



**Republic v Barasa & another (Criminal Revision 21 of 2019)  
[2023] KEHC 24785 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24785 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL REVISION 21 OF 2019  
SC CHIRCHIR, J  
OCTOBER 31, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**JOHN BARASA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN AMUTETE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a letter dated 20.7.2019 addressed to this court by the Director of Public Prosecution (DPP).
2. The Director of Public Prosecution (DPP) is seeking for a review of the orders of the lower court made on 29.7.2019 in Kakamega Chief Magistrate’s Case NO. 2798 of 2018 acquitting the accused persons under section 210 of the Criminal Procedure Code (C.P.C).
3. The review is premised on grounds that the trial court discharged the accused under section 210 for reasons that the prosecutor handling the matter was absent; that at the time the prosecutor was in another court handling other matters; that the court conducted proceedings in the absence of the prosecutor; that the court failed to take into account the fact that there is a shortage of prosecutors; and that the trial court also failed to take into account the fact that the witnesses were present in court.
4. In conclusion, the Director of Public Prosecution states that the proceedings were irregular in that they were conducted in the absence of the prosecutor.

**Determination**

5. I have considered the DPP’s submissions. The revision powers of this court are enshrined in article 165(6) and (7) of *the Constitution* and section 362 and 364 of the CPC Section 362 of the Criminal



procedure code(CPC) provides as follows: “The High court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any findings, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”

6. The DPP’s complain is that the proceedings were conducted in the absence of the prosecutor and hence, were irregular.
7. I have perused the trial court’s record. Indicates that the plea was taken on 26.11.2018, and hearing was scheduled for 20.3.2019. The hearing could not proceed as scheduled on the 20<sup>th</sup> march due to the absence of the 2<sup>nd</sup> accused, and consequently the hearing was adjourned to 23.4.2019. On the 23.4.2019 the prosecutor told the court that he had no file and no witnesses and sought for an adjournment, which was granted. The hearing was postponed to 29.2.2019. On this later date, the prosecutor said, “he was not ready” and the hearing was again adjourned to 29.7.2019. The court marked the adjournment as the last.
8. On the 29<sup>th</sup> July 2019, the prosecutor was absent. The DPP as stated that his witnesses were present but this court has not way of ascertaining that, as they are silent on that.
9. On said date the magistrate recorded:

“There is a last adjournment in this case, there is no prosecution (sic) in court to represent the state. All accused persons are acquitted under section 210 CPC. No evidence produced against them, they are to be released immediately.”
10. What I understand the DPP to be saying is that the proceedings should not have been conducted in the absence of his representative. In their contention however, the prosecution has not cited any law in support of their contention.
11. The prosecution’s argument further suggest that no proceedings should ever take place in the absence of the prosecution. I could go further and state that as far as the DPP is concerned that office sets the pace at which the proceedings are conducted.
12. In this case, the prosecution case was absent. There was no one who was sent to court to explain why the prosecutor was absent. The prosecutor was said to have been in another court, but was the trial court was not notified. The record shows there was no such information given to the trial court.
13. This court’s power on revision, in this regard, is to check the legality, correctness, propriety or regularity of lower court’s proceedings or order made.
14. The prosecution has not pointed out the irregularity in the dismissal. This court takes note of the fact that he accused persons were acquitted under section 201 instead of section 202 of the CPC. That might have been an inadvertent error on the part of the court. The reasons for and the intended net effect was the same.
15. The prosecution had failed to prosecute their case. Section 202, allows the court to acquit an accused person if the complainant fails to turn up. In the case of Roy Richard Elimime & another vs. R. (Cr. Appeal No. 67/2022) the Court of Appeal stated. “The parties named in section 202 for example, are the complainant and the accused person. if the complainant is aware of the hearing date and is absent,



without explanation, the court may acquit the accused person, unless the court sees some other good reason for adjourning the hearing.

“complainant” in this context has been interpreted to mean “the Republic” in whose name all criminal prosecutions are brought and not the victim of the crime who is merely the chief witness on behalf of the Republic”

16. In any event, the DPP’s complain is not the section relied on by the magistrate but the fact that the case was conducted in his absence. The Applicant is clearly referring to the scenario contemplated in section 202 of the CPC.
17. It is important to bear in mind the fact that *the constitution* entitles an accused person to a fair hearing which encompasses inter alia the conclusion of a trial without unreasonable delay ( see Art 50(2)(e) of *the constitution*).
18. From the record, it is evident that from November 2018, up to 29.7.2019, no single prosecution witness had taken a stand and on 29.5.2019, the court had warned the prosecution, that that was to be the last time they were adjourning the hearing.
19. I will conclude by associating myself with the views of Lenaola J (as he then was) in R- Vs- Benedict Kolorime Kameto (2008) eKLR where he held “regarding the proceedings of 4.6.2001, it would be expected that in a criminal trial there should be a prosecutor. In this case the trial magistrate by 11.58am had not seen a prosecutor in court and having called out the case, and there being no witnesses present, he deemed the case as closed and proceeded to write his ruling. These proceedings ..... cannot be declared a nullity in the absence of an explanation as to where the prosecutor was and where the remaining witness. No court should be held ransom by the prosecution and each Magistrate is entitled to ensure order and decorum in his court.”
20. There was nothing irregular in the trial court acquitting the accused person in the absence of the prosecutor. He had power to do so pursuant to the provisions of section 202 of CPC. In effect, there is no irregularity that would warrant any revision by this court.
21. The application is without merit. It is hereby dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023**

**S. Chirchir**

**Judge**

**In the presence of:-**

Erick – court Assistant

Ms. Osoro for Applicant.

