

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KIAMBU  
CRIMINAL APPEAL NO. 5 OF 2020

REPUBLIC.....APPELLANT  
VERSUS  
NICHOLAS KAMWANJARA MWATHA.....1<sup>ST</sup> RESPONDENT  
DENNIS KIMANI.....2<sup>ND</sup> RESPONDENT  
BUDLO CO. LTD.....3<sup>RD</sup> RESPONDENT

*(Being an appeal against the ruling of Hon. C.K. Kisiangani in Ruiru Criminal Case No. 31 of 2019 delivered on 7<sup>th</sup> February 2020)*

JUDGMENT

Introduction

1. This is an appeal by the Prosecution from the ruling delivered on 7<sup>th</sup> February 2020 in Ruiru Criminal Case No. 31 of 2019 where the learned magistrate dismissed the prosecution case and proceeded to acquit the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.
2. The respondents, in the trial court were charged with 4 counts of offences as follows:  
**Count I** - Having in possession in the course of trade counterfeit goods contrary to Section 32(a) as read with Section 35(1)(a) of the Anti - Counterfeit Act No. 13 of 2008  
*Particulars* - that the Respondents herein on the 18<sup>th</sup> of September 2018 at Kiwanja area in Ruiru, within Kiambu County in the republic of Kenya, in the course of trade were in possession of counterfeit goods to wit 22,100, 1 Kilogram packets with a total value of Kshs. 1,105,000/= without the authority of Binex Kenya Company Limited

the registered owner of "C Water Proof" trade mark no.88267 which goods imitated the protected goods in such manner and such a degree that those counterfeit goods substantially similar copies of the protected goods.

**Count II** - Disposing off in the course of trade counterfeit goods contrary to section 32(g) as read with Section 35(1)(a) of the Anti-Counterfeit Act no. 13 of 2008

*Particulars* - that the Respondents between the 18<sup>th</sup> September 2108 and 15<sup>th</sup> January 2019 within the Republic of Kenya in the course of trade disposed-off counterfeit goods to wit 21,581, 1-kilogram packets with a total value of Kshs. 1, 079,050/= without the authority of Binex Kenya Company Limited the registered owner of "C Water Proof" trade mark 88267 with good imitated the protected goods.

**Count III** - Manufacturing in the course of trade counterfeit goods contrary to sections 32(b) as read with sections 35(1)(a) of the Counterfeit Act No. 13 of 2008.

*Particulars* - that on 15<sup>th</sup> January 2019 at around 1730 hrs at Kiwanja in Ruiru, within Kiambu County in the Republic of Kenya, in the course of trade, the Respondents were found manufacturing counterfeit goods to wit 513, 1 Kilogram packets with a total value of Kshs. 25,650 using a mixer, 15 Kg scale MHCCO, 1 Kilogram weight, continuous brand scalar (Hualin) S/No. 11111810119 model FRB 7701 and bag closer CREVOI model DA without the Authority of Binex Kenya Company Limited the registered owner of C Water Proof.

**Count IV** - Having in possession in the course of trade counterfeit goods contrary to section 32(a) as read with section 35(1)(a) of the Anti-Counterfeit Act No. 13 of 2008.

*Particulars* - that on 15<sup>th</sup> January 2019 at around 1730 hrs at Kiwanja in Ruiru, within Kiambu County in the Republic of Kenya, in the course of trade, the Respondents were found manufacturing counterfeit goods to wit 513, 1 Kilogram packets with a total value of Kshs. 25,650 without the authority of Binex Kenya Company Limited the registered owner of C Water Proof.

3. When the matter came up for hearing on 7<sup>th</sup> February 2020, the trial magistrate closed the prosecution case and acquitted both accused persons under section 210 of the Criminal Procedure Code. The reasons were that the prosecution was given a last adjournment on 22<sup>nd</sup> January 2020. That at 9.20 a.m. there was no representation from the prosecution and there was no communication as to the whereabouts of the prosecution which showed lack of interest by the prosecution in prosecuting the matter.
4. Aggrieved by the decision of the trial magistrate the appellant filed the appeal by their Petition of Appeal dated 17<sup>th</sup> February 2020, citing the following grounds:
  - i. *The trial magistrate erred in law and in fact by conducting the proceeding on 7<sup>th</sup> February 2020 in the absence of the prosecution.*
  - ii. *The trial magistrate erred in law and in fact by closing the prosecution case Suo moto*
  - iii. *The trial magistrate erred in law and in fact by denying the prosecution the opportunity to make closing submissions.*
  - iv. *The trial magistrate erred in law and in fact by dismissing the prosecution case without giving the prosecution a chance to be heard.*
  - v. *The trial magistrate erred in law and in fact in acquitting the accused persons under section 210 of the Criminal Procedure Code.*
  - vi. *Further ground to be relied on at the hearing.*

5. The Appellant urged the court to allow the appeal, quash the judgment and set aside the acquittal, and direct the trial be conducted by another court with competent jurisdiction.
6. The court directed that the appeal be canvassed by way of written submissions.

