



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA Criminal**

**Miscellaneous Application 22 of 2009**

**REPUBLIC..... APPLICANT**

**V E R S U S**

**JANET NGUSIA HOCHILI .....1<sup>ST</sup> RESPONDENT**

**DORCAS MBAYA HOCHILI ..... 2<sup>ND</sup> RESPONDENT**

**ALFONCE MBAYA HOCHILI ..... 3<sup>RD</sup> RESPONDENT**

**R U L I N G**

The respondents were charged with the offence of assault in Kakamega Criminal Case No.1666 of 2008. They were acquitted of the charges on 26<sup>th</sup> January 2009 under **section 202** of the Criminal Procedure Code. The State intends to now appeal against the decision of the trial court to acquit the respondents and has filed the application for leave to appeal out of time.

Mr. Karuri, learned State Counsel submitted that the complainant was in court on the hearing date and was ready to testify yet the respondents were acquitted. The delay in filing the appeal was not deliberate nor inordinate and that the proposed Petition of Appeal has high chances of success.

Mr. Nyikuli, counsel for the respondent opposed the application. Counsel submitted that the complainant did not swear an affidavit to support the allegation that she was in court and that the delay in filing the appeal was deliberate. Further, counsel contends that the intended Appeal does not have high chances of success.

The trial court record shows that the respondents were arraigned before the court on 13<sup>th</sup> October, 2008 when the charge was read to them. The case was then fixed for hearing on 19<sup>th</sup> November 2008. On the first hearing date, that is 19<sup>th</sup> November, 2008, the prosecution applied for adjournment for reasons that there were no witnesses and the application was granted. The case was fixed for hearing on 26<sup>th</sup> January, 2009 and again on that date the prosecution applied for adjournment due to non-attendance of witnesses. The respondents objected to the application and the prosecution applied to have the case withdrawn under **section 87 (a)** of the Criminal Procedure Code. The court decided to acquit the respondents under **section 202** of the Criminal Procedure Code.

From the lower court record, one witness had been bonded when the matter came for hearing on 26<sup>th</sup> January, 2009. Mr. Karuri submits that the complainant was in court that day and was ready to testify. The court deferred its ruling to the afternoon and there is no indication that the complainant was present in court.

Section 349 of the Criminal Procedure Code empowers this court to allow a litigant to appeal after the expiry of the 14 days period. The learned State Counsel submitted that he was given handwritten proceedings on 11<sup>th</sup> February, 2009 and by then 14 days had expired. The application herein was filed on 3<sup>rd</sup> March 2009. I do find that the application was filed without inordinate delay.

The next issue is whether the Appeal itself once filed will serve the interest of justice. The proposed petition of Appeal states two grounds namely –

- 1) That the learned trial magistrate erred in failing to make a ruling on the application by the prosecution to withdraw the case under section 87 (a) of the Criminal Procedure Code.**
- 2) The trial magistrate erred in law in acquitting the respondents under section 202 of the Criminal Procedure Code yet no evidence or proof was tendered before the court that the complainant had been bonded.**

Section 202 of the Criminal Procedure Code states as follows –

**202. If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person 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 charge, 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 adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.**

On 26<sup>th</sup> January, 2009 the prosecutor informed the court that one witness had been bonded. Learned State Counsel in his submissions stated that the complainant was in court ready to testify that date. It therefore follows that the complainant had been bonded or had had enough notice of the hearing date. I do not think the prosecutor misled the court by stating that he had no witness yet the complainant was present.

Under **section 202** a trial court has discretion to acquit an accused person if the complainant fails to attend court. The prosecution offered to withdraw the case under **section 87 (a)**. Withdrawal of a case under **section 87 (a)** requires the consent of the court. The trial magistrate in his ruling explained the provisions of **section 87 (a), 202 and 206 (1)** of the Criminal Procedure Code and opted to acquit the accused persons under section 202 thereof.

I do find that the trial magistrate exercised his discretion properly. Indeed the magistrate noted in his ruling that the complainant had been bonded to attend court. It therefore follows that even if the appeal was to be filed out of time, it will not serve any reasonable purpose. Its chances of success are quite low.

In the end the application herein is dismissed.

**Delivered, Dated and Signed at Kakamega this 24<sup>th</sup> day of September, 2009**

**SAID J. CHITEMBWE**

**J U D G E**