



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII

MiscCriminal Appli 87 of 2007

REPUBLIC APPLICANT

VERSUS

PETER OKEMWA MASEYA RESPONDENT

RULING

The Attorney-General through Mr. Kemo, Senior Principal State Counsel, filed an application under section 362 of the Criminal Procedure Code and urged this court to review and set aside the order made in Ogembo SRM Criminal Case No.1576 of 2006. The accused therein, Peter Okemwa Maseya, the respondent, had been charged with stealing by agent contrary to section 283 (e) of the Penal Code. The particulars of the offence were that on diverse dates between 1st June and 26th June, 2005 at Mogonga Trading Centre in Gucha District, the respondent stole bananas worth Kshs.53,000/= which had been entrusted to him by Esther Kemunto for Sale.

The record shows that on 11th July, 2007 when the case came up for hearing, the prosecutor indicated that he had two witnesses, one of them being the complainant. The respondent's advocate prayed for an adjournment saying that he was unwell. The prosecutor then told the court that he did not have the police file.

The trial court dismissed the case under section 202 of the Criminal Procedure Code and discharged the accused.

The respondent filed a replying affidavit and stated that on the material day at about 9.00 a.m, his advocate sought an adjournment which was refused and the case was ordered to proceed to hearing at 11.00 a.m. Come 11.a.m, the prosecutor sought an adjournment saying that he did not have his file and his two witnesses who were available earlier were not in the courtroom. The trial magistrate refused to grant an adjournment and proceeded to dismiss the case. The respondent urged the court not to set aside the dismissal order.

Mr. Kemo and Mr. Omari for the respondent made their respective brief submissions, which I have considered.

The applicant's contention which is supported by the complainant's affidavit is different from that of the respondent. The complainant's affidavit shows that she was in court when the learned magistrate dismissed the case because the prosecutor did not have his file. The respondent contends that no witness

was available.

In the aforesaid circumstances, this court has to be guided by the trial court's record. The same does not show that the matter was called out for hearing at about 9.00 a.m. and again at about 11.00 a.m. All it indicates is that the prosecutor informed the court that he had two witnesses but the respondent's advocate applied for adjournment, as he was not feeling well. The prosecutor responded by saying that he did not have his file. Without any other comment, the trial court went on to dismiss the charge under section 202 of the Criminal Procedure Code and discharged the accused.

Under the aforesaid section, if on the hearing date an accused person attends court but the complainant, having had notice fails to show up, the court is empowered to acquit the accused, unless for some reason it deems it proper to adjourn the hearing of the case to some other date. If the complainant is present and the prosecutor is unable to prosecute the case because he does not have his file, the court cannot acquit the accused.

If the record reflects the true events of the day, and I have no reason to doubt that it does, particularly when the complainant has sworn an affidavit and averred that she was in court when the court dismissed the case, then the trial magistrate was in error and the said decision must be set aside.

I hereby review the orders made on 11th July, 2007 and set them aside.

I reinstate the original charge and direct that the case proceeds to hearing before any magistrate at Ogembo Senior Resident Magistrate's Court other than J. D. Kwena, S.R.M.

DATED, SIGNED and DELIVERED at KISII this 22nd day of July, 2008.

D. MUSINGA

JUDGE.

Delivered in open court in the presence of:

Mr. Kemo, Senior Principal State Counsel for the Republic

N/A for the Respondent.

D. MUSINGA

JUDGE.