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Director of Public Prosecution v Ntugu (Criminal Appeal E011 of 2021) [2023] KEHC 2630 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2630 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E011 OF 2021

LW GITARI, J

MARCH 16, 2023

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION .... APPELLANT

AND

JEREMIAH NTUGU .... RESPONDENT

(Being an appeal against the acquittal of the accused by the Hon. Nyaga (SRM) delivered on 10th February, 2021 sitting at Marimanti Law Courts in Criminal Case No. 1206 of 2019)

JUDGMENT

Introduction

1. The Respondent faced the charge of causing grievous harm to another contrary to Section 234 of the *Penal Code* in Criminal Case No. 1206 of 2019 at Marimanti Senior Resident Magistrate's Court. The particulars of the charge were that on 2nd November, 2019 at Nkarini sub-location, Chiakariga location in Tharaka South sub-county within Tharaka Nithi County, the Respondent unlawfully did grievous harm to one Cecilia Kanini.

2. The Respondent took plea on 5th November, 2019. He denied the charge. When the case came up for a mention to take directions on 3rd December, 2019, the hearing of the matter was schedule on 5th February, 2020. On the said 5th February, 2020 the matter was adjourned on account that the Respondent was sickly. Subsequently, the matter was fixed for hearing on three other different occasions but the same did not proceed for various reasons. The last date when the matter was fixed for hearing was on 10th February, 2021. On that day, the trial court reached a decision acquitting the Respondent under Section 202 of the *Criminal Procedure Code* on account of the non-attendance of the complainant.

3. Dissatisfied with the said decision and order, the Appellant filed this appeal citing the following eight (8) grounds of appeal:

    i. That the learned trial Magistrate erred in law and fact by acquitting the Respondent under Section 202 of the *CPC*.

    ii. That the learned trial Magistrate erred in law and fact by failing to note that the DPP is the main complainant in criminal cases on behalf of the Republic, and as such the matter should not have been dismissed under Section 202 of the *CPC*.

    iii. That the learned trial Magistrate erred in law and fact by dismissing the case prematurely, notwithstanding the seriousness of the offence the Respondent was faced with.

    iv. That the learned trial Magistrate erred in law and fact by failing to exercise his discretion and grant the prosecution an adjournment to enable them call the complainant (victim) to come and testify.

    v. That the learned trial magistrate erred in law and fact by failing to note that the prosecution had shown interest by availing witnesses in court on previous occasions where the accused was not ready to proceed with the matter.

    vi. That the trial magistrate erred by failing to note that mistakes of an investigation officer should not be visited upon against the complainant.

    vii. That the trial magistrate erred in law and fact by failing to take into considerations of movement of a police file from one station to another and its technicalities.

    viii. That the learned trial magistrate erred in law and fact by acquitting the Respondent in circumstances he did.

4. The Respondent opposed the appeal. The court gave directions that the appeal be disposed of by way of written submissions. The Appellant filed his written submission on 10th March, 2022 while the Respondent filed his submissions on 10th September, 2022.

The Appellant's Submissions

5. It is the Appellant's submission that the prosecution was unable to proceed with the hearing of the case on 10th February, 2021 owing to the transfer of the police file from Chiakariga Police Station to Marimanti Police Station and that the new investigation officer was yet to trace the file. That in addition, none of the prosecution witnesses were in court. Relying on the cases of *Republic v Henry Mwaura Ikego & another* [1979] eKLR and *Director of Public Prosecution vBenard Koech Kembo*i [2017] eKLR, the Appellant submitted that it gave good reasons as to why the hearing of the matter could not proceed on 10th February, 2021 and that as such, the court ought to have diligently exercised its discretion and adjourned the matter.

Respondent's Submissions

6. On his part, the Respondent submitted that any criminal case ought to be concluded at the earliest time possible for justice to be served on both the complainant and the accused. He contended that throughout the proceedings in the trial court, the prosecution did all that was conceivable to delay

the conclusion of the case. That in violation of the 24 hours constitutional provision under Article 49(1)(f) of the *Constitution*, the Respondent was arraigned in court on 5th November, 2019 yet he was arrested on 3rd November, 2019. It was his submission that if this appeal is allowed, he will suffer double jeopardy as he is already serving another sentence of 19 years' imprisonment. The Respondent thus prayed for the appeal to be dismissed and the decision of the trial court to be upheld.

Issues for Determination

7. I have considered the grounds in support of this appeal. I have also considered the submissions made by the parties. The main issues that arises for determination by this Court are:

   i. Who is the complainant in a criminal case?

   ii. Whether the trial court erred in acquitting the Respondent under Section 202 of the *Criminal Procedure Code*; and if so,

   iii. Whether the Respondent's acquittal should be set aside.

Analysis

8. This being a first appeal this Court is obliged to re-examine and re-evaluate the prosecution case and draw its own conclusions on the same (See: *Okeno v Republic* [1972] EA 32).