**Appellant's submissions**

7. Counsel filed submissions dated 1<sup>st</sup> April 2021, and submitted that the action by the trial magistrate in conducting proceedings on 7<sup>th</sup> February 2020 in the absence of the prosecution counsel was a fatal error, which denied the victim and the Republic the opportunity to participate in the trial.
8. Counsel states the trial court failed to enhance its equality of arms envisioned under Article 50 of the Constitution. That the learned magistrate denied the parties a chance to present their case. He drew the attention of the court to *Criminal Revision No. 9 of 2018, Prosecutor vs Stephen Lesinko (2018) eKLR* where the court held "*in the event the prosecution counsel/ authority and/or the defence is excluded, the principle of equality of arms is violated. The trial court was under a duty to take positive measures to summon the applicant and hear evidence for non-attendance before posing judgment.*"  
*Criminal Revision No. 17 of 201 Thaddeus Mungwana Chetembe vs Republic (2019) eKLR* where the court held "*it is irregular for a trial court to conduct criminal proceedings in the absence of a prosecutor. It is the DPP or a person appointed by him who has the power to conduct a prosecution under the provisions of the CPC. A trial without a prosecutor is thus a nullity.*"

9. In the circumstances, counsel submits that the trial magistrate failed to discharge her duty and summon the prosecution and hear evidence/representations for non-attendance. The trial court failed to address itself on the presence of the witnesses in the court before dismissing the prosecution case. He cited *Naiyasha Criminal revision case no 29 of 2019 Republic vs Grace Wairimu (2019) eKLR* where the court held; *"I opine that the closure of the prosecution case at the instance of the court is so drastic and extreme that a victim ought at least to be made aware of the fact by the court."*
10. It was further submitted by counsel that the provisions of **Section 210** of the **Criminal Procedure Code** require the prosecution to have called evidence by way of witnesses, close its case and submit on merit. However, in the instant case the prosecution did not call evidence and therefore the court erred in applying section 210 of the CPC. In *Criminal Revision 101 of 2006- Republic vs Jacob Koome Maore (2006) eKLR* the court held that *"...Section 210 of the CPC is not applicable where the prosecution has not adduced evidence"*.
11. Counsel urged the court to find that the trial court erred by not directing itself on the manner and how the counterfeit goods would be dealt with or disposed as per the provision of **Section 28(3) of the Anti-Counterfeit Act No 13 of 2008** which is a mandatory provision. And further that the trial magistrate failed to extend the same latitude of waiting for the Prosecution as extended to the Respondent's counsel on 21<sup>st</sup> January 2020 for more than two hours which led to the hearing being adjourned yet the prosecution had one witness.

12. In conclusion counsel urged the court to find application has merit and allow the appeal, set aside the acquittal and substitute it with an order that a fresh trial be conducted in another court of competent jurisdiction.

**Respondent's submissions**

13. The respondents' submissions were filed on 19<sup>th</sup> July 2021. It was submitted that the issue of victim notification cannot arise as the prosecution was in court on 22<sup>nd</sup> January 2020 when the trial court gave the hearing date of 7<sup>th</sup> February 2020. The prosecution's right to be heard must not be construed as the prosecution's right to be heard at its convenience. The arrested person's right to fair trial is not inferior to the victim's rights.
14. According to counsel the authorities cited by the appellant are not comparable as the facts are different, in the authorities cited the prosecution had called evidence. Counsel disputes the appellant was denied the right of arms as the prosecution had previously been given sufficient time to proceed with the trial but failed.
15. Further, it was submitted by counsel, considering the circumstances that led to the acquittal of the respondents the question should be what the court ought to do to balance the rights of an ever-absent complainant and an ever-present accused person. Reliance was placed in *Republic vs Benedict Kalorwe Kaweto (2008)* where the court held that - "*prosecutions cannot be a nullity in the absence of any explanation on whereabouts of the prosecution or witnesses. Courts should not be held at ransom by the prosecution. Each court is entitled to ensure order and decorum in the court.*"

