



**Republic v Onyango (Criminal Revision Application  
E057 of 2021) [2022] KEHC 11086 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11086 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL REVISION APPLICATION E057 OF 2021**

**JN KAMAU, J**

**JULY 26, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**ALEX ONYANGO ..... RESPONDENT**

**RULING**

**Introduction**

1. In its Notice of Motion dated and filed on 29<sup>th</sup> July 2021, the Applicant sought that the order discharging the Respondent herein under Section 202 of the *Criminal Procedure Code* issued on 28<sup>th</sup> July 2021 by Hon Lina Akoth in Kisumu Criminal Case No 239 of 2019 be revised and set aside.
2. The said application was supported by the affidavit of Proscovia Vitsengwa, a Prosecution Counsel at the Office of the Director of Public Prosecutions Kisumu. The same was sworn on 29<sup>th</sup> July 2021.
3. The Applicant averred that the Respondent was charged with three (3) counts of the offence of stealing by servant contrary to Section 281 of the *Penal Code*. It stated that he pleaded not guilty and was supplied with prosecution documents and the matter fixed for hearing. It added that the matter did not proceed for hearing on various dates on account of adjournments that it and the Respondent herein sought.
4. It contended that on 27<sup>th</sup> July 2021, it moved the court by an application to amend the Charge Sheet to include additional charges against the Respondent on which day the Respondent took plea and denied all nine counts. It was its contention that it did not object to the Respondent being given more time to prepare for the case and another date being fixed for hearing.
5. It was its contention it did not object to the Respondent being given more time to prepare for the case as he had a right to have sufficient time to prepare for his case. It pointed out that the Respondent's



counsel, objected to their application on the ground that they were ready to proceed and sought to be supplied with the Prosecution documents whereupon the court directed that the Respondent be supplied with the said documents by close of business of the material day and that the hearing proceed on the following day.

6. It stated that when the case came up for hearing on the 28<sup>th</sup> July 2021, it was ready to proceed with the Complainant and three (3) witnesses but the Respondent's Counsel stated that he had not been supplied with the copies of documents it was relying upon whereupon the court terminated the case under Section 202 of the *Criminal Procedure Code*, *suo moto* and discharged the Respondent and the surety herein.
7. It was its case that Section 202 of the *Criminal Procedure Code* could only be invoked if the Complainant failed to appear in court on the date for hearing having had sufficient notice of the same. It averred that it was therefore aggrieved by the said order as it was illegal and contrary to the law.
8. Despite directions by this court that the Respondent files a response to the applicant's present application, he did not do so. However, he filed his Written Submissions dated 28<sup>th</sup> January 2022 on 31<sup>st</sup> January 2022. The Applicant's Written Submissions were dated and filed on 24<sup>th</sup> January 2022.
9. The Ruling herein is based on the said Written Submissions which both parties relied on in their entirety.

### **Legal Analysis**

10. The Applicant submitted that Section 202 of the *Criminal Procedure Code* could not be invoked herein because it was ready to proceed with the hearing. It averred that it was ready with the Complainant and two (2) other witnesses. It emphasised that the only issue was that it had not availed some documents to the Respondent.
11. It was emphatic that its application was merited on the ground that it had provided sufficient reasons for the orders that were made on 28<sup>th</sup> July 2020 to be set aside and that the case against the Respondent be reinstated. It relied on Section 362 of the *Criminal Procedure Code* which enabled this court to revise the impugned orders.
12. On its part, the Respondent submitted that the orders the Applicant had sought could not be granted. In this regard, he placed reliance on the case of *Reuben H. Muli vs Republic* [1998] eKLR where the Court of Appeal stated that the Learned Chief Justice had no jurisdiction to revise the order of acquittal under Section 202 and that what he proceeded to do was wrong and not provided for in law and a fortiori when the accused persons were not even present. (*sic*)
13. He emphasised the doctrine of precedence and/or stare decisis as was laid out in the case of *Dodhia v National & Grindlays Bank Limited and Another* [1970] EA 195 where the court held that a system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own.
14. He argued that based on the doctrine of judicial precedence, this court was bound by the decision of the Court of Appeal in *Reuben H. Muli v Republic* (*Supra*) and hence urged the court to dismiss the present application as the same was not merited.



