



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL REVISION NO. 339 OF 2016**

REPUBLIC .....APPLICANT

VERSUS

EDWIN OTINEO OCHOLLA

ALPHONES OKOMO.....RESPONDENTS

**RULING**

Vide a letter dated 21<sup>st</sup> May, 2016 and addressed to this court by the Director of Public Prosecutions, (the applicant herein) this court has been urged to examine the record vide Mombasa Criminal case No 1499 of 2015, Republic Vs Edwin Otineo Ocholla and Alphones Okomo, and satisfy itself as to the corrections, legality or propriety of the court's orders to acquit accused persons therein. The application is made pursuant to the provisions of section 362 of the Criminal procedure code.

The brief facts of the case are that the accused persons EDWIN OTIENO OCHOLLA and ALPHONES OKOMO, were charged with breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code.

The particulars of the charge being that;

***“On the 4<sup>th</sup> day of August, 2015 at Ngumu House along Kwa Shibu road within Mombasa County, the accused persons jointly broke and entered a building at Global Houses limited and therein stole one CPU make HP and one monitor make HP, all valued at Ksh 18,000 the property of CHARLES CHACHA RIOBA”***

The accused persons were arraigned in court on 5th August, 2015 for plea whereby they pleaded NOT GUILTY to the charge and the case was then fixed for hearing. The hearing commenced on 7<sup>th</sup> December, 2015 and one witness testified. The case was adjourned to 29<sup>th</sup> February, 2016 to enable the prosecution call the remaining witnesses. When the case came up for hearing on 29<sup>th</sup> February, 2016, the prosecution applied for an adjournment on the ground that the exhibits in the case had not been availed. The hearing was then adjourned to 16<sup>th</sup> May, 2016, for lack of witnesses. On this day, the court declined to grant the prosecution the adjournment sought and proceeded to acquit the accused person under section 202 as read with section 306 (g) of the Criminal Procedure code.

The applicant is thus seeking to have this court;

(a) reverse the said acquittal and reinstate the criminal case No 1499 of 2015;

(b) order for a retrial of the said case before any court other than the court that acquitted the accused persons;

(c) the case be heard on priority basis;

The prosecution has raised the following questions for determination;

(1) whether the court was right to acquit the accused under section 202 as read with section 206 of the Criminal Procedure Code;

(2) whether the court was right to acquit accused without referring to evidence of Pw1;

(3) whether the lack of prosecution's witnesses results in the acquittal of accused.

(4) whether when the prosecution seeks for an adjournment, should the court decline and acquit the accused or should the court decline the application and give a chance to the prosecution to make any other appropriate application.

Section 362 of the Criminal Procedure Code provides that;

***“The High court may call for and examine the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any subordinate court”.***

I have read through the proceedings in Mombasa Criminal case No 1499 of 2015, and confirm that indeed the trial magistrate, declined to grant the prosecution an adjournment and proceeded to acquit the accused persons under section 202 as read with section 206 of the criminal procedure code.

In her ruling delivered on 16th May, 2016, the learned trial magistrate stated as follows;

***“I have considered the application by the prosecution to adjourn the matter for lack of witnesses, and the responses thereto by the defence. This is not the first time the prosecution is making such an application. No reason has been given for the non-attendance of the witnesses. The accused persons have been in custody since 5.8.2015 when they were arraigned in court. Only one witnesses has testified so far. The provisions of the constitution demand an expeditious trial. To allow the application by the prosecution would be in contravention of the same. In light of this, I dismiss the application by the prosecution and acquit the accused persons under section 202 as read with together with section 206 of the penal code and set them free unless otherwise lawfully held”***

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 on the summons for 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 there upon acquit the accused person, 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 think fit”.***

Section 206 of the Criminal procedure code provides as follows;

***“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.”***

Clearly, section 202 of the Criminal Procedure Code applies to instances where the complainant having been summoned to attend court to testify in a case, and then fails to do so, the court may acquit the accused person or adjourn the hearing of the case, depending on the circumstances that may be prevailing.

Section 206 of the Criminal Procedure Code, on the other hand provides for the action a court may take in a situation where an accused person, having knowledge of the time and place of hearing or further hearing fails to attend court, or the complainant fails to attend court.

In the instant case, the accused persons were always in attendance of the court proceedings and the complainant had testified as Pw1. This being the case, the circumstances did not call for the application of sections 202 and 206, both of the Criminal Procedure Code.

The complainant or a witnesses having testified, a case upon which a decision to place the accused person on their defence or not, had been made out.

I find that the trial magistrate was right in declining to grant the prosecution an adjournment for the reasons she cited in her ruling. However, I find that she in- correctly applied the law in acquitting the accused persons.

What the trial magistrate ought to have done in the instant case was to decline to grant the prosecution the adjournment they had sought and ordered them to proceed in whichever way available to them then. In which case, the prosecution would then, depending on the circumstances of their case ( as known to them), would either choose to close their case with the evidence so far adduced, or withdraw the charge against the accused persons or leave the court to decide on which orders to grant at that stage.

In the case where the prosecution elects to close their case after the court has declined to grant them an adjournment, the court would proceed to make a decision on whether the prosecution has adduced evidence worth the placing the accused person ( s) on their defence.

As for the case where the prosecution chooses to withdraw their case, the accused person (s) will be called upon to respond to such application and the court will either consent or decline the application to withdraw as it deems fit, (depending on the circumstances of the case)

And in the case of deciding to leave the decision to court, the court will proceed to presume that the prosecution has no witnesses or evidence to call and therefore deem their case as closed, then proceed to rule on whether a prima facie case has been established against the accused person (s) or not.

In the first and last instance, the relevant provisions of the law that would apply would be;

(a) section 210 of the Criminal Procedure Code where it is found that the prosecution has failed to establish a case against the accused person and the court would then proceed to acquit him or her, for having no case to answer

(b) section 211 of the Criminal Procedure Code where the accused person (s) would be placed on his /her defence depending on the weight of evidence that would be on record.

I therefore find that the application of sections 202 and 206 of the Criminal Procedure Code by the trial magistrate was in correct. And section 306 (e) of the Criminal Procedure Code as cited by the prosecution is also in applicable in a case before the subordinate court. It applies to the close of case for the prosecution at the High court.

The application by the prosecutor of public prosecution has merit and allows the same, by ordering for a

retrial of the case before any other court with competent jurisdiction.

I proceed to refer the case to the Chief Magistrate, Mombasa Law courts for necessary action and the office of the Director Public Prosecution to facilitate the process of re-arraigning the accused persons (Respondents) before the court.

**Ruling delivered, signed and dated on 6th day of February, 2018.**

**HON. LADY JSUTICE D. O. CHEPKWONY**

**In the presence of:**

M/s Ocholla, counsel for the state

C/clerk – Beja Nduke

No appearance for Respondents