



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CRIMINAL APPEAL NO 242 OF 1992**

**JOHN WAMBUA KIITI..... APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(From Original Conviction and Sentence in Criminal Case No 2602

of 1989 of the Resident Magistrate's Court at Winam:

F M O Kadima Esq RM

**JUDGMENT**

What happened on 14th June, 1990 was that the witnesses for the prosecution were not in Court though that was the date set for hearing. The Prosecution asked for adjournment saying that he did not know why they did not attend.

The application was opposed by the accused's counsel and the trial magistrate upheld the objection, refused the adjournment and ordered the trial to proceed. Of course it could not so the prosecutor said that he had no evidence to offer.

The Court then acquitted the accused under Section 210 of the Criminal Procedure Code.

Of course, I have no doubt that that was a wrong section to use under those circumstances. The section states that:-

“If at the close of the evidence in support of the charge and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward; if it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a defence, the Court shall dismiss the case and forthwith acquit him.”

The operation clause is “if at the close of the evidence in support of the charge”. There was no such evidence indeed the prosecutor had not even started to adduce evidence.

I am aware that this is a situation that has, for many years created problems to magistrates and it is surprising that it has never been brought to Parliament for alignment. The office of the Attorney General has been aware of this for a long time.

There is no section the law directly applicable to a situation such as the one that arose here. The Court is however entitled to refuse the adjournment and order that the trial shall proceed as it did in this case. The prosecution will not be able to proceed and it is unlikely that an application for withdrawal of the charge under Section 87 (a) of the Criminal Procedure Code will be allowed because the Court if it does, will only in other form be granting what it has refused – because the accused will be liable to be re-charged with the same offence.

The practice of the prosecution under such circumstances is that he asks for a few minutes adjournment and rushes for a *nolle* from those entitled to give it. Such people are, however, not to be easily found and so resort is had to “ I have no evidence to offer”. This Court’s considered view is that the Court can then go ahead and acquit and discharge the accused but using it’s inherent residential power. It should not be unable to act simply because there is no written law under which it can act. The Court must be able to make orders to meet the ends of justice in accordance with the situations presenting themselves before it. My further view is that such an acquittal and/or a discharge using the inherent powers of the Court will act as a bar to charging the accused with the same offence. This should be the position in this respect at least until Parliament sees the sense to do its duty in this respect.

As it were however, an acquittal and discharge under section 210 of the Criminal Procedure Code was wrong and it is set aside. In short, the appeal is allowed.

Dated and delivered at Kisumu this 17<sup>th</sup> day of December, 1993

**J.A. MANGO**

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**JUDGE**