



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[Coram: A. C. Mrima, J.]**

**CRIMINAL APPEAL NO. 46 OF 2018**

**JAMES MWIKWABE WAIROGA.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal arising from the decision by Hon. L. N. Mesa, Senior Resident Magistrate in Kehancha Senior Resident Magistrate's Criminal Case No. 553 of 2017 delivered on 06/09/2018)*

**JUDGMENT**

1. The appeal subject of this judgement was conceded to by the prosecution. The appeal arose from the refusal of the trial court to discharge a surety after granting leave to the prosecution to withdraw a criminal case under **Section 87(a)** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya (hereafter '**CPC**').
2. The Appellant herein, **James Mwikwabe Wairoga**, stood surety for the accused person in **Kehancha Senior Principal Magistrates Court Criminal Case No. 553 OF 2017 Republic vs. Benard Mwita Nyabobe** (hereinafter referred to as '**the criminal case**').
3. The accused person in the criminal case, Benard Mwita Nyabobe, was charged with the offence of **Causing Grievous Harm** contrary to **Section 234 of the Penal Code, Cap. 63** of the Laws of Kenya. He denied the charge and a trial was ordered.
4. Amid the trial, the complainant was murdered and the accused person abducted. A report was lodged with the Kuria DCI Offices and investigations commenced. The trial stalled and the court summoned the Appellant. All due efforts to trace the whereabouts of the accused person were futile.
5. The prosecutor then informed the court of the status and applied for leave of the court to withdraw the criminal case under **Section 87(a)** of the **CPC**. The court allowed the application and granted the leave. The criminal case was therefore withdrawn and the accused person conditionally discharged as provided for under the law.
6. The court made further orders on the surety. It declined to discharge the surety on two conditions. **One**, until the surety availed conclusive proof that the accused person was dead or until the court presumed the accused person dead, and, **Two**, until the surety paid the bond sum. It is that order on the surety which solicited the appeal.
7. The Appellant filed a Petition of Appeal and challenged the said order on four main grounds namely: -
  1. **The learned trial magistrate erred in law and facts in failing to appreciate that there was no purposes for any surety upon withdrawal automatically called for discharge of the surety.**
  2. **The learned trial magistrate erred in law and facts in retaining the Appellant as a surety in a case already withdrawn hence non-existent in law before the court.**
  3. **The learned trial magistrate seemed to have mis-appreciated that the window to re-arrest the Accused Under Section 87A of Criminal Procedure Code had nothing to do with the business of the Court in respect of the withdrawn charges as same became a right of the state capable of being exercised or not hence the Court became functus officio upon allowing withdrawal of the charge and could not hold brief for the state in the events after the withdrawal.**
  4. **The learned trial magistrate erred in law in failing to Order for release of the security documents of the Appellant upon allowing the Application for withdrawal of the charge against the accused.**

8. The Appellant prayed for the following orders: -

**(a) That this Honourable court be pleased to quash the decision / order of the Subordinate Court dated 6<sup>th</sup> September 2018 to the extent that it failed to discharge the Appellant upon withdrawal of the charge.**

**(b) That this Honourable Court be pleased to Order that upon the withdrawal of the charge as was allowed, the Appellant to be discharged as the accused and the security documents deposited in court by the Appellant be released forthwith**

**(c) Any other relief this Honourable court deems fit and expedient**

9. The appeal was heard by way brief oral submissions. The Appellant expounded on the grounds of appeal in seeking the orders. The State conceded to the appeal.

10. This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. R (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. R (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. This Court is hence called upon to interrogate the legality and soundness of the order on the surety.

12. **Section 87** of the **CPC** provides for the withdrawal from prosecution in trials before subordinate courts. **Section 87(a)** thereof states 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.**

13. *The Black's Law Dictionary, 10<sup>th</sup> Edition Thomson Reuters Edition* at page 1836 defines the word '**withdraw**' as follows: -

**3. To refrain from prosecuting or proceeding with an action.**

14. It therefore meant that when the trial court granted the leave and withdrew the criminal case then it effectively ceased jurisdiction in the matter. Henceforth, the criminal case was deemed closed and in the event the accused person was to be charged afresh then that will amount to separate criminal proceedings.

15. What then was the effect of the order on the surety? Simply put, the order sustained the criminal case in the face of the withdrawal. The court lacked jurisdiction to make that particular order on the surety. The much the court would have done was to discharge the surety unconditionally.

16. The order cannot therefore stand in law. The learned magistrate, with utmost respect, erred in making that order.

17. The upshot is that the following final orders do hereby issue: -

**(a) The appeal is hereby allowed and the order of the court made on 06/09/2018 on the surety is hereby set-aside and vacated.**

**(b) The surety in Kehancha Senior Principal Magistrates Court Criminal Case No. 553 OF 2017 Republic vs. Benard Mwita Nyabobe is hereby unconditionally discharged and the security documents deposited in court be released to the depositor.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 7<sup>th</sup> day of February, 2020**

**A. C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of:**

**Mr. Kisera** Counsel for the Appellant.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

