



**Chigiti & another v Republic (Criminal Revision E011 of 2020)
[2022] KEHC 10427 (KLR) (21 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL REVISION E011 OF 2020
RM MWONGO, J
JUNE 21, 2022**

BETWEEN

DAVID CHRISPO WERU CHIGITI 1ST APPLICANT

STEPHEN KABUI NYAGA 2ND APPLICANT

AND

REPUBLIC RESPONDENT

*(Being a revision of the ruling issued on 23rd November,
2017, in Kerugoya CM's Criminal Case No 214 of 2017)*

JUDGMENT

Introduction & Background

1. Through an application dated 30th November 2020, the applicants seek revision of the ruling issued on 23rd November, 2017, in CMs Criminal Case No 214 of 2017. The substantive orders sought are as follows:
 - a) That upon revision, the court do issue an order acquitting the accused, and
 - b) That an order do issue restraining the Kenya Police from re-arresting the accused.
2. This court (Mulwa, J) on 15th December, 2020, granted order b), above, as follows:

“Pending hearing and determination of the application, Respondents by its agents be and are hereby barred from re-arresting the applicants over the same offence which was committed between the year 2008 to 2014”.
3. By way of brief background, the applicants were arrested on 10th May, 2017, and charged with the offence of stealing by directors contrary to section 282 of the Penal Code. The particulars were that



- between 2008 and 2014 in Kerugoya, they stole cash of Kes 15,852,585.35 and a motor vehicle KBK 889W valued at Kes 1,350,000/- the property of Kerugoya Service Station Limited (the Complainant). That these items came into their possession by virtue of their employment.
4. According to the applicant, following preliminaries and mentions, the case was eventually fixed for hearing on 23rd November, 2020. The Court proceedings, both the hand-written and also the typed ones, however, indicate that the hearing was fixed for 18th November, 2020.
 5. On the hearing day, which is recorded as 18/11/2020, the accused were in attendance at 9,00am when the case was called out. The complainants, prosecution witnesses and investigation officer were not in court. The prosecutor sought an adjournment saying he did not have the file. The defence opposed the adjournment, arguing that the case should proceed and that the constitutional rights of the accused were being violated.
 6. After hearing the parties, the trial court, however, adjourned the hearing until 11.00am. At 12.00pm the prosecutor informed the court that he had the file but none of the witnesses were present. He sought adjournment again. The defence objected stating: that there was no complainant; that the case had started eight years ago when the accused were first charged; that accused persons should not be made to suffer; that the prosecution had demonstrated a lack of interest in the case; that no witness summons had been shown to the court; and that it is the role of the court to protect the accused persons.
 7. The trial court pointed out four occasions when the prosecution sought and were granted adjournments, and noted that they appeared to have no desire to proceed. The learned magistrate opined that he had indulged the state sufficiently and that justice should be served on both sides. He thus declined the adjournment.
 8. Thereupon, the prosecutor immediately applied to withdraw the case under section 87(a) CPC, asserting that no prejudice would be suffered. The defence opposed the application for withdrawal apprehensive that the accused would be re-arrested. However, the learned trial Magistrate, noting that no single witness had been heard and that there are sufficient constitutional safeguards for the accused, allowed the application and discharged the accused under section 87(a) CPC.
 9. This application seeks review of the order of discharge and substitution thereof with an order of acquittal.

Prosecution Response and Complainant's Preliminary Objection

10. The state filed a replying affidavit through PC Lawrence Langat the Investigating Officer. He stated that the adjournments in the hearing were occasioned by a letter received from DCI headquarters. He did not avail copies of the said letters. Further, he stated that witnesses were available on the hearing date, but were denied entry into court and could not be reached on phone since they were in court premises. Thus the Prosecutor sought withdrawal of the case which was allowed, and this was no error in law.
11. The complainants, Kerugoya Service Station Limited, from whom the accused allegedly stole, filed a preliminary objection. The gravamen of the objection is that: there was no irregularity, incorrectness or impropriety on the trial court's record to warrant the High Court's interference; the Court's revisionary power is exercised by discretion of the Court; The withdrawal of a case under section 87A CPC does not preclude re-arrest and re-charging of an accused; the constitutional rights of accused persons should be considered alongside those of the complainant/victim for justice



