Senior Assistant Director.

4) The learned trial magistrate erred in law in refusing to withdraw the charges under section 87(a) of the CPC which remedy was available to the prosecution in the circumstances.

5) The learned trial magistrate erred in law in invoking the provisions of section 202 and 206 of the CPC disregarding evidence on record.

6) The learned trial magistrate erred in failing to appreciate that two witnesses had testified and misdirected herself in acquitting the respondents under section 202 of the CPC

7) The learned trial magistrate misconstrued the decision in the case of R VS SHAH 1986 KLR-785 by holding that the circumstances in the case before her were exceptional to warrant refusal.

8) The learned trial magistrate erred in holding that the prosecution did not show willingness to invoke the provisions of section 146-148 of the CPC contradicted herself upon being made aware that witnesses had refused to testify.

9) The learned trial magistrate while appreciating that witnesses had been threatened, which fact was brought to her attention on 4-11-2015 erred in holding that witnesses had deliberately refused to attend court.

10)The learned trial magistrate considered extraneous matters in refusing an adjournment and subsequent withdrawal of the charges under section 87(a) of the CPC.

11) In refusing the adjournment and subsequently dismissing the charges and acquitting the accused the learned trial magistrate failed to consider that the charges were in respect of Anti- Corruption and Economic Crimes and it is in the public domain that the fight against corruption is a public interest issue.

12) The learned trial magistrate was biased against the prosecution and favoured the respondents who delayed commencement of the trial and even delivered the ruling in absence of the Senior Assistant Director thus frustrating efforts of the prosecution in presenting all issues

2. They prayed for this court to allow the appeal and quash the trial magistrate ruling and reinstate the charges against the Respondents.

3. The brief facts of the case are that the accused persons who are the Respondents herein were charged with three counts. The first count is for Fraudulent acquisition of public Property Contrary to section 45(1)(a) as read with section 48(1) of the Ant-Corruption and Economic Crimes Act No.3 of 2003. The particulars being that on 12th November 2014 at Garissa township within Garissa County, being the Deputy County Commissioner and the District Clerk respectively acquired public property to wit 285*20kg bags of rice, 50*50 bags of beans, 10(6*3) liters cooking oil and 3820 bales of nutra-pop of relief food meant for the needy and vulnerable persons in Garissa County purporting that the beneficiaries were special needy case Umulkheir and Umuseilm Children Homes.

4. The second count is related to the 1st Respondent, which is deceiving Principal Contrary to section 4(1) of the Anti-Corruption and Economic Crimes Act No. 3 of 2003. The particulars being that between 12th and 14th days of November 2014 at Garissa township, being the Deputy County Commissioner being agent of the government who to the intended beneficiaries of relief food (the needy and the vulnerable persons) and the ministry of Devolution, used false documents being counter requisition and issue voucher with food beneficiaries named as Umulkher Children Center Umuselilm Children Homes and special needy case, knowing the said beneficiaries were false.

5. The third Count were for both Respondents where they were charged with fraudulent disposal of public property contrary to section 45(1)(b) as read with section 48(i) of Anti-Corruption and Economic Crimes Act. The particulars being that on 12th November, 2014 at Garissa Township within Garissa County, being the Deputy County Commissioner and the District Clerk respectively, jointly fraudulently acquired public property to wit285*20kg bags of rice, 50*50 bags of beans, 10(6*3) liters cooking oil and 3820 bales of nutra-pop of relief food meant for the needy and vulnerable persons in Garissa County purporting that the beneficiaries were special needy case Umulkheir and Umuseilm Children Homes.

6. The accused persons were arraigned in court on 18/5/2015 for plea whereby they pleaded NOT GUILTY to the charge and the case was then fixed for hearing on 4th and 5th August, 2015. On 4th August, 2015 the Prosecution sought an adjournment as they did not have a witness in court, which application was allowed and they also substituted the charge sheet and the accused persons retook their pleas afresh and the matter was adjourned to 4th and 5th November, 2015. On 4th November, 2015 the matter was adjourned at the request of the defence on the ground that one of the defence counsel was bereaved. The prosecution indicated to the court that they were ready to proceed with two witnesses and also notified the court that there were threats against the witnesses from the accused and their agents, where the court issued a warning and directed that the Investigating officer to investigate the allegations and presents a report to the court. The hearing was adjourned to 27th January, 2016.

7. On 27/1/2016 the matter came up for hearing as scheduled and the prosecution called one witnesses and sought an adjournment, where they indicated to the court that he had summoned two other witnesses, however attempts to reach them were futile as they had switched off their phones. The defence objected to the adjournment indicating that they were worried at the prosecution pace of calling witnesses in view of the fact that they had been served with 10 witness statements and huge documentations. The court allowed the adjournment and fixed the matter for hearing for two consecutive days on 12th and 13th April, 2016. On 12th April, 2016 the prosecution sought an adjournment as there were no witnesses present and alleged that those who had been summoned had switched off their phones. The adjournment was opposed by the Respondents and the court adjourned the matter to 13th April, 2016 where the prosecution called one witness whom they stood down for lack of original documents. The matter was fixed for further hearing on 12th July, 2016.

