

4. In count 4, the respondent was also charged with forgery contrary to section 349 of the Penal Code. The particulars of the offence were that:-

“On the 16th day of September 2002 at Machakos town in Machakos District of the Eastern Province, with intent to defraud made a false entry in a duplicate banking slip by inserting new figures and words to indicate and read that amount paid into the bank was Kshs. 6,200/= where the original copy indicate correct amount paid in as Kshs. 200/=.”

5. In count 5, the respondent faced another charge of forgery contrary to section 349 of the Penal Code. It was alleged that:-

“On the 16th day of January, 2002 at Machakos township in Machakos District of the Eastern Province with intent to defraud made a false entry in a duplicate banking slip by inserting new figures and words to indicate and read the amount paid into the bank was Kshs. 5,600/= where the original copy indicate the correct amount paid in as Kshs. 600/=.”

6. For reasons that the prosecution was unable to proceed with the case after many requests for adjournments sought and obtained, the court (G.W.Ngenye, RM) acquitted the respondent under the provisions of section 202 of the Criminal Procedure Code (CPC). Section 202 of the Criminal Procedure Code which falls under PART VI of the CPC on the **“Procedure in Trials Before Subordinate Courts”** and which section deals with non-appearance of complainant at hearing provides as follows:-

“ 202. If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of his 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.”*(note: emphasis mine).*

7. The facts of this case which led to the acquittal of the respondent are clear from the record. The respondent appeared for plea on 14/05/2003 when he pleaded not guilty and the case was fixed for hearing on 5/06/2003 with a mention on 28/05/2003. In the meantime, the respondent was admitted to bail of Kshs. 100,000 with one surety of a like amount. There were several mentions before 5/06/2003 when the case was supposed to proceed to hearing.

8. On 5/06/2003, the respondent informed the court that his advocate was not present in court. The prosecutor also told the court that he was not ready to proceed with the hearing on that day, the reason being that he did not have the exhibits which had been sent to the Government D.I.E. He therefore sought for an adjournment and asked that the respondent should report to the CID office at Machakos to facilitate taking of the respondent's specimen signatures and handwriting. The application for adjournment was granted and the case fixed for hearing on 1/08/2003 before court No.4.

9. When the case next came up for hearing, the prosecutor informed the court that he was preferring additional charges against the respondent, and there being no objection by the defence, the old charge sheet which had only one count was substituted with a fresh charge sheet containing the five counts that I have already set out earlier in this judgment. The respondent pleaded not guilty to all the five counts and on this day too, the court prosecutor told the court that he was not ready to proceed with the case because the report on the specimen signatures taken from the respondent was not ready. Though Mrs Nzei, who appeared for the respondent objected to the application for adjournment, the trial court nonetheless exercised its discretion, by allowing the application for adjournment and sending the case for re-allocation to some other date in the future. The case was subsequently fixed for hearing on 5/09/2003.

10. Both the respondent and her counsel on one hand and the prosecutor on the other hand appeared before G.W.Ngenye for the hearing of the case on 5/09/2003, but instead of proceeding, the prosecutor

applied for adjournment, on the ground that the document examination was not complete. The prosecutor asked for one month to facilitate completion of the document examination. Defence counsel strenuously opposed the application for adjournment and urged the court to order the prosecutor to proceed. The court however once again exercised its discretion in favour of the prosecution and allowed the adjournment. The case was then fixed for hearing on 17/10/2003.

11. When the case came up again for hearing on 17/10/2003, the court was informed by the prosecutor that the document examination reports were not ready. He applied for adjournment. Though the defence was opposed to the application, the court once again exercised its discretion under section 202 of the Criminal Procedure Code in favour of the prosecution and granted them a last adjournment. The case was then fixed for hearing on 2/12/2003 with a mention on 17/11/2003.

12. On the 2/12/2003, all the parties appeared before G.W. Ngenye, Resident Magistrate for the hearing, but the prosecutor informed the court that he was not ready to proceed with the hearing. He stated that he had not seen his witnesses and that the police file was also not in court. He also stated that he was not sure whether the document examination report was ready. As expected, the application for adjournment was opposed on the ground that the prosecution seemed not to have completed its investigations since the arrest of the appellant on 8/05/2003.

13. Referring to the orders made on 17/10/2003 when the prosecution was granted the last adjournment in the matter, the court, declined to grant the adjournment sought. It was then that the prosecutor applied to withdraw the case against the respondent under the provisions of section 87(a) of the Criminal Procedure Code which section provides-

“87. In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney General, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal-

a. if it is made before the accused person is called upon to

make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

b.

.....
.....”

14. The application by the prosecutor to withdraw the case against the respondent under section 87(a) of the Criminal Procedure Code did not go down well with the defence. Mrs Nzei argued that the prosecution was in fact trying to obtain a further adjournment in the matter through the backdoor.

15. In its ruling, the court noted that it was over six months since the respondent was first arraigned before court on 4/05/2003, and that during all these months, the prosecution had not been able to avail any single witness for the hearing of the case. The trial court was of the view that it would be an affront to justice to allow the prosecutor’s application to withdraw the charge under section 87(a) of the Criminal Procedure Code. The application was thus rejected and the respondent acquitted since the prosecution had no evidence to offer.