16. It was also submitted that the appellant had misrepresented facts as the closing of the prosecution's case was moved by the respondents' counsel and not done *suo moto* by the court.
17. Counsel submitted that **Section 202 of the Criminal Procedure Code** gave instances when the court may acquit an accused for non-attendance of the complainant. And **Section 206** thereof pronounces itself on dismissal of suits following absence by the prosecution at the time/ place to which the hearing or further hearing is adjourned. That the acquittal of the respondents under **Section 210 of the Criminal Procedure Code** was only limited to the recorded provision of the law but did not extend to the substance of the decision. The error of the magistrate is denied but counsel agrees with the appellant that the acquittal ought not have been under section 210 of the Criminal Procedure Code as no evidence had been adduced by the prosecution.
18. Counsel sought to clarify that on 22<sup>nd</sup> January 2020 the accused persons were in court save for their counsel and that they were willing to proceed with the hearing. While on 7<sup>th</sup> February 2022, there was no information availed on behalf of the prosecution's whereabouts.
19. In addition, since the prosecution had not adduced any evidence, the trial court could not pronounce itself on the exhibits not tendered in court as evidence.
20. In conclusion counsel urged the court to find the appeal lacks merit, that the trial court properly exercised its discretion and proceed to dismiss the appeal with costs, as well as issue an order for the release of the exhibits.

**Analysis and determination**

21. This is the first appellate court, and has a duty to conduct re-examination and reappraisal of the evidence adduced before the trial court and come up with an independent conclusion. The principles of the first appellate court have been stated and restated in a myriad of cases, among them *Kiilu & Another v. Republic* [2005] *KLR 174* where it was stated:

*“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion; it must make its own conclusion only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing witnesses.”*

22. The Complaint by the state revolves around the decision of the trial magistrate to close the prosecution case for non-attendance at the hearing. The law is clear on what ought to happen in the event of non-attendance of either the prosecution or the defence.

23. Section 202 of the Criminal Procedure Code deals with non-attendance of the prosecution, while section 206 deals with non-attendance by the defence at the hearing.



24. Section 202 of the Criminal Procedure Code states as follows:

*“202. Non-appearance of the complainant at a hearing*

*If, in a 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 the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.”*

25. This provision applies to situations when the matter was coming for a hearing the first time and the prosecution was not in attendance with no justifiable reason, the court may exercise its jurisdiction and acquit the accused or adjourn the hearing if it thinks fit to do so. This discretion should be exercised judiciously.

26. In the instant case the prosecution was the complainant who had initiated the case in court on behalf of the victim (affected person).

27. I agree with the opinion in High Court Revision No. 9 of 2018, *Prosecutor vs. Stephen Lesinko [2018] eKLR*, that:

*“the victim and the complainant have a compelling interest to know the outcome of the criminal case against the accused and it’s improbable to answer this concern with the answer that the prosecution did not attend proceedings.”*

28. In the instant case, the prosecution did not adduce reasons for failure to attend court and only faults the trial magistrate for closing the case in its absence. No reason(s) were placed before the court to compel the trial court to adjourn the matter. The trial magistrate exercised her discretion and acquitted the accused. That discretion is anchored in law and it cannot be said to be irrational or incorrect and neither can the proceedings be a nullity.
29. The proceedings of the trial court bear record that when the matter was called at 9.20 am the prosecution was not in court, the court proceeded to close the prosecution case and acquitted the accused persons under section 210 of the Criminal Procedure Code. This was after the accused counsel moved the court to have the prosecution case closed as the prosecution had not shown interest in prosecuting the matter.
30. From the record, it is clear the trial magistrate intended to exercise her discretion as enshrined in law on how to move forward with the trial in the absence of the prosecution. And she went ahead to acquit the accused persons under Section 210 instead of Section 202 of the Criminal Procedure Code. The reasoning of the trial magistrate was well-meant and was in support of acquittal under section 202 of the Criminal Procedure Code.

31. Be that as it may, acquittal under Section 210 of the Criminal Procedure Code only applies where the prosecution has called witnesses, which was not the case in the instant matter. And while the trial magistrate was right in applying the reasoning of Section 202, this court finds that she incorrectly applied the law in acquitting the respondents.

32. In the circumstance therefor, I am not persuaded to find that it was not proper for the trial magistrate to acquit the accused persons under section 210 of the Criminal Procedure Code.

33. **FINAL ORDERS**

- (i) The appeal herein is merited and is allowed.
- (ii) I order a re-trial of the respondents.
- (iii) The lower court file be returned Ruiru Law Courts for a re-trial before another court of competent jurisdiction.

Orders accordingly

JUDGMENT delivered virtually, dated and signed at **Kiambu**

This 22<sup>nd</sup> day of June, 2023.



**P.M. MULWA**  
**JUDGE**

**In the Presence of:**

*Kinyua* - court assistant

*Mr. Muriuki* for the State/ Appellant

*Ms. Nyawira w/b* for the Anti-Counterfeit Authority -and assisting the state counsel

N/A for Respondents

I Certify this is a true copy of the original

*Deputy Registrar Kiambu*

Date:.....

