REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL APPEAL NOS 46 AND 47 OF 1979

(CONSOLIDATED)

REPUBLIC.....APPELLANT

VERSUS

HENRY MWAURA IKEGO .....RESPONDENT

SIMION GATONYE MIGUI.....RESPONDENT

JUDGMENT

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

The two respondents were charged with stealing goods in transit under section 279 (c) of the Penal Code and alternatively with handling. On the 13th June 1978 they appeared before a Resident Magistrate at Kakamega and pleaded not guilty. An application for bail was refused and they were remanded in custody until 21st June 1978. The hearing date was fixed for 3rd August 1978. On 23rd June 1978 both respondents were released on bail. Subsequently, the advocate for both respondents applied to change the hearing date and a new date, ie 13th October 1978, was agreed. On 13th October 1978, the magistrate due to try the case, Mr HH Buch, was on leave and so the case was adjourned for hearing on 11th and 12th January 1979.

The record of proceedings on 11th January 1979 indicates what happened:

Oluoch for prosecution.

Accused present.

Behan for accuseds.

Oluoch: Key witnesses from Uganda and Mombasa although bonded to appear have not yet arrived. Time is 11.00 am. I apply for adjournment to consult the State counsel.
The case was fixed for two days.

Behan: I object to any adjournment. The reason that the case was fixed for two days for hearing does not allow prosecution to apply for adjournment. The complainant and other witnesses were bonded to

appear today but they are not here. No reason is given for their absence.
I object to the application.

Oluoch: It is true the complainant and any other witnesses were bonded to appear. I have only two formal police witnesses but their evidence cannot be taken today before key witnesses give their evidence.

Court: This case was fixed for hearing today and tomorrow. This Court has waited for witnesses to turn up but they have not. Time is already past 11.00 a.m. The witnesses and the complainant were bonded to appear today and no reason given for their absence. Application for adjournment is refused. The charge is dismissed under section 202of the Criminal Procedure Code.

H H Buch

Resident Magistrate.

Section 202 of Criminal Procedure Code provides as follows:

If, in any 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 such adjourned hearing, either admit the accused to bail or remand him to prison, or take such security for his appearance as the Court thinks fit.

Although in his order, the magistrate “dismissed the charge” under section 202, he must have been using an old, unamended, copy of the Criminal Procedure Code. The words “shall thereupon acquit the accused” quoted above were substituted for the words “shall dismiss the charge” by Act No 10 of 1969. The order of the magistrate under section 202 therefore must be deemed to be an order of acquittal and this is what the prosecution are appealing against in this case.

The simple argument advanced by the prosecution is that the word “complainant” in section 202 includes a “public prosecutor” appointed under section 85 of the Criminal Procedure Code. The public prosecutor in this case was Mr H Oluoch. He appeared on the day fixed for the hearing, so that the magistrate had no power to invoke the provisions of section 202. For the respondents it is argued that the word “complainant” must be given its ordinary meaning, ie the person who lays the complaint; and that if one looks at the charge sheet in this case the complainant is stated to be Trans-Ocean Ltd, the owners of the stolen goods.

Looking at section 202 and the subsequent sections of the Criminal Procedure Code free from authority, it seems to me that the Code deals in those sections with the situation where the person prosecuting does not appear at all. It is a fact, except in the few cases of the institution of private prosecutions, that criminal prosecutions are conducted on behalf of the republic by police officers above a certain rank or by state counsel. Where such a prosecutor does not bother to come to Court at all on the day fixed for the hearing, it is only right to assume that the Republic is no longer pursuing the matter against the accused; hence the power of acquittal under section 202. In my judgment section 202 is not intended to cover a situation where a prosecutor does come to Court but says he cannot go on because some of his witnesses have not turned up.

I am fortified in this view by an unreported judgment of the Court of Appeal for East Africa, *Nguma v The Republic of Tanzania*. The Court there dealt with two separate appeals from the judgments of Biron J and Patel J in the High Court of Tanzania. The equivalent section in Tanzania to our section 202 is section 198 of the Tanzania Criminal Procedure Code. It is identical to our section 202, except that it says that “where the complainant does not appear, “The Court shall dismiss the charge and acquit the accused person”. As to the word “complainant” in that section Biron J had said in the case under appeal from him “the word ‘complainant’, according to most, if not all the judges of our Court, includes a public prosecutor”.

