



**REPUBLIC OF KENYA**

**HIGH COURT APPELLATE SIDE KISUMU**

**CRIMINAL APPEAL NO 113 OF 1978**

**REPUBLIC .....APPELLANT**

**VERSUS**

**MALEK ABDULLA MOHAMED.....RESPONDENT**

**JUDGMENT**

This is an appeal by the prosecution under section 348A of the Criminal Procedure Code. There is no dispute that the appeal involves a matter of law and is therefore competent.

On 7th October 1977, the respondent appeared before a Resident Magistrate in Kisumu charged with wilfully failing to comply with a requirement made by an authorised officer, contrary to section 52 of the Employment Act; the particulars being that the respondent, of New Cool Inn Hotel and Restaurant, failed on 19th August 1977 to produce documents relating to the employment of John Were and eight others, as required by the labour officer, Kisumu. The respondent pleaded "Not Guilty". The hearing was adjourned from time to time, until 26th January 1978. On that day, Mr Ochieng', who was prosecuting, applied to the Senior Resident Magistrate, Kisumu, for the withdrawal of the case under section 87 (a) of the Criminal Procedure Code. That section reads:

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 person shall not operate as a bar to subsequent proceedings against him on account of the same facts; ...

The magistrate appears not to have acceded to this requirement and said "case withdrawn under section 204 of the Criminal Procedure Code as it is pending since October 1977". Section 204 provides:

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.

On appeal to this Court, the prosecution take two grounds of appeal:

- (1) the Senior Resident Magistrate erred in law in rejecting the application for the withdrawal of the prosecution under section 87 (a) of the Criminal Procedure Code without stating his reasons; and
- (2) the Senior Resident Magistrate erred in law in withdrawing the case under section 204 of the Criminal Procedure Code when in fact no application for the withdrawal of this case under this section had been made by the complainant.

I do not agree with ground (1). It is clear that a case can only be withdrawn under section 87 (a) if the consent of the court is obtained or upon the instructions of the Attorney-General. There were no instructions from the Attorney-General in this case, so that the magistrate had a discretion to grant or withhold consent. He gave a good reason for withholding it, namely that the case has been pending since October 1977.

On the other hand, I fully agree with ground (2) of appeal because section 204 in terms contemplates (1) an application by the complainant to withdraw under that section, and (2) satisfaction by the Court that there are sufficient grounds for permitting such a withdrawal. In this case the prosecution neither applied for nor gave reasons for withdrawal under section 204.

I would therefore allow this appeal to the extent that I set aside the order and consequential acquittal of the respondent under section 204 of the Criminal Procedure Code. The effect of this is that the prosecution may, if they so desire, continue with the proceedings against the respondent upon the same charge. However, I am assured by the prosecution that their intention in appealing was to clarify the law and they propose to take no further action in the matter.

*Order accordingly.*

**Dated and delivered at Kisumu 15th June 1979.**

**E. COTRAN**

**JUDGE**