



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**MISC. CRIMINAL APPLICATION NO. 64 OF 2014**

**REPUBLIC.....APPLICANT/APPELLANT**

**VERSUS**

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

**RULING**

1. Before me is an application dated the 21<sup>st</sup> August, 2014 brought by the Office of the Director of Public Prosecutions under the provisions of Section 349 of the Criminal Procedure Code, seeking for leave to file appeal out of time from the judgment of the Hon. J. Ngeno, Chief Magistrate, in Nakuru Criminal Case No. 1773 of 2014.

2. A brief background of the matter is that one Stephen Njuguna Nyoro was charged before the Chief Magistrate's Court with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code, Chapter 63 Laws of Kenya. The case came up for hearing on the 17<sup>th</sup> July 2014 but the court started its session at 10 a.m.

3. At 10.30 a.m. when the case was called out, the prosecutor informed the court that there were no witnesses though bonded. Advocate for the accused then applied that the accused be discharged under Section 202 of the Criminal Procedure Code. There being no reasons given by the prosecutor why the witnesses were not in court, the court proceeded to dismiss the charges under the said Section 202, Criminal Procedure Code.

4. Being dissatisfied with the courts discharge of the accused, the Office of the Director of Public Prosecutions (DPP) through the OCS, Nakuru Police Station applied for an order of Revision that on the grounds that the complainant was within the court precincts, outside the court room, and without his knowledge the case was dismissed.

Section 202 Criminal Procedure Code invests in the court discretionary power to dismiss a charge and acquit the accused if the complainant fails to appear at the hearing of the charge.

The court however declined to order Revision in view of the provisions of Section 364(5) that states ..

***(5) “when an appeal lies from a finding sentence or order, and no appeal is brought, no proceeding by way of Revision shall be entertained at the insistence of the party who could have appealed.”***

**Section 348 A** states -

***“When an accused person has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or charge, or an order dismissing a charge, has been made by a Subordinate Court, the Attorney General may appeal to the High Court from the acquittal or order as a matter of law.”***

5. Pursuant to the above provision, the Office of the Director of Public Prosecutions (DPP) ought to have appealed against the order of acquittal within the 14 days period. However, it is urged that the Director of Public Prosecutions did not appeal within the 14 days period as it waited for the outcome of the Revision application, which ruling was delivered on the 31<sup>st</sup> July 2014, at which time the period to appeal had lapsed. It now prays for extension of time to file the appeal out of time. A draft petition of appeal has been annexed to the supporting affidavit.

6. In response to the application, the Respondent denies the reasons given, that the complainant was within the court precincts when the case was called out, that the prosecutor even stepped outside the court room and called out but the complainant was absent. It is stated that the court gave the prosecutor an opportunity to give reasons to the court as to why the charge should not be dismissed and he replied that he had no objection to the dismissal.

7. I have looked at the court proceedings before the trial magistrate on the 17<sup>th</sup> July, 2014. The record of the proceedings is very brief. All what is indicated is that the prosecutor told the court that there were no witnesses in court though 2 police officers had been bonded with no mention as to whether the complainant was present or absent. Upon request by the accused's advocate to discharge the accused under Section 202 Criminal Procedure Code, the court proceeded to acquit the accused on the ground that there be no reasons the charges are dismissed under Section 202 of the Criminal Procedure Code.

8. From the reading of the Supporting Affidavit to the application by the complainant and the Replying Affidavit by the Respondent, this court is unable to determine between the two who was being sincere in their averments as to exactly what happened before court on the 17<sup>th</sup> July 2014. The court record is equally of no assistance.

9. In the circumstances, and to be fair and just to all the parties, and for due process to be seen to be followed, I shall allow the application and grant leave to the Office of the Director of Public Prosecutions (DPP) to appeal out of time, and in any event to file and serve the Petition of Appeal within 30 days of the date of this ruling, failing which the leave expires automatically. It is so ordered.

**Dated, signed and delivered at Nakuru this 16<sup>th</sup> day of March 2015**

**JANET MULWA**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Chirchir for the State

No appearance for the accused/applicant

Court clerk: David