Parties' Submissions

12. As directed by the court, the matter was disposed of by written submissions.
13. The complainant submits that on both the Notice of Preliminary Objection and the criminal revision application as follows:
 - a) The accused persons largely contributed to the delay in their trial when they moved to the High Court and obtained conservatory orders pending the hearing and determination of the petition.
 - b) The advent of COVID-19 also partly contributed to the delay in the trial of the accused persons.
 - c) The Investigating Officer, PC Lawrence Langat has sworn a replying affidavit dated the 14th of January, 2021 and explained why the complainant/witnesses were not in Court to testify on the material date when an application for withdrawal was consequently made and allowed by the Court.
 - d) There is no irregularity, incorrectness or impropriety on the face of the subordinate court's record to be revised under section 362 of the Criminal Procedure Code.
 - e) The trial Magistrate exercised his discretion properly in allowing the withdrawal of the case under section 87(a) of the Criminal Procedure Code.
 - f) A discharge under section 87(a) of the Criminal Procedure Code does amount to an acquittal.

Consequently, the complainant urges that the applicants' criminal revision application lacks merit and should be dismissed.

14. On the preliminary objection by the so called complainant, the applicants submit that it is a non-starter, is misconceived and totally misplaced in law. They argue that it cannot hold given that there is no criminal case that is pending against the Applicants. They refer to Criminal Appeal Number 295 of 2005 Kamau John Kinyanjui v The Republic where the Court of Appeal at, page 5 and 6, settled the question as to who is a complainant in a criminal trial; and whether he is the victim of the crime.
15. The Court of Appeal posed and answered that question, and stated that starting from first principles:

“...we cannot help but observe that all criminal prosecutions in Kenya, whether they be instituted by a private person or by the Attorney- General, are always headed:-

“Republic, i.e. the Republic of Kenya versus the accused person.” It is the Republic which undertakes the prosecution for a crime on behalf of the victim of the crime and in doing so, the Republic is acting on behalf of all Kenyans, it is in the interest of ail Kenyans that crime be punished and if the issue of punishing crimes was to be left to the victims of such crimes, there will be the question of whether the victims would be in a position to pay for the prosecution of the perpetrators of such crimes. To avoid such questions arising the Republic normally does the prosecution on behalf of the people and hence the title ‘Republic Vs. The Accused Person’ and not ‘The Victim of the Crime vs. The Accused Person’”



16. The applicants also cited the case of *Republic v John Wambua Munyao & 3 Others* [2018] eKLR. at para. 39 of the judgment the court stated:

“What then were the options available to the Court? In Roy Richard Elimma & Another vs Republic Cr. Appeal No. 67 of 2002. the court of appeal in considering Section 202 of Criminal Procedure Code dealt with the issue of complainant and stated: ‘The parties named in Section 202 for example, are all complainants 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’”.

17. The applicants argue that prosecutions are brought by the state and not by the complainant, who is merely the chief witness on behalf of the Republic

18. On the question of the Non-appearance of complainant at hearing, the Applicants cited section 202 of the CPC and submit that where a complainant is not in Court, the trial Court is left with only two statutory options: To either Acquit the accused person; or To adjourn the case. They assert that the trial magistrate should have acquitted the Applicants which he failed to do, and this Court has the revisionary power to do so.

19. On the issue of the revision, the applicant submitted that Article 157 Sub Article 10 of *the Constitution* provides that the Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority. The argument here being that the so called complainant has no role in commencement or stoppage of proceedings.

20. On the Court’s powers of revision, the applicant submits that the jurisdiction of the High Court to review or revise orders of a subordinate Court or tribunal is under pinned in Article 165(6) and Section 362 of *the Constitution* of Kenya 2010 as read together with Section 364 of The *Criminal Procedure Code* Cap 73 of the Laws of Kenya.

21. Citing *Republic vs. John Wambua Munyao & 3 others* [2018] eKLR, the applicants pointed out that Odunga J. stated that:

“ 31. the powers of revision under section 362 of the Criminal Procedure Code are only to be invoked to enable this Court satisfy itself as to the correctness, legality or propriety of any finding sentence or order recorded or passes and as to the regularity of any proceedings of any subordinate Court.....

.....

