



**Republic v Omukanda & 4 others (Criminal Appeal 104 of 2019)  
[2023] KEHC 21426 (KLR) (1 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 104 OF 2019  
WM MUSYOKA, J  
AUGUST 1, 2023**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**JOSEPH AMISI OMUKANDA ..... 1<sup>ST</sup> RESPONDENT**

**ALBERT ANGWA MUKANDA ..... 2<sup>ND</sup> RESPONDENT**

**BONFACE ANGWE MUKANDA ..... 3<sup>RD</sup> RESPONDENT**

**DAVID AMISI ..... 4<sup>TH</sup> RESPONDENT**

**BENSON ANDAYI ..... 5<sup>TH</sup> RESPONDENT**

*(Appeal from order of Hon. E. Malesi, Senior Resident Magistrate, SRM,  
in Kakamega CMCCRC No. 1433 of 2018, of 23rd September 2019)*

**JUDGMENT**

1. The respondents, Joseph Amisi Omukanda, Albert Angwa Mukanda, Bonface Angwe Mukanda, David Amisi and Benson Andayi had been charged before the primary court, on 11 counts of incitement to violence, assault causing actual bodily harm, stealing, and malicious damage to property. The events complained of happened on 31<sup>st</sup> May 2018, at Eshikoni Village, Esumeiya Sub-Location, West Butso Location, Navakholo Sub-County, Kakamega County. The complainants were Linet Washiali, Patrick Okaso Nyanje, Abdalla Omusina Juma, David Malova, Enos Anzetse Ambongo, Robert Wabuko, the Government of Kenya, and Ben Washiali.
2. An oral hearing of the matter was not conducted. Plea was taken on 14<sup>th</sup> June 2018 and 11<sup>th</sup> September 2018. The second plea taking was occasioned by consolidation of charges. All the respondents pleaded not guilty. On that day, 11<sup>th</sup> September 2018, the prosecution had 8 witnesses, and was ready to



proceed. An adjournment was caused by the 1<sup>st</sup> respondent, on grounds that he was due to travel out of the country that day. The matter was adjourned to 1<sup>st</sup> October 2018, when it did not proceed, as the 1<sup>st</sup> respondent was absent, and the trial magistrate was said to be away on official duty. The matter was then marked for mention on 15<sup>th</sup> October 2018, when it was fixed for hearing on 21<sup>st</sup> January 2019. On 21<sup>st</sup> January 2019, the prosecution did not have witnesses, and the matter was adjourned to 22<sup>nd</sup> May 2019 for hearing. On 22<sup>nd</sup> May 2019, the prosecution asked for time to attempt out of court settlement. 3<sup>rd</sup> July 2019 was allocated as the date for mention on that. On 3<sup>rd</sup> July 2019, the issue of out of court settlement did not arise, as none of the parties mentioned it, and the suit was fixed for hearing on 23<sup>rd</sup> September 2019. On 23<sup>rd</sup> September 2019, the prosecution had no witnesses, and prayed to withdraw the prosecution under section 87(a) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya. The trial court, instead, acquitted the respondents, under section 210 of the *Criminal Procedure Code*.

3. The appeal herein arises from that acquittal under section 210 of the *Criminal Procedure Code*. The trial court is accused of canvassing an acquittal under section 210, as the defence had already conceded to an adjournment, and the acquittal under section 210 was wrongful as no witnesses had testified.
4. This matter is fairly straightforward. The prosecution was not ready with its witnesses, and sought an adjournment. The defence had conceded to it, but the trial court wanted none of it. Whereupon, the prosecution sought to terminate the trial of the respondents, under section 87(a) of the *Criminal Procedure Code*, but the court applied section 210 of the *Criminal Procedure Code*, instead, and acquitted the respondents.
5. On 23<sup>rd</sup> September 2019, the prosecution was asking for adjournment for a third consecutive time. On 21<sup>st</sup> September 2019, the caused an adjournment, as it had no witnesses. The matter was put off to 22<sup>nd</sup> May 2019. On 22<sup>nd</sup> May 2019, it was recorded that there were 7 witnesses in court, but the prosecution asked that the matter be adjourned as some of the appellants had sought an out of court settlement. When the matter came up for mention on 3<sup>rd</sup> July 2019, for mention, on the out of court settlement, none of the parties mentioned any out of court settlement, and no one talked of any negotiations, instead they asked for a hearing date, and were given 23<sup>rd</sup> September 2019. Come 23<sup>rd</sup> September 2029, the prosecution did not have witnesses. On 3 consecutive occasions, when the matter was up for hearing, the prosecution caused adjournments. The trial court was justified, in the circumstances, not to entertain a further adjournment on the matter, at the instance of the prosecution, even though the defence had acquiesced to it. The trial court has control of proceedings, and it is not bound by the wishes of either side, the prosecution or the defence, except to do what is just, in the circumstances. Justice called for discontinuance of the proceedings, as the prosecution was not serious with prosecuting the case.
6. On the application of sections 87(a) and 210 of the *Criminal Procedure Code*, the trial did not start in earnest, for no witnesses testified before the court. Withdrawal of a prosecution or of charges, where no witnesses have testified, is governed by section 87(a), and not section 210, which applies where the prosecution has presented witnesses and closed its case, and the trial court has to rule on whether a prima facie case has been established. The trial court was overzealous. It ought to have allowed a withdrawal under section 87(a), and not section 210. The court exercised a discretion which it did not have. See *Republic vs. Hasmukh Meghji Shah [1984]* eKLR (O’Kubasu & Todd, JJ), *Republic vs. Nathif Jama Adan & 6 others [2020]* eKLR (C. Kariuki, J) and *Director of Public Prosecutions vs. Perry Mansukh Kansagara & 8 others [2020]* eKLR (Mwongo, J).
7. Consequently, I find merit in the appeal herein, and I hereby allow the same. I, accordingly, quash the acquittal of the respondents, on 23<sup>rd</sup> September 2019, in Kakamega CMCCRC No. 1433 of 2018, under section 210 of the *Criminal Procedure Code*, and I substitute the order with one allowing



withdrawal of the prosecution of the respondents, under section 87(a) of the Criminal Procedure Code, and discharge of the respondents accordingly. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS.....  
1<sup>ST</sup>.....DAY OF.....AUGUST..... 2023**

**W MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

**Appearances**

Ms. Chala, instructed by the Director of Public Prosecutions, for the appellant.

Mr. Munyendo, instructed by Amasakha & Company, Advocates for the respondents.

