

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL REVISION NO. 198 OF 2018

REPUBLIC.....APPLICANT

VERSUS

LEONARD AMUKABWA AND 3 OTHERS.....RESPONDENT

R U L I N G

1. The application coming up for determination is by way of revision sought vide a letter dated 14th May, 2018 from the office of the Director of Public Prosecutions. The ODPP averred that the learned trial magistrate erred when she refused to grant a last adjournment on grounds that the prosecution did not have the police file and the witnesses yet on two previous occasions, namely 19.2.2018 and 29.03.2018, the trial court was not sitting. Further that on 04.09.2017, the trial court did not also sit, and that on all the three occasions the prosecution was ready to proceed with the hearing as there were witnesses in court.

2. Secondly, the ODPP was aggrieved by the trial court's refusal to allow the prosecution to withdraw the case under Section 87(a) of the Criminal Procedure Code in a felony case. The ODPP's view of the matter was that withdrawal under Section 87(a) of the CPC would have enabled the prosecution to bond witnesses.

3. Thirdly, the ODPP faulted the trial Magistrate for failing to peruse the entire record which would have shown her that the matter had been delayed at the behest of all parties and especially the defence. Further that the record showed that the prosecution had hitherto sought adjournment only twice throughout all the proceedings.

4. Mr. Ngetich, Counsel for the State submitted that the trial court did not properly apply her mind to the provisions of Section 202 of the CPC, because had she done so, she would have seen that there was no proof that witnesses had been bonded and had refused to attend court. He urged court to revise the order of dismissal by the learned trial court.

5. I have now had the opportunity to peruse the lower court file being CMCCR. Case No. 1424 of 2017. From the record, the accused persons first appeared in court on 04.05.2017, which is now just a year down the line. I also note that between 04.05.2017 and 02.05.2018 when the case was dismissed under Section 202 of the Criminal Procedure Code, no single witness had testified for the prosecution.

6. I also note from the record that the accused persons were charged with two counts of robbery contrary to Section 296(2) of the Penal Code, and three counts of gang rape contrary to Section 10 of the Sexual Offences Act No. 3 of 2006. The accused persons also face two alternative charges of handling stolen goods contrary to Section 322(1) and (2) of the Penal Code.

7. The reasons given for the various adjournments sought are on all on the record. I have also carefully read the provisions of Section 202 of the CPC which donate power to a trial court before whom an accused appears for hearing to acquit the accused if the complainant having had notice of the time and place appointed for hearing does not show up. The section also provides that if there is some reason that would dictate against acquitting the accused, then the trial court has the option of adjourning the case to another date, upon such terms as it thinks fit and may in pursuance of adjourning the case, either admit the accused to bail or remand him in prison or take security for his appearance as the court thinks fit.

8. In the instant case, the accused were on bond. Taking all the circumstances above stated into account, and in light of the powers confirmed upon me by the provisions of Section 362 of the Criminal Procedure Code, I find and hold that the order of the learned trial magistrate dismissing this case under Section 202 of the CPC, though legal was not the proper step to take in this matter. The accused persons are alleged to have committed serious offences and the case is hardly a year old in the court.

9. For the above reasons, and by the powers of Section 354 of the CPC, I now make the following orders:-

1. I hereby reverse the trial court's order acquitting the accused persons herein and in its place, I make an order for the withdrawal of the case against the accused persons under the provisions of Section 87(a) of the Criminal Procedure Code.

Orders accordingly

Ruling written and delivered on this 29th day of May, 2018

RUTH N. SITATI

JUDGE