

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CRIMINAL REVISION NO. 60 OF 2018

THE OFFICE OF THE DIRECTOR

OF PUBLIC PROSECUTIONS.....APPLICANT

=VRS=

WILFRED OGERO MOSIGISI.....RESPONDENT

{Being a Revision against the Ruling of Hon. N. Kahara – RM Keroka delivered on the 24th day of January 2017 in the original Keroka Principal Magistrate’s Court Criminal Case No. 1499 of 2015}

RULING

This application is similar to the one in Nyamira Criminal Revision No. 59 of 2018 the only difference being that in this case after the trial magistrate refused to allow the prosecution’s application for adjournment the prosecution Counsel sought to withdraw its case under Section 87 (a) of the Criminal Procedure Code but that too was refused on the ground that the accused was likely to be re-arrested immediately and charged afresh. The trial court then proceeded to write a ruling that the prosecution had not established a prima facie case against the accused person and acquitted the accused under Section 210 of the Criminal Procedure Code.

I have considered the rival submissions herein as well as the authorities cited. It is my finding that the trial magistrate did not exercise her discretion judiciously. Whereas she had a discretion to allow or refuse an adjournment for good cause the reason she gave for declining to grant leave to the prosecution to withdraw its case was improper. The law envisages that where the prosecution withdraws its case under Section 87 (a) of the Criminal Procedure Code the accused is discharged and becomes liable to be re-arrested and charged afresh. The trial court exercised its discretion only so that the accused would not be arrested immediately he left the court on that day. How did she know he would be arrested on the same day? The prosecution would have been within its right to re-arrest the accused and to charge him afresh as that was within their power and the trial magistrate did not exercise her discretion judicially and her order may have resulted in a miscarriage of justice. Be that as it may while this court has wide revisionary powers the discretion it can exercise in that respect in this case is limited by **Section 364 (1) (b) of the Criminal Procedure Code** which makes it clear that this court cannot alter or reverse an order of acquittal on revision. That Section states: -

“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

An order to reverse an acquittal can only be made in an appeal. The prosecution ought to have appealed the acquittal. The application is dismissed.

Dated, signed and delivered in Nyamira this 26th day of July 2019.

E. N. MAINA

JUDGE