



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT HOMA BAY**

**CRIMINAL APPEAL NO.11 OF 2018**

**REPUBLIC.....APPELLANT**

**VERSUS**

**MONICA WANGUI MAINA.....1<sup>ST</sup> RESPONDENT**

**GABRIEL ETIANG OTWANE.....2<sup>ND</sup> RESPONDENT**

**SIMON KIPSANG KIRWA.....3<sup>RD</sup> RESPONDENT**

**(Being an appeal from the decision of Hon. T. Obutu, SPM**

**in Homa Bay criminal case No.209 of 2015 delivered on 9-4-2018)**

**JUDGMENT**

[1] The petition of appeal filed herein on 13<sup>th</sup> April 2018, by the state/appellant comprises three grounds of appeal against the decision of the Senior Principal Magistrate at Homa Bay made on 9<sup>th</sup> April 2018, in **CMCC No.209 of 2015**, in which the three respondents, **Monica Wangui Maina, Gabriel Etiang Otwane** and **Simon Kipsang Kirwa**, were charged with three respective counts of dealing with suspect property, contrary to **Section 47 (1) (a)** as read with **section 47 (2)** and **Section 48 (1)** of the **Anti-Corruption & Economic Crimes Act No.3 of 2003**.

[2] It was accordingly alleged that on the 27<sup>th</sup> March 2015, along Homa Bay-Kisumu Road within Homa Bay County, being persons employed by a public body, to wit, National Police service, as police officers of the rank of corporal attached to Kendu Bay Traffic base were respectively in possession of money that they had reasons to believe had been acquired in the course of corrupt conduct, namely, corrupt receipt of benefit from motorists along the Homa Bay-Kisumu Road. In that regard, the first respondent (Monica) was allegedly found in possession of Kshs.1000/= while the second respondent (Gabriel) was found in possession of Kshs.1, 400/= and the third respondent (Simon) in possession of Kshs.630/=.

[3] After pleading not guilty before the trial Chief Magistrate (**P. Gichohi**), the hearing of the case effectively commenced on 26<sup>th</sup> August 2015, with the evidence of Elias Kipyego (**PW1**), an investigator with the Ethics and Anti-Corruption Commission (EACC) based at Kisumu.

This proceeded on later dates with the evidence of other investigators, namely, PC Hilary Chepkwony (**PW2**), Everlyne Ombogo (**PW3**), Raphael Alango Nyima (**PW4**), Nicholas Kirwa Koech (**PW5**), John Wainaina Muturi (**PW6**) and John Otieno Nyagala (**PW7**) who testified as the last prosecution witness on 15<sup>th</sup> November 2016.

[4] Thereafter, the appellant, through the learned prosecution counsel, **Mr. Shabola**, submitted that the evidence against the respondents was sufficient enough to have them placed on their defence. The respondents, through the learned defence counsel, **Mr. Nyauke**, left the matter to the court to make a ruling on the basis of the evidence on record.

[5] On the 20<sup>th</sup> December 2016, the court made its ruling and placed the respondents on their defence. This happened at a time when the trial chief magistrate was on transfer to another judicial station and was therefore expected to expedite the trial and fully complete it. However, she recused herself from the conduct of the case on 20<sup>th</sup> March 2017, when the matter came up for defence hearing. In so doing, the learned chief magistrate stated that:-

**“It appears that the defence is not ready to proceed today. They appear from the application made by Mr. Nyauke to have toyed with the idea of the case being handled by another court.**

**While timelines are not cast in stone and it is not within the jurisdiction of the defence or the prosecution to determine if this court can come back to complete the case, the number of witnesses seem large, and that decision can only be made by my superiors. However, I consider the complaint that was made in court by counsel to defence (Mr. Nyauke, advocate) against me regarding my conduct of this case. It is dated 24/11/16.**

**Though the said complaint was not based on facts and I have already responded to the same. I believe that whatever**

**decision I will make regarding this case and whatever will follow as an outcome if I hear the case, justice may not be seen to be done.**

**To preserve the integrity of this court and for justice to be seen to be done, I would wish to recuse myself from the conduct of this matter completely.**

**In the circumstances, I hereby make an order that this matter be placed before court 1 Honourable Obutu-SPM for further directions and or instruction from the superiors as to who will handle this matter other than myself. In the circumstances also, I decline to issue any summons.”**

[6] Pursuant to the foregoing order, the matter was placed before the learned Senior Principal Magistrate (**Mr. Obutu**) on the 10<sup>th</sup> July 2017. It was then that the defence counsel (Mr. Nyauke) indicated that the matter was for directions and that the trial court had disqualified itself from handling the matter. He therefore prayed that the matter do start “de-novo”.

