



REPUBLIC OF KENYA



KENYA LAW
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**Nyawinda v Republic (Criminal Appeal E045 of 2021)
[2023] KEHC 2051 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E045 OF 2021
KW KIARIE, J
MARCH 20, 2023**

BETWEEN

DAN OCHIENG NYAWINDA APPELLANT

AND

REPUBLIC RESPONDENT

*(From the ruling in Criminal Case No. 283 of 2020 of the Chief Magistrate's
Court at Homa Bay by Hon. Tom Mark Olando–Principal Magistrate)*

JUDGMENT

1. On September 20, 2021 the learned trial magistrate allowed an application by the prosecution to withdraw the case under section 87 (a) of the *Criminal Procedure Code*. The appellant was aggrieved and filed this appeal. He was represented by Mr Ongoso Ayoma, learned counsel. He raised the following grounds of appeal:
 - a) That the learned magistrate erred in law and fact in consenting to the withdrawal of the case against the appellant under section 87(a) of the *Criminal Procedure Code* chapter 75 Laws of Kenya.
 - b) That the learned magistrate erred in law and fact by failing to appreciate adequately or at all the circumstances surrounding the case against the accused in making the impugned order and thereby arrived at a manifestly unjust decision which has exposed the appellant to grossly perilous and prejudicial circumstances.
 - c) That the learned magistrate erred in law and fact in failing to appreciate adequately or at all that the prosecution having ignored and/or failed to produce witnesses on the hearing date, he ought to have dealt with the matter under section 202 of the *Criminal Procedure Code* chapter 75 Laws of Kenya, and therefore consequently proceeded to make a decision which was manifestly unjust.



- d) That the learned magistrate erred in law and fact in having rightly declined an application for adjournment on the part of the prosecution but nonetheless proceeded to consent to their withdrawal under section 87(a) of the *Criminal Procedure Code* chapter 75 Laws of Kenya and consequently granting the same adjournment through the backdoor.
 - e) That the learned magistrate erred in law and fact in failing to consider adequately or at all the fact that the prosecution handled the instant matter in a callous and disinterested manner whence subsequent hearing dates were given in open court in the presence of the witnesses and the investigating officer but which witnesses and investigating officer failed to attend such subsequent hearings without subscribing any reasons for their failure to do so.
 - f) That the learned trial magistrate erred in law and fact in failing to appreciate adequately or at all that in light of article 157(11) of the *Constitution* his discretion to consent to withdrawal under section 87(a) of the *Criminal Procedure Code* must be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interests of administration of justice and the need to prevent and avoid an abused of the legal process and thereby arrived at a manifestly unjust decision.
 - g) That the learned magistrate erred in law and fact in failing to consider and/or appreciate adequately or at all the appellant's submissions that the appellant, being a police officer, shall remain indefinitely suspended from his employment by virtue of the provisions of the *National Police Service Act* No 11A of 2011 if the matter were to be withdrawn under section 87(a) of the *Criminal Procedure Code* and thereby arrived at a manifestly unjust decision.
 - h) That the learned magistrate erred in law and fact in failing to consider and/or appreciate adequately or at all the rights of the appellants to a fair and expeditious trial under article 50 of the *Constitution* of Kenya 2010 and thereby erroneously consented to the withdrawal of a matter which has been pending for more than one (1) year under section 87(a) of the *Criminal Procedure Code*.
 - i) That the aforesaid decision of the learned magistrate was otherwise grossly oppressive and prejudicial to the appellant.
2. The state opposed the appeal through Ochengo Justus, learned counsel. He argued that the withdrawal by the prosecution did not occasion prejudice to the appellant.
 3. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will therefore be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.
 4. It was argued for the appellant that the trial court ought to have invoked section 202 of the *Criminal Procedure Code*. The section provides:

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.

5. The complainant in this case is Lameck Odiwuor Odhiambo. He testified on June 7, 2021. The learned trial magistrate therefore did not have section 202 of the *Criminal Procedure Code* at his disposal on September 20, 2021.
6. Section 87 (a) of the *Criminal Procedure Code* provides as follows:

In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, 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;
7. There are instances a trial court will not allow withdrawal under section 87 (a) of the CPC. This has however must be in the interest of justice. Since justice has to serve both ways, I find that in the circumstances of this case the court exercised its discretion judiciously.
8. Whenever an application is allowed under section 87 (a) of the CPC, the ensuing order is that of a discharge and not an acquittal.
9. The appeal lacks merits and I accordingly dismiss it.

Delivered and signed at Homa Bay this 20th Day of March, 2023

KIARIE WAWERU KIARIE

JUDGE

