



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
Criminal Appeal 172 of 2007

REPUBLIC APPELLANT

VERSUS

GEORGE BITANGE NYACHIEO RESPONDENT

JUDGMENT:

This is an appeal by the Attorney-General from an acquittal order that was made on 5th October, 2007. The respondent was charged with obtaining money by false pretences contrary to **Section 313** of the **Penal Code**. The particulars of the offence were that on the 6th day of November, 2004 at Sengera Location, Gucha District, with intent to defraud, the appellant obtained cash **Kshs. 200,000/=** from one **Joseph Aboki Nyameri** by falsely pretending that he was in a position to process a passport and a travelling visa to the said Aboki Nyameri and secure for him employment in Botswana.

The record shows that plea was taken on 12th March, 2007 when the accused (respondent) was released on a bond of Kshs. 200,000/= with one surety of like amount or cash bail of Kshs. 15,000/=. The said cash bail was paid. The hearing was fixed on 5th October, 2007. It appears that on 1st October, 2007 when the case came up for mention the accused was absent and the court issued a warrant of arrest against him and further ordered that the cash bail be forfeited. The hearing was still confirmed for 5th October, 2007 as earlier scheduled.

On that date, the record does not show whether the accused attended court or not. But the prosecutor prayed for an adjournment saying that the file had not been forwarded to him and he had no witnesses to call. The trial court indicated that the prosecution was not interested in the case and dismissed it under **Section 202** of the **Criminal Procedure Code**. The court further discharged the accused and ordered the cash bail to be refunded to him.

The following grounds of appeal were raised by the Attorney-General:

- “1. The magistrate erred in law by acquitting the appellant under Section 202 Criminal Procedure Code without indicating whether or not the accused himself was present on that day.**
- 2. The magistrate erred in law by not indicating whether or not the warrant issued against the appellant (sc) on 1st October, 2007 had been dealt with.**
- 3. The magistrate erred in law by acquitting the appellant yet the complainant had been served with a police bond dated 13th October, 2007 indicating hearing date to be 15th October, 2007 (copy attached).”**

This court was urged to allow the appeal and set aside the acquittal order aforesaid. The Attorney-

General made considerable effort to serve the respondent with the record of appeal but the respondent seemed to have been avoiding service. Ultimately the court allowed the Attorney General to serve the record upon the respondent's wife.

Prima facie, it appears that the proceedings before the trial court were irregular.

If on 1st October, 2007 the court issued a warrant of arrest against the accused for his non appearance, the court should not have proceeded to make any other order on 5th October 2007 without first ascertaining whether he had been arrested or whether he had availed himself. To date it is not clear whether the accused was in court or not. If he was not in attendance, the court ought to have insisted on his arrest. If he was present, the court should have noted so and proceeded to either vacate the orders of his arrest or make such other variation as would have been appropriate.

Secondly, if the complainant had been bonded to be in court on 15th October, 2007, he could not have been expected to be there on 5th October, 2007.

An accused person can only be discharged under **Section 202** of the **Criminal Procedure Code** if the complainant, having been duly summoned to attend court, fails to do so for no apparent reason.

In the circumstances, I allow the appeal, vacate the orders made by the trial court and direct that a retrial be done.

DATED, SIGNED AND DELIVERED AT KISII THIS 31ST DAY OF MARCH, 2009.

D. MUSINGA

JUDGE.

31/3/2009

Before D. Musinga, J.

Court: Judgment delivered in open court in the presence of:

Mobisa – cc

Mr. Mutai for State

N/A for appellant.

D. MUSINGA

JUDGE.