



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CRIMINAL REVISION NO. 20 OF 2019

(Arising from Kakamega CMCRC No. 1033 of 2018

(consolidated with Kakamega CMCRC No. 1067 of 2018))

REPUBLIC (DIRECTOR OF PUBLIC PROSECUTIONS).....APPLICANT

VERSUS

KELVI OKWAKO KOFIA.....1ST RESPONDENT

BOSS MURIIRA KABANCHI.....2ND RESPONDENT

JUDGMENT

1. The criminal revision cause herein arose in circumstances similar to those in the matters that were the subject of *Republic vs. Judith Achola Malala* [2019] eKLR (Kakamega HCCRC No. 5 of 2019).

2. The matter came up for hearing on 29th July 2019, before Hon. W Lopokoiyit, Resident Magistrate (RM). The records reflect that the state prosecutor was absent, and so was one of the accused persons, the respondents herein. The accused person present indicated that he was ready to proceed. The court considered those factors, and the fact that the accused person had taken plea on 13th April 2018, yet the case had never taken off, and acquitted the accused under section 210 of the Criminal Procedure Code, Cap 75, Laws of Kenya.

3. The state was aggrieved, and applied to this court, through a letter by the Senior Assistant Director of Public Prosecution, Regional Head Kakamega County, Patrick Magero Gumo, dated 30th July 2019, for revision of the decision of the trial court on the basis that:

- (a) The trial court had conducted the hearings in the absence of the prosecution;
- (b) The trial court had failed to take notice of the fact that there was a shortage of prosecutors for the Kakamega law courts;
- (c) The trial court had dismissed the matter under section 210 of the Criminal Procedure Code due to non-attendance of prosecution counsel who was then before another court, and despite the court having been alerted of that fact; and
- (d) Failing to take into account that the investigating officer had asked for another date.

4. Plea had been taken in the matter on 13th April 2018. Hearing was fixed for 11th July 2018. Nothing happened on 11th July 2018, and on 6th June 2018, the prosecution expressed an intent to consolidate the two cases, the subject of this revision case and asked for a fresh hearing date, and the matter was fixed for hearing on 24th September 2018. The two matters were consolidated on 24th September 2018. The accused persons took plea afresh, and the matter was allocated a fresh hearing date, 27th November 2018. On 27th November 2018, the matter was adjourned for lack of witnesses. It was marked as a last adjournment. It came up several times between then and 29th July 2019, when it was eventually terminated.

5. This case is on all fours with *Republic vs. Judith Achola Malala* (supra). Consequently, I shall adopt the reasoning that was applied in that decision for the purpose of this matter. The only difference is that the accused persons were acquitted on the basis of section 210 of the Criminal Procedure Code, rather than under section 206, yet no evidence had been tendered to warrant acquittal under that provision. The accused persons ought to have been acquitted under section 206, since this was a case where the termination was upon failure to present evidence at an adjourned hearing, in circumstances where the matter had never taken off.

6. I do not find the reasons given by the state for not attending at the hearing plausible. It was up to the state to arrange how its matters were to be attended to on account of the shortage of prosecution counsel. There is nothing on record to indicate that the trial court had been appraised of such shortage. There is nothing on record to indicate that the investigating officer addressed the court. In any event, the prosecution is at the behest of the Directorate of Public Prosecutions, and not the police. Whatever the police might say to the court, would be neither here nor there.

7. I find no merit in the revision sought by the prosecution office, and I hereby decline to revise the decision of the trial court to acquit the accused persons.

DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF JULY, 2020

W MUSYOKA

JUDGE