



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.248 OF 2010

(An Appeal arising out of the decision of Hon. U.P. Kidula – CM delivered on 20th April 2011 in Kibera CM.CR. Case No.2568 of 2008)

REPUBLIC.....APPELLANT

VERSUS

JOHN FAUSTIN KINYUA.....1ST RESPONDENT

IRENE MUTHONI MWAURA.....2ND RESPONDENT

JUDGMENT

On 20th April 2010, U.P. Kidula, the Chief Magistrate who was hearing the criminal case facing the respondents made the following order:

“There is no prosecutor in court to either apply for adjournment or prosecute the case. There is no explanation as to where Mr. Kiage is or where he is held up. The usual prosecutor in this court had no instructions from Mr. Kiage as he said Mr. Kiage had not talked to him. In the circumstances of this case I will apply Section 202 of the Criminal Procedure Code. The Accused persons in this case are acquitted under Section 202 of the Criminal Procedure Code on all counts that they were charged with.”

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 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.”

The State was aggrieved by the decision. It has filed an appeal to this court. In the petition of appeal, the Appellant took issue with the order made by the trial magistrate. The Appellant was of the view that the order was made without jurisdiction since there was a prosecutor in court, and secondly, two prosecution witnesses had already testified in the case. The Appellant stated that if the trial magistrate was indeed

entitled to dismiss the prosecution's case, it would have done so under **Section 210** of the **Criminal Procedure Code**. The Appellant stated that the decision to acquit the respondents was drastic and draconian and did not take into consideration the broader interest of justice. The Appellant urged the court to allow the appeal and set aside the order that was issued by the trial court and direct that the case proceeds to hearing until its final determination.

Prior to the hearing of the appeal, counsel for the parties agreed to file written submissions in support of their respective opposing positions. The said written submissions were duly filed. Counsel for the parties highlighted the said submissions during the hearing of the case. It is the Appellant's case that the trial court acted in haste when it invoked **Section 202** of the **Criminal Procedure Code** and acquitted the respondents. The Appellant contends that the trial magistrate did not have jurisdiction to acquit the respondents under **Section 202** of the **Criminal Procedure Code** because two witnesses had already testified in the case. The trial magistrate was required to analyze the evidence that was adduced by the two prosecution witnesses to determine whether a *prima facie* case had been established. It was therefore a misdirection for the trial court to rule that no evidence had been laid by the prosecution to entitle it to invoke **Section 202** of the **Criminal Procedure Code**. The Appellant reiterated that the decision to acquit the respondents was not judiciously made and was not in the interest of justice. The Appellant was concerned that the trial court had applied a harsher standard when the prosecutor failed to attend court yet on 7th April 2010 the trial magistrate had failed to attend court and had not given any reasons for her failure to attend court. The Appellant urged the court to consider the history of the case especially as relates to the number of adjournments sought and granted prior to the issue of the order that is sought to be impeached in this appeal. The Appellant urged the court to allow the appeal, set aside the order issued by the trial court and direct that the case be heard afresh before another court.

In their response, the respondents asserted that the order issued by the trial court was inevitable taking into consideration the antecedents thereto. It was not the first time that the prosecution had sought adjournments due to failure by the special prosecutor Mr. Kiage to attend court. The respondents narrated instances in which the special prosecutor, for no excusable reason, failed to attend court thus occasioning the adjournments. The respondents reiterated that the trial magistrate was within her right to acquit the respondents under **Section 202** of the **Criminal Procedure Code**. They stated that there was no justification why the special prosecutor failed to attend court when the case was scheduled for hearing on the particular day. The respondents were of the firm view that the trial magistrate exercised her judicial discretion properly when she dismissed the case for failure by the prosecutor to attend court. They urged the court to dismiss the appeal.