9. The Respondent herein was arrested on 3rd November, 2019. As noted above, he took his plea on 5th November, 2019. The accused denied charged and a plea of not guilty was recorded by the learned trial magistrate. The matter was however not fixed for hearing as the court was informed that the complainant was admitted in hospital. Later on 9/11/2019 when the matter came up for mention, the court was informed that the complainant was still very sick in hospital and the matter could therefore not been fixed for hearing. The prosecution informed the court that the charge which was preferred was a holding charge. The matter was then mentioned in court severally as from 19/11/2019 upto 4/3/2020 when it was given a hearing date of 18/3/2020 as several adjournments followed due to Covid 19. It was given a hearing date of 22/7/2020 though in between there were several mentions. Unfortunately, again on that day the matter could not proceed as the accused was not produced in court. The prosecutor informed the court that he had three (3) witnesses in court. The hearing date was again fixed on 26/10/2020. Come that day the prosecution had two witnesses in court but unfortunately he could not proceed as he did not have the exhibits as the file had been transferred from Chiakariga to Marimanti Police Station. The matter was adjourned again to 9/11/2020. Come the date and the prosecution was again not ready to proceed and was fixed for hearing on 10/2/2021. The matter could again not proceed as the file and the witnesses were not in court. The trial magistrate then proceeded and made the following order:-

> " Court:
>
> I note matter has prolonged, a sign of loss of interest by the prosecution. It is an old matter and hence today the accused must have his way. I hence acquit him under Section 202 for non-attendance of complainant."

See page 19 of the record. As can be seen from the above order, the learned trial magistrate did not indicate the law under which he acquitted the respondent he simply indicated 202. Let us assume that he meant Section 202 of the *Criminal Procedure Code* (Cap 75 Laws of Kenya) and consider how

it applies in Criminal proceedings like the one which were before the learned trail magistrate. The marginal notes of Section 202 of the *Criminal Procedure Code* states:-

> " Non-appearance of complainant at hearing"

10. Section 202 of the *Criminal Procedure Code* provides that:

> " 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 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."

From the reading of this Section, it is clear that it applies in a criminal trial when the matter came up for hearing for the first time and the accused appears in court but the complainant, having had notice of the time and place appointed for the hearing of the charge does not appear. In such situation the trial Judge shall there upon acquit the accused. However, the court has discretion to adjourn the matter for some good reason. The provision is couched in mandatory terms. My understanding is that the Section applies when the matter is coming up for the first time in court and the complainant with notice of the hearing date fails to attend court. If for some reason the trial magistrate adjourns the matter, the section 202 (*supra*) ceases to apply and from that stage onwards in the trial Section 206 of the *Criminal Procedure Code* sets in to deal with the issue of adjournment and none attendance of witnesses. Section 206 (1) of the *Criminal Procedure Code* provides:

> " 206.
>
> (1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs."

The consequence of none attendance by the complainant under this section is that the court may dismiss the suit. The court however has discretion to adjourn the matter to another date. The wording of this two sections is that they talk about the 'complainant' and not the 'prosecutor'.

The *Criminal Procedure Code* does not define a complainant. The term complainant is derived from the word complaint and the complainant must of necessity mean the person who initiates the complaint in court under Section 89 of the *Criminal Procedure Code*. In our criminal justice system, criminal proceedings are filed and prosecuted by the Director of Public Prosecutions. The complainant is therefore a party in the criminal proceeding who initiates the complainant against the accused. That is why criminal proceedings refers to the parties as the State or the Director of Public Prosecution versus AB (Accused).

It follows that the complainant referred to under Section 202 as well as Section 206 of the *Criminal Procedure Code* is the prosecutor who is also the Director of Public Prosecution. For this reason, when

the trial magistrate purported to dismiss the charge for none attendance by the complainant, he fell into error as the prosecutor was in court and he could not apply Section 202 of the *Criminal Procedure Code* as that was not the first time the matter came up before the court. The Section could only apply if the prosecutor was not in court and the matter was in court for the first time.

11. From the excerpt of the trial court's order highlighted above, it is clear that the non-attendance of the complainant on 10th February, 2021 led to the dismissal of the charge against the respondent. The case was therefore not concluded on merit. The record reflects that the state prosecutor was in attendance on that day but none of his witnesses were present. According to the Appellant, the trial court erred in failing to note that the main complainant in criminal cases is the Appellant on behalf of the Republic.

12. On the first issue regarding the definition of the term "complainant", it is notable that the same is not defined in the *Criminal Procedure Code* (Cap 75 of Laws of Kenya). The nearest that the Criminal Procedure Code has come to giving the meaning of the word complainant is under Section 208(1) of the *Code* which reads as follows:

> "(1) If the accused person does not admit the truth of the charge, the court shall proceed to hear the complainant and his witnesses and other evidence (if any)."

