



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL REVISION NO. 93 OF 2014

BETWEEN

REPUBLIC.....APPLICANT

AND

MIKE OLE NKORUMA.....1ST RESPONDENT

MUSANGI DANIEL MACHARIA.....2ND RESPONDENT

SAMUEL MWANGI NJOROGE.....3RD RESPONDENT

*(Application for revision from the order in Criminal Case No. 410 of 2014 of the Principal
Magistrates Court at Mbita, Hon. S. O. Ongeru, Ag PM dated 16th September 2014)*

RULING

1. This matter came to the attention of this court by way of an application for revision pursuant to section **sections 362** and **364** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** by the Office of Director of Public Prosecutions, Homa Bay.
2. In the proceedings before the subordinate court, the accused were charged with the offence of transporting forest produce without a permit contrary to **sections 52(1)(a)(2)** and **55(1)(c)** of the **Forest Act, 2005**. It was alleged that on 3rd July 2014 at about 5.30 pm along the Mbita-Homa Bay road in Mbita Sub-County, they were jointly transporting forest produce namely; 1300 Cedar posts without a permit using motor vehicle registration number KBL 945 H make Mitsubishi Lorry on contravention of the **Act**.
3. The accused pleaded not guilty and the matter fixed for hearing on 16th September 2014. On that day the Prosecution Counsel applied to withdraw the case under **section 87** of the **Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** on the ground that the transporter had a valid transport permit and that matter was not contested by the forest officer. The accused did not object to the application. In his ruling the learned magistrate held that the accused were brought to court after they had been found not have a permit and since the permit was not furnished to the court, he could not grant the application to withdraw the case. Consequently he rejected the prosecutor's application and ordered the matter to proceed for hearing.
4. The prosecutor then applied to close his case whereupon the learned magistrate made the following order; *"As the prosecution is not ready to prosecute the matter the charges against the accused [are]*

dismissed under **section 202** of the **Criminal Procedure Code**. Each of the accused may be released forthwith unless lawfully held.”

5. The issue raised herein is whether the learned magistrate exercised his discretion judiciously in declining to allow withdrawal of the case. The learned magistrate was attentive to the fact that the charges facing the accused concerned the lack of a permit to transport forest produce. Since the prosecutor submitted that, “[t]he transportation permit was valid and was not contested by the forest officer,” the learned magistrate was entitled to demand a copy of the permit before allowing the prosecutor to withdraw the case.

6. I find that learned magistrate exercised his discretion judiciously in disallowing the application for withdrawal of the case. After his application was rejected, the prosecutor had the chance to either produce the permit or proceed with case. He also had the opportunity to apply for an adjournment. Instead of exercising these options, he instead opted to close the prosecution case.

7. The accused were acquitted under **section 202** of the **Criminal Procedure Code** which deals with non-appearance of the complainant and which states as follows;

Non-appearance of complainant at hearing

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.

8. I do not think **section 202** of the **Criminal Procedure Code** applied to the circumstances of this case as it was not one where the complainant failed to appear in court but one where the prosecutor had the opportunity to proceed with the case either by calling the witnesses or by applying for an adjournment. He opted not to present any evidence and closed his case. Once the prosecutor had closed his case, the learned magistrate had no option but to acquit the accused as they could not be called upon to make their defence in the absence of any evidence against them. The acquittal, though, ought to have been under **section 210** of the **Criminal Procedure Code** as the accused had no case to answer. Following the acquittal, the items seized from the accused could only be returned to them.

9. In view of the findings I have made, I decline to revise the orders made by the subordinate court on 16th September 2014.

DATED and **DELIVERED** at **HOMA BAY** this 9th day of February 2015.

D.S. MAJANJA

JUDGE