In response, the prosecution counsel (Mr. Shabola) confirmed that the matter was for directions but noted that it was at the defence stage. He left the matter to the court to give its direction.

[7] The court noted that there was no oppositions to the prayer by the defence to have the matter start afresh and made an order to that effect.

Accordingly, fresh hearing was slated for 12<sup>th</sup> and 13<sup>th</sup> June 2017.

Come the 12<sup>th</sup> June 2017, and the prosecution availed two witnesses i.e. Elias Kipyego (**PW1**) and Nicholas Kirwa Koech (**PW2**), but were unable to avail additional witnesses on 13<sup>th</sup> June 2017, as most of them had been transferred from their previous work stations.

[8] It is instructive to note that these two witnesses had testified in the previous trial as PW1 and PW5 respectively and at that time, Elias (PW1) was based in Kisumu before being transferred to Mombasa, his duty station as at the time of the new trial.

The prosecution’s application for adjournment was granted by the court without objection from the defence. The matter was then fixed for further hearing on 15<sup>th</sup> and 16<sup>th</sup> August 2017, but this was not to be as the prosecution counsel and his witnesses were unable to travel to court.

Despite opposition from the defence, the court adjourned the matter to 29<sup>th</sup> September 2017, after taking judicial notice of the political turmoil being experienced in the Country at the time.

[9] On 29<sup>th</sup> September 2017, the matter was mentioned before the Principal Magistrate (**S. Ndegwa**) as the trial Senior Principal Magistrate was attending a seminar. The hearing was therefore pushed forward to the 11<sup>th</sup> October 2017, when it was again adjourned to 23<sup>rd</sup> November 2017, at the instance of the prosecution with no objection from the defence.

However, on that 23<sup>rd</sup> November 2017, the prosecution applied to withdraw the matter under **Section 87 (a)** of the **Criminal Procedure Code**, as they waited for the decision of the Court of Appeal arising from the decision of the High Court at Nairobi in Civil Appeal No.90 of 2016. The defence counsel requested for time to respond accordingly and the matter was adjourned to 15<sup>th</sup> January 2018, on which date the defence applied for more time.

[10] The response by the defence was made on 13<sup>th</sup> February 2018, as scheduled and on the 3<sup>rd</sup> April 2018, the trial court rendered its ruling in which it declined and rejected the prosecution’s application to withdraw its case under **Section 87 (a)** of the **Criminal Procedure Code**.

Accordingly, the defence prayed for the acquittal of the accused persons under **Section 202** of the **Criminal Procedure Code**. The prosecution, instead prayed for a hearing date with opposition from the defence.

The court answered the prosecution’s prayer by adjourning the case to 9<sup>th</sup> April 2018, for further hearing.

However, on that 9<sup>th</sup> April 2018, the prosecution indicated that it did not bond witnesses as it intended to apply for a review of the trial court’s ruling rejecting its application for withdrawal of the case under **section 87 (a) Criminal Procedure Code**.

[11] The reaction by the defence was to vehemently oppose the hitherto, implied application for adjournment by the prosecution in the

following terms expressed by the defence counsel:-

**“We oppose the application. We were in court on 3/4/18. We opposed the application but the court granted an adjournment. The accused persons are suffering. They travel from far. Justice is a two edged sword. The rights are the same. Parties should be treated as equal. Since 2015 the state has been dragging this matter. The court should take notice that the accused persons are on interdiction. No review has been filed and the witnesses are never in court. There are no instructions exhibited that the state intends to file a review.**

**We pray that the application be rejected.”**

[12] As demonstrated in its subsequent ruling made on the same date, the court agreed with the defence by rendering itself as follows:-

**“Today the 9<sup>th</sup> day of April 2018, the state is again seeking for an adjournment on the grounds that they intend to apply for a review on the ruling of this court.**

**Again the defence objected to the application. It is clear and on record that the state do not have any witnesses in court to demonstrate good faith, it is also not disputed that no review has been filed in the High Court or this court.**

**Further it is also clear that there is no stay from any court staying these proceedings. I do find the application by the state not in good faith. At least they ought to have filed a review or had their witnesses attend court as a sign of good faith. I have perused the letter dated 5<sup>th</sup> of April 2018. The same exhibits an intention to appeal or review. The intention is yet to be executed for reasons unknown to the court. I do agree with the submissions that justice is a double edged sword and cuts both sides. To allow the application by the state will amount to injustice on the part of the accused persons.**

**The upshot is that, I find the application by the state not merited and do reject the same. Matter to proceed for hearing as earlier scheduled”.**

[13] The clear effect of the ruling was to compel the prosecution to call the remainder of its witnesses forthwith and proceed with the hearing of its case.