13. The Court of Appeal in considering Section 202 of the *Criminal Procedure Code* dealt with this issue in the case of *Roy Richard Elirema & another v Republic* [2003] eKLR. It thus stated that:

> "The parties named in section 202, for example, are the complainant and the accused person. If the "complainant" is aware of the hearing date and is absent without explanation, the Court may acquit an accused person, unless the Court sees some other good reason for adjourning the hearing. The "complainant" in this context has been interpreted to mean the Republic in whose name all criminal prosecutions are brought, and not the victim of crime who is merely the chief witness on behalf of Republic – see, for example, the majority judgment of the Court of Appeal for East Africa in *Uganda v Milenge & another*, [1970] EA 269."

14. If follows from the above interpretation that the "Republic", through the office of the Appellant, is the actual complainant in a criminal charge against a particular person or authority or legal entity. Having found so, the next issue is whether the trial court was right to acquit the Respondent under the provisions of Section 202 of the *Criminal Procedure Code*.

15. On 10th February, 2021 when the Respondent was acquitted, the Appellant was present before the trial court. Having found that the Appellant was the main complainant, an order of acquittal under Section 202 of the *Criminal Procedure Code* ought not to have been issued on account of non-attendance of the complainant.

16. Be that as it may, a reading of Section 202 of the *Criminal Procedure Code* gives the court discretion even if the complainant is absent, to adjourn the case if good reasons are shown. In this case, the prosecution informed the trial court on that day that the police file was not in court and that neither were his witnesses. The Appellant sought to be given 2 weeks to make a follow up on the police file.

17. It is evident from the record that this was the second time that the prosecution was making an application for an adjournment of the hearing on the account that the police file was missing. The first time was on 26th October, 2020 when the Appellant indicated that he could not proceed with the case because of the missing the exhibits. He explained that there had been a mix up occasioned by the transfer of the police file from Chiakariga Police Station to Marimanti Police Station. The trial court

consequently ordered the Appellant to do a personal follow up on the same. On 16th November, 2020, when the trial court scheduled the hearing of matter for 10th February, 2021, the status of police file was not interrogated.

18. Article 159(2)(b) of the *Constitution* provides that in exercise of judicial authority, the courts should be guided by the principle that justice should not be delayed. In the instant case, the Respondent was entitled to his constitutional right to a fair hearing within a reasonable time. It had taken 1 year 3 months since the date of his arrest for the trial court to reach its decision to acquit him. At the point of his acquittal, none of the Appellant's witnesses had taken the stand and given their evidence. In my view, the delay in commencing the hearing of the matter was inordinate.

19. On the other hand, the record also shows that the Appellant had made attempts to produce witnesses to give their testimonies but the same could not proceed for various reasons given herein above. The Appellant explained that the matter could not proceed on the last two occasions that it had been set for hearing because the police file was missing. To be emphasized at this point is that an acquittal should not follow as a matter of course where a file has disappeared. That said, the fact remains that the Respondent's acquittal was based on the alleged non-attendance of the complainant which was not the case and not because the police file was missing.

20. Any discretion granted to a court ought to be exercised judiciously in accordance with sound and reasonable judicial principles. Considering that this was the first time that the trial court noted that the prosecution witnesses were absent, I agree with learned counsel for the state that the trial court ought to have accorded the prosecution another opportunity to follow up on the police file and call their witnesses.

For the reasons I have stated, I find that this appeal is well founded and has merits. I will now proceed to consider the powers of this court. This appeal was filed by the applicant under Section 348 A of the *Criminal Procedure Code* which gives the Director of Public Prosecutions the Right to appeal against acquittal, order of refusal or order of dismissal. The section provides:

> " 348A (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.
>
> (2) If the appeal under section (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately."

The orders which the court may issue are to substitute the acquittal with a conviction and may sentence the accused appropriately.

In this case the case before the trial court was not heard on merits. There was no acquittal or a conviction. Section 354 (3) & (d) of the *Criminal Procedure Code* provides.

> " 354(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-
>
> (c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge,

hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court there on to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit;

(d) in an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper."

In this appeal therefore, the appropriate order is to set aside the order acquitting the respondent as it was made in error and therefore null and void.

I therefore set aside the order of the learned trial magistrate acquitting the respondent.

I order that:-

1. The respondent shall be charged afresh at Marimanti Law Courts.

2. The trial shall proceed before a magistrate with jurisdiction.

3. The fresh case shall be heard and determined within six months.

4. The respondent shall appear before the principal Magistrate Marimanti on 20/3/2023 to plead to the charges.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY OF MARCH 2023.

L.W. GITARI

JUDGE

16/3/2023

The Judgment has been read out in open court.

L W. GITARI

JUDGE

16/3/2023