

IN THE FEDERAL COURT OF APPEAL
ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU
21ST JULY, 1978. FCA/E/71/77

BEFORE THEIR LORDSHIPS

JOHN ANIEMEKA PHIL-EBOSIE, BOONYAMIN OLADIRAN
KAZEEM, DONALD GRAHAM DOUGLAS, JJCA

BETWEEN:

THE STATE APPELLANT

VS.

EDMUND NNAJI RESPONDENT

CRIMINAL PROCEDURE - *Appearances - Non appearance of prosecutor in court - Dismissal of the information was proper - But acquittal of the respondent as if on merit was wrong.*

CRIMINAL PROCEDURE - *Acquittal of an accused - That bars further trial - Accused is only entitled thereto - For reason that deal with his guilt or innocence.*

CRIMINAL PROCEDURE - *Dismissal of charge or information - Without coming to end of the proceedings - Can be deemed to be on merit under certain circumstances.*

CRIMINAL PROCEDURE - *Dismissal of information on merit - Where the previous charge was struck out for want of prosecution - Prosecutor's absence from court during the second trial though reprehensive - Cannot justify dismissal on merit without trial.*

FACTS

The respondent in this appeal was charged on an information of four counts in the High Court of East Central State, Enugu, Judicial Division.

From the record of proceedings the case was first called up in Court on the 11th June, 1975. The appellant was absent as he was not notified of the fixture. A principal State Counsel appeared for the prosecution. The learned trial Judge adjourned the case to the 28th July, 1975. On this date the respondent appeared, and the charge was read to him. He pleaded not guilty to the four counts. The case was then adjourned to 17th October, 1975 for hearing. The respondent was granted bail in the sum of N1000.00 with a surety in like sum. Present in the court also on this day at the proceeding were a State Counsel who appeared for the prosecution and the counsel for the respondent. On the 17th October, 1975, the respondent and his counsel attended court but there was no appearance for the prosecution. The learned trial Judge recorded thus:-

"Court: No one appears for the State. There is no letter or word to this Court excusing the absence of counsel for the State. The case against the accused was originally No. E/23/74 but was struck out on 28/4/74 for want of prosecution. The accused was recharged as at present and arraigned on 28/7/75. The hearing was fixed for this morning in the presence and hearing of State Counsel, Ukachukwu, who is not now in court. In the absence of anything urged in support of the charge against the accused, I dismiss the charge against him and he is hereby acquitted and discharged in each of the four counts."

Against this order of acquittal the State filed this appeal on one ground only.

ISSUE FOR DETERMINATION

Whether the learned trial judge was right in discharging and ordering the acquittal of the accused/respondent when the prosecution has neither been heard nor has it informed the court that it had no evidence to offer.

HELD (Unanimously allowing the appeal per judgment delivered by **PHIL-EBOSIE JCA**)

Appearances - Non appearance of prosecutor in court

1. Under the provisions of section 280 of the Criminal Procedure Law Cap. 31 of the Laws of Eastern Nigeria 1963, it was proper for the learned Judge to dismiss the information for non-appearance of the Pros-

ecutor. We are however of the view that in the circumstances of this case it was wrong for the learned trial Judge to proceed to acquit the respondent after dismissing the charge. (p. 83 F)

Acquittal of an accused - That bars further trial

2. The order of acquittal implies that the dismissal was on merit (see section 301 (1) of the Criminal Procedure Law Cap. 31 of Laws of Eastern Nigeria. It is the law in Nigeria as it is in England that an accused person is not entitled to an acquittal or a dismissal of the charge against him on merit which bars a second trial for the same offence unless for reasons which have something to do with his guilt or innocence.(p.83 G)

Dismissal of charge - Without coming to end of the proceedings

3. Where, however, there has been a hearing and evidence led sufficiently to enable the court to decide that an accused person had no case to answer at the close of the case for prosecution, it has been held that the order of dismissal should be one of merit (See Police v. Marke 2 F.S.C. 5 approving Nwali v. Police (1956) 1 ENLR 1). In Marke's case after Police had led most of the evidence and an application for an adjournment to enable police to obtain further witness had been refused, the prosecution closed its case. As there was no case for the Defendant to answer the accused was discharged. It was held that the discharge was equivalent to an acquittal. In the present appeal, the records show that there was no trial preceding the dismissal of the information. It is clear that the learned trial Judge received no evidence from which he could determine the guilt or innocence of the respondent. There was also no withdrawal of the information by the prosecution although, even if there was at that stage of the trial, an order of acquittal would still be improper. (p. 84 F)

Dismissal of information on merit

4. From the proceedings it is clear that the learned trial Judge based his order of dismissal of the case on the fact that the respondent had not only been previously charged with the same offence for which he was then

standing trial before him but also that this previous charge had been struck out for want of prosecution. And at this second trial, the prosecution would appear to be lukewarm in the prosecution of the charge because they failed to appear in court on the date fixed for trial with their knowledge and consent. Although this conduct of the prosecution may be regarded as reprehensive, yet we do not think that from the authorities cited above the Judge was right to dismiss the information on merit.
(p.85 C)

C **REPRESENTATION**

Morah M. A. Senior State Counsel (Mrs. Ofodile with him) for Appellant.

Enechi Onyia for Respondent.