However, the prosecution had no witnesses to call at that juncture as they had to travel from Nairobi. A last adjournment was therefore sought by the prosecution to enable them avail the remainder of their witnesses.

The defence raised an objection to the application and urged the court to invoke the provisions of **Section 202 Criminal Procedure Code**. The court sustained the objection by stating that:-

**“It appears that the state is unable to provide any witnesses at this stage. I do proceed and acquit the accused persons under the provisions of Section 202 of the Criminal Procedure Code”.**

This appeal is an expression of the appellant’s dissatisfaction with the said ruling which resulted in the acquittal of the three respondents of the charges against them respectively.

[14] The appellant preferred three (3) grounds of appeal as follows:-

**[1] The learned trial magistrate erred in law when he failed to take judicial notice of the court of appeal decision in Civil Appeal No.102/2016.**

**[2] The learned trial magistrate erred in law in not exercising his discretion judiciously when the prosecution made an application to withdraw the case.**

**[3] The learned trial magistrate order that the case do proceed to hearing in light of the decision of the Court of Appeal in Civil Appeal No.102 of 2016 amounted to a waste of judicial time, absurd, conical and an exercise in futility.**

The appellant therefore prayed that the appeal be allowed and an order that Homa Bay Criminal Case No.209 of 2015 stands withdrawn be made.

[15] The appeal was canvassed by way of written submissions and in that regard the appellant’s submissions dated 26<sup>th</sup> June 2019 were filed on the same day while those of the respondents dated 25<sup>th</sup> November 2019, were filed on 26<sup>th</sup> November 2019.

This court, gave due consideration to the rival submissions.

Its duty was to re-visit the circumstances which led to the impugned order/ruling made by the trial court on 9<sup>th</sup> April 2018, and draw its own conclusions in determining whether or not the appeal should be allowed and to what extent.

[16] In that regard, the court started off by recapitulating the history of the case and the path it took upto the date when the impugned ruling was made. The appeal is essentially against the impugned ruling and not any other. Therefore, grounds one (1) and two (2) of the appeal are

irrelevant insofar as they refer or relate to the refusal by the trial court to have the case withdrawn under **Section 87 (a) of the Criminal Procedure Code** on account of the appeal in the Court of Appeal against a decision made by the High Court at Nairobi in Civil Appeal No.90 of 2016. This appeal is the **Civil Appeal NO.102 of 2016 – Micheal Kamau & others –vs- EACC & others**, referred to in the appellant's submissions.

[17] Ground three (3) is most relevant as it directly and/or indirectly relates to the impugned ruling of the 9<sup>th</sup> April 2018, which arose due to the inability of the prosecution (appellant) to proceed with the hearing of its case as ordered by the trial court.

It's application for time to file for review of the trial court's order of the 3<sup>rd</sup> April 2018, in which its application to have the case withdrawn under Section 87 (a) Criminal Procedure Code was rejected, was also rejected with orders acquitting the three respondents under Section 202 of the Criminal Procedure Code.

In challenging the impugned ruling, the appellant was in fact challenging the acquittal of the respondents under Section 202 Criminal Procedure Code and that is why it is herein praying for an order that Homa Bay Criminal case No.209 of 2015, be marked as withdrawn and that the order of acquittal made in favour of the respondents be set aside and substituted for a discharge order.

[18] This prayer is a clear reflection of the appellant's intent to re-visit its failed application before the trial court for withdrawal of the case under section 87 (a) Criminal Procedure Code so that the respondents may receive a conditional discharge of the charges facing them rather than an absolute discharge in the form of an order of acquittal.

The effects of a conditional discharge would render the respondents vulnerable, uncertain and at the mercy of the appellant who would thus acquire the leeway to trample on the respondents' right to a fair hearing of the case.

[19] On the other hand, the effect of an acquittal order is to afford the respondents absolute immunity against any intended or contemplated future prosecution of the charges facing them on the basis of similar facts and evidence.

Indeed, if the sword of justice is double edged, then its aim and/or target would invariably be determined by the prevailing circumstances and the need to ensure fair play and exercise fairness.

[20] The scenario leading to this appeal is traceable to the trial court's proceedings of the 9<sup>th</sup> April 2018, where the appellant indicated that it had not bonded its witnesses and was not ready to proceed as it intended to file an application for review of the court's ruling made on 3<sup>rd</sup> April 2018, in which the court rejected its (appellant's) application to withdraw the case under Section 87 (a) of the Criminal Procedure Code (CPC). This meant that the appellant was requesting for time to file its intended application for review of the impugned court order and therefore, for an adjournment of the case in the meantime.