16. It is against that acquittal that the State has appealed. The Memorandum (sic) of Appeal (should be Petition of Appeal) sets out four(4) grounds of appeal-

a. The trial Magistrate erred in law in acquitting the respondent under section 202 of the Criminal Procedure Code when the prosecution had rightfully applied to withdraw the charge under section 87(a) of the Criminal Procedure Code.

b. The trial Magistrate erred in law in acquitting the respondent under section 202 of the Criminal

Procedure Code which section specifically deal (sic) with situations where the complainant fails to come to court.

c. The trial Magistrate erred in law in considering extraneous matters which matters were not conversed (sic) or relevant in the determination of the case.

d. The trial was conducted by a Police Constable (sic) who then was not a competent prosecutor.

17. During the hearing of the appeal, Mr. Wang' Ondu, learned State Counsel contended that the trial court fell into error when it failed to call upon the prosecution to adduce evidence before dismissing the application after counsel for defence had submitted opposing the application for adjournment. Mr. Wang' Ondu therefore contended that for reasons that the proper procedure was not followed in dismissing the case against the respondent, the appeal should be allowed. Mr Wang' Ondu also contended that because proceedings were conducted by a Police Constable on the 2/12/2003, the entire proceedings became a nullity and urged the court to order a retrial on the grounds that-

i) the respondent was facing very serious charges;

ii) the prosecution witnesses will be readily available if an

order for retrial is made;

iii) for the ends of justice, the case should be remitted to the

court below for retrial.

18. The learned State Counsel referred the court to two recent authorities:-

(a) Shen Zhanghwa versus Republic [2006]eKLR and Republic vs Francis Kimani Waweru & John Kimani Maina. I have had the opportunity to read through the judgment by my learned Sister, Lesiit in the Shen Zhanghwa case, but I am unable to find its relevance to the present case, and I will therefore not rely on it in reaching or making my conclusions in this case.

19. It was contended on behalf of the respondent that the order acquitting him under section 202(a) of the Criminal Procedure Code was properly made, particularly in view of the fact that the prosecutor tried, on 2/12/2003, to obtain another order for adjournment after a last adjournment had been granted on 17/10/2003. It was also contended on behalf of the respondent that the liberty to withdraw cases under section 87(a) of the Criminal Procedure Code must be exercised judicially and within the law. It was further contended that to order a retrial in this case would be vexing the respondent twice, an action that would be contrary to the principle of natural justice.

20. It is now my duty as the first appellate court to reconsider the facts that are on record and submit them to a fresh evaluation and examination with a view to reaching my own conclusions in the matter. I have given anxious thought and consideration to the facts before me and also considered the law and in particular the provisions of sections 202 and 85(2) of the Criminal Procedure Code and I have reached the conclusion that this appeal must fail. In the first place, there is no doubt that at no time was the prosecution ready to proceed with the case on all the occasions when the case came up for hearing. It was also clear that throughout that time, the prosecution, still sought time and opportunity to carry out further investigations into the matter. Section 202 is clear in its wording that if the complainant fails to turn up when the case comes up for hearing, upon being notified of the hearing date, the court shall thereupon acquit the accused unless for some reason, the court thinks it proper to adjourn the case to a future date upon such terms as it thinks fit. It is my considered view that by 2/12/2003, there was no good reason why the court would have found it proper to adjourn the case, to another day, particularly in view of the fact that on 17/10/2003, the court had granted the last adjournment to the prosecution. Courts should not make orders in vain and the trial court was thus entitled to give force to its earlier order made on 17/10/2003. I do not think, as contended by the appellant that the trial court took any extraneous matters

into account in making the ruling acquitting the respondent.

21. The appellant has also contended that because part of the proceedings in the court below were conducted by an incompetent prosecutor, one Police Constable Mbula, contrary to section 85(2) of the Criminal Procedure Code, then the entire proceedings should be declared a nullity and a retrial ordered. To then the extent that the proceedings in the court below were invalidated by P.C Mbula as court prosecutor on 2/12/2003, I have no doubt that it is so on the basis of **ELIREMA & ANOTHER VS REPUBLIC[2003] 1 E.A 50**.

22. In view of the above finding should I order a retrial which the learned State Counsel has urged this court to do? I have noted that the respondent, was first arraigned in court on 14/05/2003, which is now over four years. Though learned State Counsel says that the witnesses will be readily available, it would be against the respondent's interests to order a retrial. The record of the lower court shows clearly that the prosecution was never ready at any one time to proceed with its case for over six months, despite the fact that the respondent was always ready to proceed. I do not therefore think that it is expedient to order a retrial in this case and subject the respondent to a fresh trial. The prosecution had its chance to prosecute its case against the appellant but instead of doing so, threw that opportunity through the window. At no time was the court ever informed that an official of Masii Farmers Co-operative Society was available in court and ready to testify. Accordingly, I refuse to make an order for retrial and confirm the findings of the learned trial Magistrate dated 2/12/2003. The appeal is therefore dismissed in its entirety.

23. It is so ordered.

Dated and delivered at Machakos this 8th day of November, 2007

R.N. SITATI

JUDGE