Sec 364 of the Criminal Procedure Code provides as follows:

(1)

(b) in the case of a proceeding in a subordinate Court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in the case of any other order other than an order of acquittal, alter or reverse the order.” (Emphasis added)



22. The applicants argue that the High Court has powers to revise a decision of the trial court other than a decision of acquittal, and this revision is thus necessary so that the court may satisfy itself as to the correctness legality and propriety of the lower court's finding.
23. The applicants submit that substantive justice must be dispensed with under Article 159 of *the Constitution*. The applicants cannot be subjected to the trial process all over again.
24. On their part, the Respondent submits that section 87A does not bar a re-arrest of the applicants to a subsequent proceeding against them on account of the same facts. They urge that the spirit and tenor of judicial discretion seeks to advance the objects and principle of a right to fair trial under Article 50 of *the Constitution* when the applicants were discharged under Section 87A of the CPC.
25. Further, the prosecution submits that the Applicants have on more than one occasion attempted to stall and/ or stop proceedings in Criminal Case No 214 of 2017. They cited and annexed Constitutional Petition No 1 of 2018, where the applicants moved this honourable Court in an effort to have the matter in Criminal Case No 214 of 2017 dismissed but were un-successful as the trial Judge dismissed the Petition. The same is attached and (Marked Annexure one). The prosecution submits that there are other suits at different stages touching on the subject matter.
26. On the question as to whether the applicants should be acquitted under Section 202 of the CPC, they urge the court to consider the affidavit of PC Lawrence Langat and filed on 14th January, 2021 averring that witnesses had been summoned but were unreachable as they had switched off their phones with the Court premises in obedience to the rules of the Court.
27. The prosecution also submits that not all discontinuance of Criminal Proceedings or discharge lead to acquittal. The accused persons had not been called upon to make their defence as such the discharge of the accused persons cannot operate as a bar to subsequent proceedings against them on account of the same facts. The provision of Section 87(a) of the CPC of withdrawal before the accused is put on his defense should not stop the prosecution from ordering re-arrest on account of the same facts.

Analysis and Determination

28. In my view, the issues for determination are as follows:
 1. Whether the Preliminary Objection by the complainant has merit
 2. Whether the accused persons should be acquitted

Preliminary Objection

29. A valid preliminary objection must be on a pure point of law. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, the locus classicus on preliminary objections in our jurisprudence, it was stated by Law JA as follows:

“So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
30. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side



are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

31. I do not think the complainant's objection fits into the description of a preliminary objection so defined, for the reason that even if successful, it would not dispose of the whole suit. More importantly, however, it is not a preliminary objection, properly defined, since the invocation of section 87A CPC by a prosecutor is discretionary and subject to the consent of court which consent is also an exercise of discretion. Similarly, the exercise of the court's revisionary power is also discretionary, as pointed out in the notice of preliminary objection, and therefore does not fit into the categories defined in the Mukisa case as preliminary objections.
32. In addition, I think the complainant is on rather precarious ground in making representation as it did and arguing this matter as if they were co-prosecutors in the criminal case. the role of a complainant who is a victim was well explained by the Supreme Court when it ruled in *Joseph Lendrix Waswa v Republic* [2020] eKLR that victims have no active role in the prosecution of the case. The victim cannot and does not wear the hat of a secondary prosecutor.

“We are of the view that the victim has no active role in the decision to prosecute, or the determination of the charge upon which the accused will finally be tried. This is the sole duty of the DPP. While the victim of a crime can participate at any stage of the proceedings as deemed appropriate by the trial Judge, a victim or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP. The DPP must at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process. Additionally, a victim cannot and does not wear the hat of a secondary prosecutor. When victims present their views and concerns in accord with section 9(2) (a) of the VPA, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to take into account.”

33. In light of the foregoing, I would, and hereby do, dismiss the objection as a preliminary objection, and treat it as merely an objection.

Whether the accused persons should be acquitted

34. The applicants core arguments are two: First that this court has power to exercise revisionary jurisdiction, and second, that the proper provisions of law to invoke when a complainant and his witnesses fail to show up at a hearing is section 202 *CPC*.
35. With regard to the exercise of revisionary powers, section 362 of the *CPC* is clear. it 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 finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.” ((Emphasis added).

36. As none of the parties challenged the court's jurisdiction to review in this case, this court deems it in order to exercise that power, should there be anything incorrect, irregular or lacking propriety in the decision of the lower court.
37. The trial court is accused of improperly invoking section 87A of the CPC to allow the prosecution to withdraw the case in the circumstances presented before the court, rather than



apply section 202 of the CPC on acquittal for non-appearance of the complainant and his witnesses.

