REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
APPELLATE SIDE
CRIMINAL APPEAL NO. 103 OF 2000

(From Original Conviction and Sentence in Criminal Case No. 3131 of 1998 of the Senior Principal Magistrate's Court at Machakos: A. M. O. Osodo Esq. on 11.7.2000)

ALLOYS KYENGO MULI :::::::::::::::::::::::::::::::::::: APPELLANTS

AND ANOTHER

VERSUS

REPUBLIC :: RESPONDENT

Coram: J. W. Mwera J.

Masika Advocate for Appellant

Miss Makungu State Counsel for Respondent

C.C. Muli

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J U D G E M E N T

This court heard that on 29.6.2000, the prosecutor before the Learned Trial Magistrate sought to withdraw prosecution of the two (2) appellants herein who had been arraigned before him under S. 296(1) Penal Code in that on 30.8.98 at Kalicha village Mitaboni Machakos jointly while armed with dangerous weapons, namely sticks and clubs robbed one Samuel Mweki of Sh.4,000/= and immediately before or after the said robbery used actual violence on Mweki. This is as per the substituted charge sheet signed on 2.10.98. The particulars sound quite much like a charge under S.296(2) Penal Code which was substituted.

So on 29.6.2000 the prosecutor told the court below:

> "I do not have witnesses. They have not been traced for bonding. They have changed their resident (sic). Since we were (?) the last adjournment, I pray that the case be withdrawn under S. 87(a) of the Criminal Procedure Code."

Mr. Mwangangi for the appellants/accused opposed that application because for the last four times the case came for hearing the prosecutor had not had witnesses in court and adjournments were granted to him. He was of the view that the charge would better be dismissed and his clients acquitted, so it goes.

The prosecutor answered that even if in the past he had presented witnesses, on 29.6.2000 a hearing de novo had been ordered because, so the court heard and the record shows, the initial trial magistrate (Miss Thuita) had been transferred from the station and Mr. Osodo had taken over the trial under S.200 Criminal Procedure Code. Under that section the accused is informed of his right to require that a new hearing commence if he does not favour the trial to go on from where the outgoing magistrate left it. The appellants here exercised that right on 21.1.2000 when they are recorded to have said:

"Accused: "We pray that the case be heard de novo."

Whether one or both chorused this desire it is not clear. But it can be seen that a fresh trial before Mr. Osodo Resident Magistrate was in the offing. It means that all that preceded the Learned Trial Magistrate's order that the hearing should start afresh is cleared from the state. This court heard that prior to 21.1.2000, the prosecution called its witnesses and closed its case. The defence case had gone on partly before Miss Thuita, then she was transferred.

The next hearing date was 18.2.2000. It is recorded that the complainant was unwell and so an adjournment was granted. On 16.5.2000 the prosecutor reminded the Learned Trial Magistrate that the fresh hearing was supposed to begin but his witnesses had not come – another adjournment was granted. Then came on 21.6.2000, again the witnesses had not been bonded. Mr. Masika could not brook another adjournment and he told the court that it showed that the complainant was not interested in the trial. It must come to an end. The lower court noted Mr. Masika's sentiments, and those of the prosecutor that dismissing the charges at that point would leave the complainant aggrieved – and a last adjournment was granted.

That is why on 29.6.2000 when again the prosecutor did not have witnesses in court he was not oblivious to the last adjournment and so he applied to withdraw the prosecution under S. 87 (a) Criminal Procedure Code as alluded to above. Mr. Mwangangi opposed that course.

The Learned Trial Magistrate delivered a ruling allowing the prosecution to withdraw under S.87(a) Criminal Procedure Code. In that ruling a recap of the history of the prosecution of the appellants was recorded. The Learned Trial Magistrate noted, and it should have been in error, that the charge was under S.296(2) Penal Code. As pointed out earlier the charged under this section was substituted with one under S. 296(1) Penal Code – simple robbery which the Learned Resident Magistrate could now handle. He also noted that from the previous hearing witnesses had shown up. That there was no proof that in that new hearing before him they had deliberately refused to attend court. Only that they had not been traced and bonded. That the offence was serious. The Learned Trial Magistrate took all that in regard and was inclined to grant the withdrawal, now under attack.

After that ruling, this appeal on 3 points was filed on 24.7.2000.

Mr. Masika argued them all together in that the Learned Trial Magistrate should not have allowed the prosecution to withdraw under S.87(a) Criminal Procedure Code. That the charges ought to have been dismissed under S.202 Criminal Procedure Code. This section provides that where an accused comes to court on an appointed day, yet the complainant who has notice of the same does not appear, the court shall acquit the accused or for reasons thought proper, adjourn the hearing to another day on terms the court thinks fit.

Mr. Masika urged this court to find that the lower court therefore did not properly exercise its discretion to grant leave to the prosecution to withdraw under S.87 (a) Criminal Procedure Code and that ordering as he did only subjected his clients to another process of criminal trial when the complainant had lost interest in the case.

The Learned State Counsel had a contrary view in the circumstances of this case. The S.87(a) Criminal Procedure Code under review here reads:

"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 the judgement 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 discharge, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted."

So in essence it is the trial magistrate who should consent to an application to withdraw from prosecuting the accused or if the Attorney General has given such instructions. The law does not require this, but normally a prosecution will give reasons why he wishes to withdraw under S.87 (a) Criminal Procedure Code. S.87(b) Criminal Procedure Code is not called in question here since the appellants were yet to testify. It was before even the prosecution called witnesses in the fresh hearing that started before the Learned Resident Magistrate as set out above. Indeed the prosecutor told this court that the witnesses had not been bonded this time round. They had testified in the earlier trial that was abandoned. The offence was serious and the Learned Trial Magistrate was satisfied that there was no deliberate act on the part of the witnesses not to attend court. Only that they had not been traced and bonded.

After hearing both sides, the court is not inclined to accept Mr. Masika's position that the Learned Trial Magistrate exercised his discretion wrongly to grant consent for the prosecution to be withdrawn under S.87(a) Criminal Procedure Code. He heard both sides and assigned reasons for his consenting. True, court cases should come to an end but this one had just started as the appellants exercised their right to a fresh trial. It cannot be said that they were being subjected to several trials over. Before the Learned Resident Magistrate was a new trial. Granted, adjournments due to non-availability of witnesses common as is a feature in criminal trials, is regrettable and judicial officers should be firm to ensure the accused persons know the fates of cases facing them as soon as it is practicable. Delays deny justice. But this was not a case to be treated under S.202 Criminal Procedure Code as Mr. Masika would have it because under S.202 Criminal Procedure Code it is provided that the complainant who has been bonded to come to court for a hearing on a given day, has failed to do so, and if can be added, without a good reason or cause. That was not the case here and this appeal is dismissed.

Judgement accordingly.

Delivered on 12th February 2001.

J. W. MWERA

JUDGE