



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL REVISION NO. 35 OF 1983**

**REPUBLIC.....APPLICANT**

**VERSUS**

**HASMUKH MEGHJI SHAH.....RESPONDENT**

**JUDGMENT**

This is an application by the state against an order made by the learned Resident Magistrate on May 27, 1982. The history of this matter before us is that one Hasmukh Meghji Shah was charged before the Chief Magistrate on two counts – the first one being simple theft and the second being handling stolen property contrary to section 322 (2) of the Penal Code. The accused (hereinafter referred to as the respondent) appeared before the Chief Magistrate on the February 19, 1982 when he entered a plea of “not guilty” and was released on bail. The case was marked for mention on February 23, 1982. On that date (February 23, 1982) the respondent appeared before the chief magistrate when prosecution indicated that they intended to consolidate this case with another case. The case was then fixed for hearing on court No 10 on the May 27, 1982.

When the case came up for hearing on May 27, 1982 before the learned Resident Magistrate the following is what was recorded to have taken place:

“Prosecutor: I am instructed to withdraw this case under section 87 (a) CPC. We intend to use him as state witness.

Orare, Esq.

I would only say that the withdrawal is absolute and that no charges hang over accused’s head. His articles plus the passport if not used in this case be returned.

Order: In the light of the fact that accused may be a state witness, it may appear inconsistent with that stance to have the prosecution only withdraw the case under section 87 (a) Criminal Procedure code. This in effect means that a case whether connected with this one or not may be brought against him. It is fair that such state of affairs does not exist. Thus releasing accused completely from any stress or strain in case he will have to give evidence in some connected matters. I should order absolute withdrawal and acquittal for the accused. Any items due to him and in no way required for any case, to be returned to him.

J Mwera

Resident Magistrate

27/5/82”

The state is now asking the High Court to set aside the above order of the learned Resident Magistrate.

Section 87 of the criminal procedure code (cap 75 Laws of Kenya) provides:

“87. In any trial before a subordinate court any public prosecutor may, with the consent of the court, or on the instructions of the Attorney General, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon such withdrawal –

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged but such discharge of an accused shall not operate as a bar to subsequent proceedings against him on account of the same facts:

(b) if it is made after the accused person is called upon to make his defence, he shall be acquitted”.

The learned magistrate’s order talks of “absolute withdrawal and acquittal”. This simply means the learned Resident Magistrate acquitted the respondent. Under section 87 (b) of the Criminal Procedure Code the respondent could only be acquitted if he had been called to make his defence. In the present case no single witness had opened his mouth let alone the respondent being called upon to make his defence. Hence, section 87 (b) of the Criminal Procedure Code had no application in this case.

The other section under which the respondent (or any other accused person) could be acquitted is section 204 of the Criminal Procedure Code which provides:

“204 If a complainant, at any time before a final order is passed in any case under this part, satisfies the court that there are sufficient grounds for permitting him to withdraw his complaint, the court may permit him to withdraw the same and shall thereupon acquit the accused”

In our view the above section does not apply to this case. The word “complainant” was considered by the Court of Appeal for East Africa in *Martin Nguma and others v Republic* (Criminal Appeals No 48 & 69 of 1976 – unreported).

We think that we are stating the law correctly when we say that under section 204 of the Criminal Procedure Code the court cannot proceed on its own motion it must be moved by the complainant. In our present case the prosecutor clearly stated that he was withdrawing the case under section 87 (a) of the Criminal Procedure Code.

An accused person may also be acquitted under section 210 of the Criminal Procedure Code which provides:

“210. If at the close of the evidence in support of the charge and after hearing such summing up, submission or argument as the prosecutor, the accused person or his advocate may wish to put forward, 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 shall forthwith acquit him”.

The above section applies where the prosecution have called witnesses to testify against the accused and after the close of the prosecution case. Clearly that was not the position in the present case. Hence, the respondent was not acquitted under the above section.

Then section 215 of the Criminal Procedure Code provides:

“215. The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him”.

Again, it is clear that this section had no application to the facts of this case.

We have attempted to go through the sections of the Criminal Procedure Code under which an accused (like the respondent herein) could be acquitted.

Mr Arum for the respondent argued with considerable force that this court has no power to reverse an order of acquittal. Mr Arum was of the view that the respondent was acquitted under section 210 of the Criminal Procedure Code, but in view of what we have already said as regards an acquittal under section 210 of the Criminal Procedure Code we are sure that Mr Arum cannot seriously contend that his client was acquitted under that section. He was not acquitted at the close of prosecution case. No evidence had been adduced yet.

Mr Chunga for the republic has submitted that the Attorney General did not give instructions and hence withdrawal of the case required the consent of the court.

Our understanding of section 87 of the Criminal Procedure Code is that where the Attorney General gives instructions for a case to be withdrawn under that section then the court has no alternative but to withdraw the case and discharge the accused if such application is made before the accused person is called upon to make his defence or acquit the accused if the application is made after the accused person has been called upon to make his defence. But where there are no instructions from the Attorney General to withdraw the case under this section then any withdrawal of the case must be with the consent of the court. The court has discretion either to allow or refuse to give its consent to such withdrawal. It is our view that it will be only in exceptional cases that such consent will be withheld since it is our considered opinion that any prosecution in a court of law should be left to the prosecutor so long as the rights of an accused person are not being infringed. Indeed confrontation between the prosecutor and the court in cases where the prosecutor wishes to withdraw should be discouraged. Our experience has shown that courts in this country are (and should be) willing to have cases withdrawn under section 87 (a) of the Criminal Procedure Code without much ado. That we think should be the position.

We are grateful to both counsel for the few authorities cited to us. We have considered these authorities which we have found useful but decided not to reproduce any passages from them as we are sure that the point for determination has been adequately dealt with in what we have said so far.

The learned Assistant Deputy Public Prosecutor (Mr Chunga) has assured us that the Republic will not be asking for the re-trial of the respondent, only that the Republic wanted the correct procedure to be spelt out. We hope we have spelt out the correct procedure in this ruling.

In view of the foregoing we set aside the order of the learned Resident Magistrate in which he purported to acquit the respondent and in its place we substitute an order of discharge under section 87 (a) of the Criminal Procedure Code. Order accordingly.

**Dated and Delivered in Nairobi this 28th day of March 1984.**

**E.O.O'KUBASU**

**JUDGE**

**J.H.S.TODD**

**JUDGE**