The majority judgment of the Court of Appeal (Mustafa Ag V-P and Musoke JA) set out section 198 of the Tanzania Code and continued:

The word “complainant” is not defined in this section nor in the Criminal Procedure Code. But we learn from the judgment of Biron J, a senior judge of considerable experience in the High Court, that the word “complainant” is generally regarded by the judges in the High Court in Tanzania as including a public prosecutor. We would endorse this view which flows logically from the definition of the word “complaint” in section 2 of the Criminal Procedure Code that it is “an allegation that some person known or unknown has committed or is guilty of an offence”. It is not usual, and indeed would be superflous, to define a word in a piece of legislation and also include definitions of all derivatives and variations of the word defined. Normally, where a word is defined in a document, an indication of the meaning of any derivative or variation of the word is thereby indicated, unless, of course, the context otherwise requires. In our view it is logical and within the rules of interpretation to hold that the word “complainant” includes a public prosecutor. What this means in effect is that where a private person complains directly to a magistrate in a criminal matter he is the “complainant”. If, however, the same person, instead of complaining direct to a magistrate were to complain to the police and the police brought the complaint to Court in the name of the Republic then we think it follows that the Republic or the public prosecutor is the “complainant” and the victim of the wrong complained of becomes a witness for the purpose of substantiating the allegation.

It was argued for the respondent by both Mr Mimihagati and Mr Mwakilasa that in both appeals the Republic was represented by a prosecutor and therefore section 198 of the Criminal Procedure Code could not apply. The advocates for the appellants submitted in effect that a complainant who appeared without his witnesses was as good as absent, as he would be unable to proceed with the hearing of the case. However, the words in section 198 are “... if the complainant does not appear ...”. We think that “appearance” must mean physical presence and cannot be construed to mean constructive presence or non-presence. The advocates for the appellants would construe “appearance” to mean physical presence, combined with the ability of the complaint there and then to proceed with the conduct and hearing of the case. We are not satisfied that such an extended meaning can be put on the word “appearance”; if the legislature had intended it to have that meaning, it could easily have said so.

In cases of ambiguity a Court has a duty to construe the meaning of words. Sometimes in construing, a Court, by way of analogy or to avoid an impasse, gives an extended meaning to simple words. But it should not, because of the lack of legislation to cover a certain point, try to over-strain or distort the meaning of a word in order to span an unbridgeable gap. The legislature has not legislated to cover the point on which these two appeals turn, and a Court should not, by means of interpretation, as it were, attempt to legislate on behalf of the legislature. In our view section 198 was not applicable, as the complainant had appeared.

With respect, I fully agree and for those reasons I hold that the magistrate had no power to invoke section 202 in the circumstances of this case.

The question remains, however, as to what the magistrate could and should have done in the circumstances. I need not decide in this appeal whether the magistrate could have acquitted the accused by applying section 210 of the Criminal Procedure Code or any inherent power, as suggested in *Nguma v The Republic of Tanzania*. I say this because I am of the opinion that the request for an adjournment made by the prosecutor in this case should have been acceded to. The previous adjournments were not the fault of the prosecution. The first adjournment was at the request of the defence, and the second because the magistrate was on leave. The key witnesses, as the prosecutor said, were coming from Uganda and Mombasa. It was only 11.00 am and the prosecutor wanted to consult state counsel. Further more, the case had been fixed for two days. Although a magistrate has a general discretion to adjourn or to refuse to adjourn under section 205 of the Criminal Procedure Code, that discretion must be exercised judicially and sensibly. The interests of the accused must certainly be taken into account; but in this case both accused were on bail and could not have suffered unduly through an adjournment. The interest of the prosecution is equally important in that it is their duty to prosecute and to see that justice is done. In this case, I am of the view that it would have been reasonable and just to allow, if not a general adjournment, an adjournment to the following day, since the case was fixed for two days to allow the prosecutor to make inquiries about his missing witnesses and to consult state counsel.

In the result, I hold that the magistrate in this case had no power to invoke section 202 of the Criminal Procedure Code and I set aside his order under that section. I hold further that he exercised his discretion wrongly in refusing an adjournment on 11th January 1978.

The result of this is that the prosecution may now proceed against these two accused. Whether they do so is a matter for them, but if they do, I would direct that the matter proceeds before a different resident magistrate of competent jurisdiction.

Appeal allowed.

Dated and delivered at Kisumu this 22nd ady of June 1979.

E. COTRAN

JUDGE.