38. Section 87A provides:

“In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal—

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts

(b)”

39. In the case of *George Taitumu v Chief Magistrate Court, Kibera & 2 others* [2014]eKLR the court stated:

“Section 87(a) of the CPC gives the learned magistrate broad discretion to accept or reject an application for withdrawal of charges presented by the prosecutor. In light of Article 157(11) of *the Constitution*, such discretion has to be exercised judiciously taking into account the facts of each case and in particular whether the application is brought in the public interest, the interest of administration of justice and the need to prevent and avoid an abuse of the legal process.” (Emphasis added)

40. On the other hand, Section 202 *CPC* which is touted as the correct provision to invoke in the circumstances of this case, provides:

“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.”

41. The question is whether it was proper or improper, correct or incorrect for the trial magistrate to invoke section 87A in the circumstances pertaining.

42. In *Republic v Edwin Otineo Ocholla & another* [2018] eKLR it was held that:

“Clearly, section 202 of the Criminal Procedure Code applies to instances where the complainant having been summoned to attend court to testify in a case, and then fails to do so, the court may acquit the accused person or adjourn the hearing of the case, depending on the circumstances that may be prevailing”

43. There are circumstances that draw the court to take a particular course of action.



44. In the case of *Republic v Janet Ngusia Hochili & 2 others* [2009] eKLR the trial court decided to acquit the respondents under section 202 of the Criminal Procedure Code in a simple assault case in the following circumstances: The trial court record showed that the respondents were arraigned before the court on 13th October, 2008 when the charge was read to them. The case was then fixed for hearing on 19th November 2008. On the first hearing date, that is 19th November, 2008, the prosecution applied for adjournment for reasons that there were no witnesses and the application was granted. The case was fixed for hearing on 26th January, 2009 and again on that date the prosecution applied for adjournment due to non-attendance of witnesses. The respondents objected to the application and the prosecution applied unsuccessfully to have the case withdrawn under section 87 (a) of the Criminal Procedure Code. The High Court there held:

“Under section 202 a trial court has discretion to acquit an accused person if the complainant fails to attend court. The prosecution offered to withdraw the case under section 87 (a). Withdrawal of a case under section 87 (a) requires the consent of the court. The trial magistrate in his ruling explained the provisions of section 87 (a), 202 and 206 (1) of the Criminal Procedure Code and opted to acquit the accused persons under section 202 thereof.

I do find that the trial magistrate exercised his discretion improperly. Indeed, the magistrate noted in his ruling that the complainant had been bonded to attend court.”

That case was a simple assault case, unlike this case where the offence is stealing by directors, and the amounts are substantial, and the public interest must be taken into account.

45. The prosecution also submitted that the Applicants have on more than one occasion attempted to stall and or stop proceedings in the subject Criminal Case No 214 of 2017, hence contributing to the delays in the case. They point out that in Constitutional Petition No 1 of 2018, the applicants moved this Honourable Court in an effort to have the matter in Criminal Case No 214 of 2017 dismissed but were not successful as the trial Judge dismissed the Petition. The prosecution also averred in the affidavit of PC Langat that the prosecution witnesses had been bonded were not admitted into the court, although they were in the court premises. Is this a circumstance to take to account?
46. In my view, an accused person is entitled to take any legal measures to defend himself, so long as they are within the bounds of the law. It is therefore an ingenious and un-serious argument when a hearing has been fixed and failed to take off on several occasions, that time was lost due to the accused exercising his constitutional or other rights, and that as a result the prosecution witnesses are unavailable.
47. I cannot see that the trial magistrate committed an error or irregularity in allowing the application of the prosecution to withdraw the case under section 87A. The exercise of his discretion has not been shown to have been injudicious or unreasonable or irregular. There is nothing specifically pointed out to show that he wrongly exercised his discretion. I have perused the proceedings of the lower court. I do not see anything there indicating that the applicants requested the trial magistrate to instead invoke Section 202 of the *CPC* as a counter to the prosecution’s application under Section 87 A.
48. Ultimately, I find that the decision by the trial magistrate was not irregular per se and is not a candidate for review on grounds set out in section 362 of the CPC.



49. The Applicants' application is therefore dismissed in its entirety, and the interim orders are hereby discharged.
50. The prosecution is directed to commence the prosecution within 30 days of the date hereof and expeditiously continue with such prosecution until conclusion of the case. After commencement of the proceedings there shall be no adjournments except, as shall abide strictly by the provisions of the CPC.
51. Orders accordingly.

DELIVERED AT KERUGOYA ON THIS 21ST DAY OF JUNE, 2022.

R MWONGO

JUDGE

Delivered in the presence of:

1. Mamba for the State
 2. Ms. Githaiga holding brief for Mugwimi for the Applicant
- Murage, Court Assistant

