REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL NO 158 OF 1988

ATTORNEY GENERAL…….....…….....APPELLANT

VERSUS

JENIFFER SHIMANYULA…….……..RESPONDENT

(From original order in Criminal Case No 1779 of 1987 in the Resident Magistrate's Court at Mombasa, I Indeche Esq RM)

JUDGMENT

This is an appeal by the Hon Attorney General of Kenya against the order of the Resident Magistrate, at Mombasa (Injene Indeche Esq) made in Principal Magistrate's Court Criminal Case No 1779 of 1987 acquitting Jennifer Shimanyula, the respondent in this appeal, of seventeen counts of forgery contrary to S 349 of the Penal Code, and two counts of stealing by servant contrary to s 281 of the Penal Code. The acquittal was in purported exercise of the powers conferred by S 202 CPC.

After I heard learned state counsel, Mrs Lucy Momanyi, and the Learned Counsel for the respondent, Mr Gikandi, it became clear to me that both of them missed the crux of this appeal. Their respective submissions dwelt at great length on whether or not the trial court properly exercised its discretion under S 202 CPC. However, to my mind the question of law raised by this appeal is whether the trial magistrate possessed the jurisdiction to dismiss the charges against the respondent at the stage he did.

The order complained of was made on 24th December, 1987. It was the second time the case came for a hearing it having been adjourned on an earlier date, viz 23rd September, 1987, because the trial magistrate was engaged elsewhere on other assignments. On that second occasion the court prosecutor unsuccessfully applied for the adjournment of the case. The trial magistrate in his one sentence ruling declined to grant the adjournment prayed for and ordered the case to proceed. The basis for seeking an adjournment was that the complainant was unwell. The court prosecutor produced a telegram to support his submission. Mr Gikandi who also represented the respondent in that court submitted at some length in opposition of the application for adjournment. The trial magistrate should have but did not exercise his powers under S 202 CPC at that stage. Having not done so and instead ordered the case to proceed, he lacked the jurisdiction to acquit the respondent under that section. All he was competent to do was to call upon the prosecutor to tender evidence in support of the charge, and to proceed to acquit the respondent for lack of evidence under S 210 CPC if he failed to tender any evidence or sufficient evidence in support of the charges. Coupled with the foregoing is the fact that the trial magistrate appears to have denied the prosecution a hearing. After he refused to grant an adjournment of the case altogether for that day, the prosecutor successfully applied for a five minutes adjournment of the case in order to get final instructions from his Superior officer. During the resumed court session he informed the court that he was waiting for the investigating officer of the case, who he had been told was on his way to the court. The trial magistrate without further ado proceeded to make the order appealed against. With profound respect to the trial magistrate, having earlier ordered that the case proceed, he was duty bound to call upon the court prosecutor to present and examine his witnesses. He could only proceed to dismiss the charges after the court prosecutor would have indicated he had no evidence to offer. Such dismissal, if ever it was adopted, would not have been under S 202 CPC.

There is one other matter which merits comment. Both Mr Gikandi and the trial magistrate remarked that the complainant had failed to attend court on 23rd September, 1987, the first time the case came for a hearing. I note from the lower court record that the case was adjourned on the court's own motion

because the trial magistrate was not available to hear the case. The alleged non-attendance of the complainant on that day weighed heavily in the mind of the trial magistrate and prompted him to remark that he had been lax in pursuing her complaint against the respondent. The remark was quite unfair to the complainant in absence of any record showing that the complainant was absent on that day. The trial magistrate was not personally present in court on that day. The case was adjourned by another magistrate. The trial magistrate did not, therefore, know, of his own knowledge, that the complainant was not in court then. He relied on what learned defence counsel had said. The complainant not having been called then it could not be said the learned defence counsel had personal knowledge of her non-attendance.

In the circumstances as outlined in the paragraph immediately preceding this one, it was quite clear that the trial magistrate did not consider this matter with a judicial temper. Had he done so he would have noticed from the record before him that the case had not been adjourned previously due to the failure of the complainant to attend court.

In the foregoing circumstances I am inclined in favour of allowing the appeal, which I hereby do, set aside the order of acquittal made on 24th December, 1987, and order that the case be heard, *de novo*, before another magistrate with jurisdiction to hear it. The case shall be mentioned before the Principal Magistrate on 20th March, 1989 for re-allocation. Order accordingly.

Dated and Delivered at Mombasa this 17th Day of March, 1989

S.E.O. BOSIRE

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JUDGE