8. On 12th July 2016 the prosecution further sought an adjournment for lack of witnesses; they alleged that the witness who was due to testify had switched off her phone. The Respondents opposed the adjournment. The prosecution sought to withdraw the charges under section 87(a) of the CPC, the same was opposed by the Respondent and the Court declined the withdrawal and refused further adjournment. On 19/7/2016 the court proceeded to acquit the accused person under section 202 as read with section 206 of the Criminal Procedure code.

9. The instant appeal proceeded by way of written submissions. The appellant's submissions are dated 27th February, 2020 and filed on 28th February, 2020. They summarized their grounds of appeal into three. The first one is on the failure by the trial court to allow the appellants to withdraw the charges under section 87(a) of the Criminal Procedure Code. In this regard they submitted that the court ought to have acceded to their request based on the alleged threats to their witnesses, which threats were brought to the attention of the court even though a report was not filed as requested.

10. Additionally, they submitted that although a withdrawal under section 87(a) of the CPC can lead to reinstatement of the charges, the same does not infringe the accused rights under the Constitution and the law. They relied in the case of **Titus Koome Kubai & others vs Republic Meru High Court Petition No. 1 of 2014.**

11. The second ground advanced by the appellants is that the trial court erred in acquitting the accused persons under section 202 of the Criminal Procedure Code. They instead submit that the court ought to have considered the evidence on record and consider its verdict under section 210 of the Criminal Procedure Code.

12. The final ground addressed by the appellant is that the trial court erred in dismissing the charges against the accused persons under section 206 of the criminal procedure Code. In this regard they rely in the case of **Haji Ibrahim Ali Hussein vs Republic (2017) eKLR.** It is

their submissions that the state was the complainants and their evidence was on record.

13. The 1st Respondents filed their written submissions dated 22nd June, 2020 and filed on 23rd June, 2020. They opposed the instant appeal and justified the trial court position and gave the genesis of this appeal as per the record. It is their case that the trial court dismissal of the charges facing the Respondents was as a result of lack of seriousness on their part of by failing to bond witnesses guaranteeing their attendance in court. And that no evidence of summons to witnesses were produced and therefore the lack of witnesses warranted the dismissal of the charges to protect the Respondents rights to fair trial under Article 50 of the Constitution.

14. In sum they urged the court to find that the trial magistrate correctly held that there were exceptional or unusual circumstances to warrant the court to fairly conclude that it was in the interest of justice to dismiss the charges facing the Respondents. They rely in the cases of **R vs Shah 1986 KLR, R vs Geoffrey Musyoki Kombo (2007) eKLR and Republic vs Misheck Muyuri(2007) eKLR.**

15. The 2nd Respondent also fled their written submissions dated 26th June, 2020 and filed on 8th July, 2020, where they also opposed the instant appeal insisting that the appellants were granted a fair opportunity to prosecute their case and call their witnesses but failed, for instance they failed to invoke section 144-148 of the Criminal Procedure Code and therefore in their view the trial court rightly exercised its discretion in acquitting the Respondents and dismissing the charges therein. They urged the court to find no merit in the appeal and dismiss the same.

DETERMINATION

16. In my view the following questions arise for determination;

> **a) Whether the trial court was right to acquit the Respondents under section 202 as read with section 206 of the Criminal Procedure Code?**
>
> **b) Whether when the prosecution seeks for an adjournment, should the court decline and acquit the accused or should the court decline the application and give a chance to the prosecution to make any other appropriate application?**
>
> **c) Whether the appeal is merited?**

17. As capture above, it is clear to me from the record herein that indeed the trial magistrate, declined to allow the prosecution to withdraw the case pursuant to section 87(a) of the Criminal Procedure Code and to grant the prosecution an adjournment and proceeded to acquit the accused persons under section 202 as read with section 206 of the criminal procedure code.

18. The learned trial magistrate in her ruling delivered on 12th July, 2016 in respect to the appellants request to withdraw the charges pursuant to section 87(a) of the CPC stated as follows;

> **"In the case before this court, the prosecution did not give any reason for withdrawal of the case. In my considered opinion, the application to withdraw under section 87(a0 of CPC is to stay proceedings temporary and this will infringe the rights of the accused which are guaranteed under Article 50(1) (e) of the Constitution. In addition, this case has exceptional circumstances being that case came up for hearing 5 times. Prosecution applied for adjournment 4 times due to lack of witnesses. Prosecution conceded that the witnesses are problematic. No reasons were disclosed to the court why witnesses have refused to attend court and testify. The prosecution did not show any willingness to invoke the provisions of section 146-148 of the Criminal Procedure Code to avail witnesses before court."**

19. In respect to her ruling delivered on 19/7/2016 dismissing the charges against the Respondents under section 202 and 206 of the criminal procedure Code, the learned trial magistrate noted as follows;

