



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 20 OF 2016**

**DIRECTOR OF PUBLIC PROSECUTION.....APPELLANT**

**VERSUS**

**DAVID SIEGO MONO.....1ST RESPONDENT**

**JAPHET KITHINJI RECHE.....2ND RESPONDENT**

**ALEX JOSEPH MUGO.....3RD RESPONDENT**

**R U L I N G**

1. The appellant was aggrieved by the order of Embu Principal Magistrate in Embu Chief Magistrate Criminal case No. 542 of 2013 made on 15/01/2016.
2. The grounds of appeal are that the trial magistrate erred by acquitting the respondent and failing to give the prosecution the chance of calling its witnesses who were present in court. Further that the court did not allow the officer commanding police station (OCS) Itabua who was present in court on 5/01/2016 to explain why the police file was produced late.
3. The court failed/neglected to record that the witnesses were present in court and ready to testify. It was wrong for the court to deny the prosecution a chance to withdraw the case under Section 87(a) of the Criminal Procedure Code.
4. The respondents was charged with the offence of cutting down crops belong to the complainant valued at Kshs.37,395/= contrary to Section 334 of the Penal Code. He pleaded guilty to the charge and the matter proceeded for hearing.
5. The facts of the case are that on the material day 15/01/2015, the prosecution applied for adjournment on grounds that the police file had not been availed from Itabua police station. The application was opposed by the respondent's counsel on grounds that this was not the first time to fail to avail the court file and that no good reason had been given.
6. The magistrate granted adjournment up to sometime in the day but still the prosecution failed to avail the police file. It sought for the "very last" adjournment which was rejected. An application to withdraw the case under Section 87(a) of the Criminal Procedure Code (CPC) was made which was opposed by the respondent's counsel and rejected by the court.
7. An order to acquit the accused persons under Section 202 of the CPC was made.
8. The background is that the plea in this case was taken on 24/06/2013 whereas the respondents pleaded not guilty. The case was fixed for hearing on 17/03/2013 but did not take off because the defence counsel was absent. It came for hearing 18 times thereafter but did not take off for various reasons and more predominantly because the prosecution were not ready to proceed. On 15/06/2016, the court refused adjournment and subsequently rejected withdrawal under Section 87(a) of the CPC.
9. Out of the eighteen times the case came for hearing, the prosecution were not ready to proceed for more than ten (10) times. The defence did not object to the first few applications for adjournments but were later to vehemently oppose the applications and brought it to the attention of the court that the respondents trial had dragged for about two years and had never taken off.
10. On the material day, and given the history of the case, the trial magistrate was indeed justified to refuse the application for adjournment and for withdrawal under Section 87(a) of the CPC. There had been undue delay in the trial without any justification.
11. Under Article 50(2)(e) of the Constitution, the accused has a right to have his trial begin and be concluded without delay. The prosecution had already denied the respondents this constitutional right. The court would have failed in its duty had it granted a further adjournment or allowed withdrawal of the case.

12. The proceedings show that the prosecution obtained the map and the land registry sheet in the course of the delayed trial and discovered that the ground on which the allegedly uprooted crops stood was on the road reserve and not on the land of the complainant. The prosecutor sought adjournment to seek instructions from the Officer Commanding Police Division (OCPD) to withdraw the case. Nothing more was heard thereafter about the withdraw.

13. The conduct of the prosecution in the trial was such that it was determined to keep the respondents in court for as long as the court allowed them to do so knowing very well that their case was headed nowhere.

14. I find that the grounds of appeal herein are baseless and not supported by the proceedings. The history of the case and the facts is such that it puts the conduct of the prosecution in question. As much as the appellant has a right to appeal against an acquittal, I reach the conclusion that this particular appeal amounts to an abuse of the due process of the court.

15. I find no merit in this appeal and it is hereby dismissed.

16. The respondents are set at liberty unless otherwise lawfully held.

17. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF AUGUST, 2017.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Ms. Muriuki for Ithiga for respondents**

**Ms. Manyal for appellant**

**The 3 respondents**