This court has carefully considered the submission, both written and oral made before this court. Before giving reasons for its determination, it is important that the background of what transpired in the trial magistrate's court be set out. The respondents were charged with offences instituted by the then Kenya Anti-Corruption Commission. The respondents were charged with five (5) counts related to the allocation and transfer of a property, House No.304 Villa Franca Estate Nairobi. The said house belonged to Kenya Re-insurance Corporation. It was the prosecution's case that the respondents had caused the said property to be transferred from the Corporation to the 2nd respondent without any consideration being paid. The respondents were arraigned before the trial court on 11th September 2008 for plea. They pleaded not guilty to the charge.

The case was listed for mention on 18th September 2008 when the prosecution indicated that the special prosecutor Mr. Kiage would be present to confirm the hearing date. The case was listed for hearing on 25th November 2008. On 25th November 2008 the matter did not proceed because the court was informed that Mr. Kiage, the special prosecutor was unwell. The hearing of the case was adjourned to 3rd February 2009. On 3rd February 2009 the case did not proceed because the trial court was not sitting. The hearing of the case was adjourned to 11th March 2009. On that day, the advocates of the respondents were not present in court. The case was adjourned for mention on 23rd March 2009 when the case was fixed for hearing on 27th May 2009. On 27th May 2009, the trial court was not sitting. The hearing of the case was adjourned to 20th August 2009. On 20th August 2009, the case did not proceed because the 1st respondent

was absent. The court was informed that the 1st respondent had been convicted and sentenced in another case hence his absence from the court. The court adjourned the case to a date when the 1st respondent would be produced in court.

The court was informed subsequently thereafter that the 1st respondent had been released on bail pending appeal. The case was listed for hearing on 7th and 8th of December 2009. On 7th December 2009, the prosecution sought adjournment on the grounds that Mr. Kiage, the special prosecutor was attending a workshop at Kenya School of Monetary Studies. The adjournment was granted. For the record, although the respondents were present in court, their advocates were absent. The case was listed for hearing on 25th March 2010. On that day, the case proceeded to hearing. The prosecution called two witnesses. Both witnesses testified before the case was adjourned at the instance of the advocate of the 1st respondent. He indicated to the court that he would not be in a position to proceed with the case on the following day because he had fixed two adoption cases for hearing before the High Court. The prosecution did not object to the adjournment. The case was listed for hearing on 20th April 2010.

It was on this date that the trial court issued the order that is sought to be impeached on this appeal. The issue for determination by this court is whether the trial court was justified in dismissing the prosecution's case and acquitting the respondents on account of the failure by the prosecutor to attend court. From the above summary of what transpired in court prior to the fateful date, it is clear to this court that the prosecution had not conducted itself in such a manner as to attract the drastic decision that was taken by the trial court. While there is no doubt that the prosecution acted lackadaisically by failing to attend court on the scheduled dates, there was no reason why the trial court did not exercise its discretion and adjourn the case to another date when the prosecution would be given an opportunity to prosecute its case.

From the record of the court, it was clear that on previous occasion both the prosecution and the defence were equally culpable for occasioning adjournments of the case. For the trial court to punish the prosecution for failing to attend court on that one occasion clearly betrays misdirection on the part of the trial court. The trial wrongly exercised its discretion by dismissing the prosecution's case and acquitting the respondents. In any event, if the trial court was minded to close the prosecution's case, it would have done so under **Section 210** of the **Criminal Procedure Code** since two prosecution witnesses had already testified. It was the duty of that court to evaluate that evidence and determine if any prima facie case had been made before acquitting the respondents.

From the above analysis, it is clear that the trial court acted irrationally and abused its judicial discretion when it invoked **Section 202** of the **Criminal Procedure Code** without any basis in law. In the premises therefore, the appeal lodged by the Appellant is hereby allowed as a result of which the order issued on 20th April 2010 is hereby set aside. The criminal case facing the respondents is restored to hearing. It shall be heard *de novo* by the Anti-Corruption Court Nairobi. It is so ordered

DATED AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2015

L. KIMARU

JUDGE