15. The jurisdiction of the High Court with regard to revision is provided for under Section 362 of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya). The same states 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.”
16. The scope of the High Court to revise decisions of trial courts has been discussed in a number of decisions. This court had due regard to the case of [Republic v James Kiarie Mutungei](#) [2017] eKLR where it was held that the revisionary authority of the High Court could be initiated by an aggrieved party or by the court suo moto by the court calling for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question.
17. Notably, Section 202 of the [Criminal Procedure Code](#) Cap 75 (Laws of Kenya) provides as follows:

“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, (emphasis court) 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.”
18. Although the Trial Court had indicated that the case had stalled for about three (3) years, it relied on a wrong provision of the law to acquit the Respondent herein. A perusal of the proceedings of 28<sup>th</sup> July 2020 showed that the Complainant and two (2) other witnesses were present, a fact that was not rebutted by the Respondent herein.
19. This court noted that only some documents had not been availed to the Respondent herein. There was no indication if the Respondent has sought for the said documents before the hearing commenced or why the same had not been supplied. Be that as it may, this court acknowledged that the provisions of Section 202 of [Criminal Procedure Code](#) were only applicable where the complainant failed to appear or to attend hearing having had adequate notice of the hearing and the accused person was present in court. Under those circumstances, the court was at liberty to either acquit the accused person or adjourn the hearing to another date.
20. This court was therefore satisfied that the acquittal order herein had the potential to do substantial injustice to the Applicant because the Trial Court still had the option to adjourn the matter later on that day after directing the Respondent be supplied with the documents. Indeed on 27<sup>th</sup> July 2021, the Respondent had demanded to proceed on the same date after being supplied with documents which was evidence that he did not need much time to go through the documents.
21. The case of [Reuben H. Muli v Republic](#) (1998) eKLR (*Supra*) that the Respondent relied upon was distinguishable from the facts of this case because there was no complainant and therefore the court restored the acquittal on that ground.
22. This court also have due regard to the provisions of Article 159(2)(d) of the [Constitution](#) of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities. In



addition, it recognised that no party should suffer prejudice but it should instead be allowed to have its day in court.

23. This court was thus persuaded that this was a suitable case for it to exercise its discretion to set aside and/or vacate the orders of the Trial Court that were made on 28<sup>th</sup> July 2021 as the same were clearly illegal and lacked any legal basis. The Trial Court may have pushed for termination of the case under Section 87(a) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) but not under Section 202 of the *Criminal Procedure Code* as the complainant and two (2) witnesses were present in court so as not to cause injustice to the Applicant herein.

### **Disposition**

24. For the foregoing reasons, the upshot of this court's decision was that the Applicant's application that was dated and filed on 29<sup>th</sup> July 2021 was merited and the same be and is hereby allowed in terms of Prayer No (2) therein.
25. The effect of this decision is that the order issued on 28<sup>th</sup> July 2021 by the Learned Trial Magistrate acquitting the accused under Section 202 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) be and is hereby set aside and/or vacated. It is hereby directed that the case Kisumu Criminal Case No 239 of 2019 Republic v Alex Onyango be and is hereby re-opened for trial of the Respondent herein.
26. It is further hereby directed that the lower court file be placed at Kisumu Chief Magistrate's Court before the Chief Magistrate on 18<sup>th</sup> August 2022 for allocation of Kisumu Criminal Case No 239 of 2019 Republic v Alex Onyango to a magistrate other than the Learned Trial Magistrate herein who dealt with this case for hearing and determination expediently.
27. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF JULY 2022**

**J. KAMAU**

**JUDGE**