> **"Firstly, there is on record the evidence of PW1 and half completed evidence of PW2. The evidence of PW1 doesn't suggest he is the complainant. The evidence of PW2 even though incomplete doesn't also suggest PW2 is testifying for the complainant. Secondly, from the charge sheet, there are known complainants who have failed to attend court on all the dates the case has been fixed for hearing. The prosecution has conceded that the complainants/witnesses have become difficult and have refused to attend court to testify."**

20. Section 202 of the Criminal Procedure Code in which the Respondents were acquitted on provides; that;

> **"If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed on the summons for hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall there upon acquit the accused person, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may pending the adjourned hearing, either admit the accused to bail or remand him to prison or take security for his appearance as the court think fit".**

21. It is clear that section 202 of the Criminal Procedure Code above applies to instances where the complainant having been summoned to attend court to testify in a case, and then fails to do so, the court may acquit the accused person or adjourn the hearing of the case, depending on the circumstances that may be prevailing. The question therefore is whether the trial court decision to dismiss the case against the Respondent under the above section 202 of the CPC is tenable. The issue is who the complainant is and whether the complainant in this case

appeared in pursuit of the charges against the Respondents. In this regard section 89 of the CPC provides for the process of Initiation of criminal proceedings. It states:-

> **"89. Complaint and charge**
>
> **(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.**
>
> **(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.**
>
> **(3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.**
>
> **(4) The magistrate, upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer.**
>
> **(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."**

22. It is apparent to me from the reading of the above section that the complainant is the person who initiates a charge, and in our Criminal Justice System as envisaged under Article 157 of the Constitution, that responsibility is bestowed upon the Director of Criminal Prosecutions, and it is that office that conducts the actual prosecution. Indeed I agree with the appellant that the complainant in this case was the State and that the trial court erred in finding that there was no indication of a complainant after analyzing the evidence of PW1 and PW2, and therefore the dismissal of the Respondent case based on section 202 of the CPC cannot stand, as in this case the Complainant (DPP) was present in court at all times.

23. Additionally, the trial magistrate also dismissed the Respondents charges under Section 206 of the Criminal procedure code. It provides as follows;

> **"If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs."**

24. It is clear that Section 206 of the Criminal Procedure Code provides for the action a court may take in a situation where an accused person, having knowledge of the time and place of hearing or further hearing fails to attend court, or the complainant fails to attend court. In the instant case, both the accused persons and the complainant were always in attendance of the court proceedings and the complainant had called one witnesses PW1 and stood down another onePW2. Therefore, it is clear to me that the circumstances of this case did not call for the application of sections 202 and 206, both of the Criminal Procedure Code.

25. Considering the circumstances of this case, it is my view that the trial court although merited in declining to grant the prosecution further adjournments and declining their application to withdraw the matter under section 87(a) of the CPC, it misapplied the above sections of the law in using it to dismiss the charges facing the Respondents. It ought to have directed the Prosecution to proceed with the matter in whatever way it they deemed, for instance the prosecution might have been forced to close their case or leave the matter to the court to decide.

26. The fallback for the trial court would have been in the circumstances the consideration of section 210 and 211 of the Criminal Procedure Code. The former provides that where it is found that the prosecution has failed to establish a case against the accused person the court would then proceed to acquit him or her, for having no case to answer, and the latter provides that where the court finds compelling evidence it would place the accused on his defence.

27. In respect to the trial court decision to deny the appellant the right to withdraw the charges pursuant to section 87(a) of the CPC, it is my finding that the trial court decision in this regard is merited. The State in the circumstances could not be allowed to bend the rules of the game in their favour midway into trial without a just cause. They were granted an opportunity to present their case but failed to do so.

28. Further, they were granted an opportunity to investigate the threats allegations against their witnesses and report the same to the court, but they failed to do so, and therefore it remained mere allegation. Furthermore, they failed to bond witnesses to attend court and apply the provisions of section 144-145 of the Criminal procedure code in this regard, and therefore allowing them to withdraw the charges under section 87(a) of the CPC would in the circumstances infringe the rights of the respondents protected under Article 50 of the Constitution.

CONCLUSION

29. It is therefore my fining based on the foregoing that the trial court incorrectly applied section 202 and 206 of the Criminal Procedure in dismissing the charges facing the Respondents. In the circumstances I find the instant appeal merited to that extent. However, it is clear to me that the genesis of the failure of the prosecution to proceed with their case was the unwillingness of the witnesses to testify.

30. It is evident from the record that they would switch off their phones at the material time when they were needed to attend court. It is notable that the prosecution failed to invoke the legal mechanisms in place to secure the attendance of their witnesses in court, and even if this court orders retrial it is not guaranteed of the same. Further, I have looked at the evidence of PW1 and it is clear to me that he is not of much help to the appellant's case, and even if the court was to allow the prosecution to close their case and leave the court to make a decision, an acquittal would still have been the case.

31. Therefore, in view of the above, in totality this court finds no merit in the instant appeal, and it declines the prayer for retrial in the circumstances.

32. Thus, the court makes the following orders;

> ***i) The appeal has no merit and is thus dismissed.***

DATED, DELIVERED AND SIGNED AT GARISSA THIS 29TH DAY OF JULY, 2020.

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C. KARIUKI

JUDGE