



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 63 OF 2015**

**REPUBLIC.....APPELLANT**

**VERSUS**

**STEPHEN NJUGUNA NYORO.....RESPONDENT**

**JUDGMENT**

In this matter the State through the office of the DPP Nakuru have filed this appeal challenging the acquittal of the Respondent by the Hon. Chief Magistrate sitting at Nakuru Law Courts.

The Respondent **STEPHEN NJUGUNA NYORO** was arraigned before the trial court on 3/6/2014 on a charge of **ROBBERY WITH VIOLENCE CONTRARY TO SECTION 296 (2) OF THE PENAL CODE**. The particulars of the charge were that

***“On the 1<sup>st</sup> day of June 2014 at Nakuru Township within Nakuru County, jointly with others not before court robbed EVANS MUCHOMA OANDA of his ITEL Phone, two ATM cards, a National Identity Card and cash Ksh 10,000/= all valued at Ksh 23,000/= at or immediately before or immediately after the time of such robbery used actual violence to the said EVANS MUCHOMA OANDA”***

The Respondent entered a plea of ‘**Not Guilty**’ to the charge and his trial was set down for 17/7/2014. On that hearing dated no witness was in court and the prosecutor one **INSPECTOR OYIER** stated as follows:

***“No witnesses are in court. The Corporal was bonded Sgt Muchoma and Sgt Robert Kidogo from Municipal Enforcement Office”.***

Counsel for the Respondent **MR. TOMBE** applied to have his client discharged under Section 202 of the **Criminal Procedure Code Cap 75, Laws of Kenya**. The trial court obliged and acquitted the accused under this provision of the law. The State being aggrieved by this acquittal of the Respondent filed this appeal.

Section 202 of the Criminal Procedure Code provided as follows:-

***“If in a case which a subordinate court had 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 charges***

***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 adjournment hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit”*** (own emphasis).

I have carefully perused the record of the proceedings in the lower court and I have also considered the submissions made by both counsels.

**‘Mr Chigiti’** for the State argues that the State were not allowed an opportunity to call their witnesses. With respect I do not agree. The hearing date was set in presence of both parties. The Respondent was in court on the date scheduled for the hearing. The court prosecutor indicated that two prosecution witnesses **had** been bonded but neither was in court. One the absentee witnesses was identified as **Sgt Muchoma** whom I believe was the same as **‘Evans Muchoma Oanda’**, the complainant named in the charge sheet.

No reason was given for the absence of the two witnesses. The prosecutor confirmed that the two had been bonded, thus they were aware of the hearing date and were aware that their presence was required.

It is pertinent to note that the prosecutor did not make an application to have the hearing adjourned to another date. He simply made the declaration that the witnesses were bonded but failed to come to court. No reason and/or explanation was given for the failure of these witnesses to honour the summons to attend court.

It is also pertinent to note that the complainant and the witness were not lay persons. They were both police officers (Sergeants) and knew the importance of honouring summons/bonds to appear in court. The two were said to be attached to the Municipal Enforcement Office.

All too often police officers though bonded chose to ignore or disregard summons to appear in court. In deed to a great extent police officers are the major cause of delay in criminal cases due to the laissez-faire attitude they adopt to the court processes. Given that these witnesses were officers and given that they had been properly notified of the hearing date their failure to attend court was inexcusable. The trial magistrate also noted that the time was 10.40am. It is well known that court sessions commence at 9.00am. A witness who has not arrived by 10.40am clearly has no intention of attending the hearing.

The prosecutor did not seek an adjournment of the case. Counsel for the Respondent invited the court to invoke Section 202. In the circumstances I cannot find that the trial court erred in acceding to this request. If the complainant being police officer duly has been notified of the hearing date and could not be bothered to attend court, there was no reason to keep the case alive and pending until the officer deemed it convenient to himself to attend court.

I find that the trial court did not err in invoking Section 202. The court properly exercised its jurisdiction in applying this law. I find no merit in this appeal and the same is hereby dismissed in its entirety.

**Dated and delivered in Nakuru this 28<sup>th</sup> day of July, 2017.**

Mr. Tombe for Respondent

Mr. Motende for Appellant.

**Maureen A. Odero**

**Judge**