

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 61 OF 2014

CALEB OCHIENG NYONJE APPELLANT

VERSUS

REPUBLIC RESPONDENT

[An appeal against withdrawal under section 87(a) C.P.C. in Criminal Case No. 570 of 2012 by

PM's Court at Maseno before Hon. A.R. Kithinji PM dated 24th April 2013]

JUDGMENT

The appellant was discharged under section 87(a) of the Criminal Procedure Code in a case where he together with a co-accused were charged with burglary and stealing contrary to section 304(2) and 279(b) of the Penal Code. This was after a final application for adjournment was rejected by the trial court and close to one year after the institution of the prosecution and without calling any witness. Being aggrieved by the withdrawal he appealed.

The grounds for his appeal can be summarized as there being no evidence that witnesses were ever bonded to attend Court and if so why no action was taken against them yet he and his co-accused faithfully attended Court; the omission by the court to explain or interpret the purport of section 87(a) of Criminal Procedure Code to him in a language he could understand so as to enable him to respond to the application; that the likelihood of him being charged afresh was not taken into account and that he ought to have been acquitted under section 202 of the Criminal Procedure Code.

Section 87(a) of the Criminal Procedure Code gives a subordinate court discretion to accept or refuse an application by the prosecution to withdraw a case. Such consent must however take into consideration the rights of the accused. Only in exceptional circumstances is such refusal refused. The application in this case was made before the appellant and his co-accused were called upon to make their defence which meant that they were discharged. The section clearly stipulates that such a discharge of the accused shall not operate as a bar to subsequent proceedings against him on account of the same facts. The appellant filed this appeal way back in the year 2014 and there is no indication as yet that the prosecution wishes to charge him afresh on account of the same facts and should they do so then he shall have an opportunity to raise that issue. It is correct that section 202 of the Criminal Procedure Code empowers the Court and this in mandatory terms to acquit the accused person where the complainant has not attended court. It is on record that in considering the prosecutor's application the court observed that the complainant had earlier on in the proceedings attended court and may not have been informed to attend on that day. It is therefore apparent from the record that in allowing the application the court tried to balance the rights of the appellant and his co-accused and those of the complainant as well. Accordingly I find no merit in this appeal and it is dismissed.

Signed, dated and delivered at Kisumu this 19th day of January, 2017

E. N. MAINA

JUDGE

In the presence of:-

Miss Kimani for the state

Appellant in person

CA: Serah Sidera