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STATUTE REFERRED TO

Criminal Procedure Law Cap. 31 Laws of Eastern Nigeria 1963 s. 280

E

JUDGMENT OF THE COURT (Delivered by Phil-Ebosie, JCA)

The respondent in this appeal was charged on an information of four counts in the High Court of East Central State, Enugu, Judicial Division. From the record of proceedings the case was first called up in Court on the 11th June, 1975. The appellant was absent as he was not notified of the fixture. A principal State Counsel appeared for the prosecution. The learned trial Judge adjourned the case to the 28th July, 1975. On this date the respondent appeared, and the charge was read to him. He pleaded not guilty to the four counts. The case was then adjourned to 17th October, 1975 for hearing. The respondent was granted bail in the sum of N1000.00 with a surety in like sum. Present in the court also on this day at the proceeding were a State Counsel who appeared for the prosecution and the counsel for the respondent. On the 17th October, 1975, the respondent and his counsel attended court but there was no appearance for the prosecution. The learned trial Judge recorded thus:-

"Court: No one appears for the State. There is no letter or word to this Court excusing the absence of counsel for the State. The case against the accused was originally No. E/23/74 but was struck out on 28/4/74 for want of prosecution. The accused was recharged as at present and arraigned on 28/7/75. The hearing was fixed for this morning in the presence and hearing of State Counsel, Ukachukwu, who is not now in court. In the absence of anything urged in support of the charge against the accused, I dismiss the charge against him and he is hereby acquitted and discharged in each of the four counts."

Against this order of acquittal the State filed this appeal on one ground only.

Briefly put the ground is that the learned trial Judge misdirected himself in law in discharging and ordering the acquittal of the accused/respondent when the prosecution has neither been heard nor has it informed the court that it had no evidence to offer; consequently the court was not in a position to find the accused/respondent guilty or not guilty and cannot therefore discharge and acquit him.

There was not much argument at the hearing of the appeal as there are well established authorities in support of allowing the appeal. The learned counsel for the respondent after a short argument conceded the point. We then allowed the appeal and said we would give our reasons later. We now do so.

Under the provisions of section 280 of the Criminal Procedure Law Cap. 31 of the Law of Eastern Nigeria 1963, it was proper for the learned Judge to dismiss the information for non-appearance of the Prosecutor. We are however of the view that in the circumstances of this case it was wrong for the learned trial Judge to proceed to acquit the respondent after dismissing the charge.

The order of acquittal implies that the dismissal was on merit (see section 301 (1) of the Criminal Procedure Law Cap. 31 of Laws of Eastern Nigeria. It is the law in Nigeria as it is in England that an accused person is not entitled to an acquittal or a dismissal of the charge against him on merit which bars a second trial for the same offence unless for reasons which have something

to do with his guilt or innocence. This rule is illustrated by the case of R. v. Bedford and Sharnbrook, Justices Ex parte Ward 1974 Crim. LR 109. In that case the Defendant who was charged with contravening section 1 of Road Safety Act 1967 was called before the court in mistake for another accused of the same name against who the prosecution did not intend to proceed. No charge was read out nor was he invited to plead. The Divisional Court held, refusing an order for prohibiting to restrain the Justices from entertaining any further proceedings against him that the prosecution was entitled to pursue the charge against him as there has been no determination of the charge. Similarly in the case of Okon Akpan Una v. Inspector-General of Police (1955) 15 W.A.C.A. 22 the accused person in the case had been discharged by a Magistrate Grade III and was subsequently arraigned before Magistrate Grade 1 on the same charge. After his plea of not guilty the prosecutor asked for an adjournment to enable him collect some evidence on a certain point which he had to prove in the case, the Magistrate refused the application for adjournment and proceeded to acquit the accused. The prosecution appealed against the order of acquittal and it was held by the Judge that the order of acquittal was wrong. He ordered another retrial before another Magistrate. On further appeal by the prosecutor to the WACA it was held that it was improper to acquit an accused person when the charge against him had not been withdrawn under section 284 or CPO and when evidence had not been heard to enable the court to decide whether the accused was guilty or no guilty.

Where, however, there has been a hearing and evidence led sufficiently to enable the court to decide that an accused person had no case to answer at the close of the case for prosecution, it has been held that the order of dismissal should be one of merit (See Police v. Marke 2 F.S.C. 5 approving Nwali v. Police (1956) 1 ENLR 1). In Marke's case after Police had led most of the evidence and an application for an adjournment to enable police to obtain further witness had been refused, the prosecution closed its case. As there was no case for the Defendant to answer the accused was discharged. It was held that the discharge was equivalent to an

acquittal.

In the present appeal, the records show that there was no trial preceding the dismissal of the information. It is clear that the learned trial Judge received no evidence from which he could determine the guilt or innocence of the respondent. There was also no withdrawal of the information by the prosecution although, even if there was at that stage of the trial, an order of acquittal would still be improper.

From the proceedings it is clear that the learned trial Judge based his order of dismissal of the case on the fact that the respondent had not only been previously charged with the same offence for which he was then standing trial before him but also that this previous charge had been struck out for want of prosecution. And at this second trial, the prosecution would appear to be lukewarm in the prosecution of the charge because they failed to appear in court on the date fixed for trial with their knowledge and consent. Although this conduct of the prosecution may be regarded as reprehensive, yet we do not think that from the authorities cited above the Judge was right to dismiss the information on merit.

It was for this reason that we allowed the appeal and ordered the case be remitted to the Enugu High Court to be tried by another Judge.

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The Council of Fed. Poly Mubi v. Yusuf (1998) 1 KLR Belgore JSC