[21] The reaction of the defence to that application was astonishing considering that the prosecution had actually closed its case in the first instance and when it came to the defence hearing, the respondents quickly applied for the hearing of the entire case afresh or "de-novo" when it dawned upon them that the original trial magistrate had recused herself from the conduct of the case following unproven accusations made against her by themselves.

[22] Accordingly, the learned defence counsel rendered himself thus:-

**"We oppose the application. We were in court on 3/4/18. We opposed the application but the court granted an adjournment. The accused persons are suffering. They travel from far. Justice is a two edged sword. The rights are the same. Parties should be treated as equal. Since 2015 the state has been dragging this matter. The court should take note that the accused persons are on interdiction. No review has been filed and the witnesses are never in court. There is no instructions exhibited that the state intends to file a review. We pray that the application be rejected".**

These remarks clearly indicated that the defence was objecting more to the prosecution's intention to seek review of the impugned court ruling rather than to an adjournment of the hearing of the case. To say the least, the reaction went overboard with a view to eliciting emotional empathy from the court.

[23] As if taking cue, the court found the appellant's application unmerited and rejected it with an order that the hearing of the case do proceed as earlier scheduled.

Not having much of a choice, as the appellant's witnesses were not available at that juncture, the appellant made a last ditch effort to apply for a last adjournment in order for them to avail the remaining witnesses.

The defence would have none of that, and noting that the prosecution was unable to avail its witnesses, urged the court to invoke the provisions of Section 202 Criminal Procedure Code. The prosecution resigned itself to fate which came by way of the trial court's order of acquittal of the three respondents of the charges facing them respectively.

[24] The acquittal order was made pursuant to Section 202 of the Criminal Procedure Code. Indeed, it is this order which forms the gravamen of this appeal. The big question must therefore be whether the order was legally sound and proper for it to be sustainable.

Basically, Section 202 of the Criminal Procedure Code provides for non-appearance of complainant at hearing in the following terms:-

**“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 in the summons for the 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 thereupon acquit the accused, 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 thinks fit”.**

[25] Undoubtedly, this provision gives wide discretion to the court to either dismiss the case and acquit the accused persons altogether or for good reason sustain the case by allowing an adjournment of the hearing to another date with or without conditions or terms deemed fit and proper.

However, it is always expected that in the exercise of its discretion, the court would act judiciously i.e. with good judgment or sense, practical expediency, discreetly and/or prudently.

From the circumstances of this case and due consideration being given to the underlying factors surrounding it, this court, with the greatest respect, holds the opinion that the trial court did not exercise its discretion judiciously when it invoked the provisions of Section 202 Criminal Procedure Code to dismiss the case for want of prosecution and acquit the three respondents.

[26] In any event, section 202 Criminal Procedure Code was in the circumstances inapplicable as it refers to non-appearance of the complainant at the hearing of the case. Herein, the hearing had already re-commenced with two prosecution witnesses testifying. The matter would not therefore be dismissed for want of prosecution. If anything, the trial court ought to have considered whether or not the evidence already adduced by the prosecution was sufficient to require that the respondents be placed on their defence. An acquittal under Section 210

Criminal Procedure Code ought to have followed if the court found that the prosecution had failed to establish a “prima facie” case requiring the respondents to be placed on their defence.

Further, Section 202 Criminal Procedure Code could not apply as the state prosecutor cum complainant was present in court on the 9<sup>th</sup> April 2018.

[27] Under section 202 Criminal Procedure Code, complainant means the “Republic” in whose name all criminal prosecutions are brought. A state prosecutor therefore represents the state in the case brought against an accused person. He would in the circumstances fall within the meaning of the term “complainant”. (See, **Republic –vs- Mwaura (1979) KLR 209**, **Ruhi –vs- Republic (1985) KLR 373** and **Roy Richard Elimua & Another –vs- Republic Criminal Appeal No.67 of 2002**).

For all the foregoing reason this appeal is hereby allowed only to the extent that the trial court’s order made on 9<sup>th</sup> April 2018, acquitting the three respondents of the respective charges facing them under section 202 Criminal Procedure Code be and is hereby set aside with an order that the case be reinstated and remitted back to the lower court for further hearing and/or further orders before a different magistrate of competent jurisdiction.

The three respondents shall remain on bond as previously ordered by the lower court and shall avail themselves before the court as and when notified through the defence counsel.

Ordered accordingly.

**J.R. KARANJAH**

**JUDGE**

**19.12.2019**

**[Delivered and signed this 19<sup>th</sup> day of December, 2019]**