



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL REVISION NO 18 OF 2019

(From original conviction and sentence in Criminal Case No. 80 of 2019 of the Principal Magistrate's Court at Wang'uru (Karaba).

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

– VS –

JOSEPH MURIMI MUGWERU.....RESPONDENT

RULING

1. This Revision arises from the ruling of the trial Learned Magistrate, Hon. G. M. Mutiso P.M. sitting at the Chief Magistrates court at Karaba, in Criminal Case No. 86 of 2019.

2. The accused person was one Joseph Murimi Mugweru who was charged with the offence of assault causing actual bodily harm Contrary to Section 251 of the Penal Code, to one Gladys Mukui Muli on the 21/1/2019 at Makima Location Mbeere Sub-County in Embu County.

When arraigned in court on the 15/8/2019, the accused denied the charge and was released on a bond of Kshs 100,000/- plus one surety. On the 19/9/2019, when the charge was read out to him, he pleaded guilty, thus changed the plea taken earlier. However when the particulars of the charge were read to him, he denied, upon which a plea of not guilty was entered.

3. The first hearing date was taken for the 24/10/2019. The accused dutifully attended court, but the prosecutor Ms. Onyango, Learned State Counsel sought for an adjournment as the witnesses were absent.

In response, the accused person asked the court to release him stating that he had suffered in remand.

4. The record shows no other communication between the trial Magistrate, and the prosecutor. What followed was a Ruling wherein the court acquitted the accused pursuant to provisions of Section 202 of the Criminal Procedure Code, reasons stated that the prosecution did not give any explanation as to why the witnesses were absent.

5. It is this ruling acquitting the accused that prompted the Office of the Director of Public Prosecutions(O.D.P.P) Mr. F. Ashimosi to file this application for Revision dated 18/11/2019.

It is based on grounds that upon the State Counsel making an application for adjournment, the trial court did not make any order on the application, but instead dismissed the case under Section 202 of the Criminal Procedure Code.

6. The Applicant argues that, that was the first time that the case was fixed for hearing and that the complainant and her witnesses had arrived at 8.00 Am at the Law Courts and proceeded to sit in Wang'uru Court 2 where the case had been dealt with the previous times, and only after matters for Court 2 were finalized when they were told that their case was in Court No. 1 and upon arriving there at 11.00 Am, they were informed that the case had been dismissed.

7. It is urged that the trial court should not have dismissed the case but ought to have allowed or declined the application for adjournment, and give the prosecution an opportunity to take other action like withdrawing the case.

8. It is submitted by the Applicant that Section 202 Criminal Procedure Code contemplates a situation where the complainant is aware of the place and time appointed for hearing and does not or refuses to attend court.

It is urged that the complainant was under the wrong impression that her case would be heard in the same court where it had been dealt with

on earlier dates and thus did not refuse to attend court, that she indeed attended court but sat in the wrong court.

The complainant and her witnesses swore affidavits to support the above argument and the application.

9. The High Court has supervisory powers over the subordinate courts and Tribunals.

Section 362 of the Criminal Procedure Code donates the power thus,

“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”.

10. Section 367 Criminal Procedure Code provides that

“when a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed and the court to which the decision of order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith”.

Section 362 talks of any criminal proceedings before a court. That in my view includes interlocutory proceedings applications, orders and Judgments.

11. The issue in this application is an interlocutory proceeding upon which the trial Magistrate made a final order dismissing not the application for adjournment but the case, without making a ruling on the application for adjournment.

12. The purpose of the revisionary powers of the High Court is to correct manifest irregularities or illegalities and give appropriate directions. The court is also empowered to determine the regularity of any proceedings of any such Subordinate Court. - Criminal Revision No. 4 of 2019 at Machakos – Joseph Nduri Mbuvi –v- R (2019) eKLR.

13. I have examined the record of the Criminal proceedings before the trial Magistrate. The trial Court had the discretion to allow or disallow the prosecution’s application for adjournment as the witnesses were not present in court when the case was called out. The record shows that no ruling was given by the trial court on the application. Instead, a ruling was read out dismissing the case. The prosecution was not given an opportunity to explain itself when the court decided to dismiss the case.

14. Section 364 of the Criminal Procedure Code provides that,

“(1) 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 –

(b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

An order of acquittal, as is the case of this application, is exempted from orders that the High Court may interfere with by a revision. It may exercise its revisionary jurisdiction in case of a conviction (Section. 364 (1) (a)) but not where the court ordered an acquittal, (Section. 364 (1)(b)).

15. It is therefore clear that the High Court has no revisionary Jurisdiction in case of an acquittal – Mbuvi –v- R (supra).

The above was reiterated in the case D.P –V- Jackson Cheronno (2019) eKLR and Director of Public Prosecution –v- Samuel Kimuchu & another (2012) eKLR that the High Court cannot exercise revisional jurisdiction in an order of acquittal, but may however exercise such jurisdiction in case of a conviction or in any other order.

16. Article 165(6) of the Constitution states that the High Court has supervisory jurisdiction over Subordinate Courts to make any order or give any direction it considers appropriate to ensure the fair administration of justice.

In the Circumstances of this application, it is my view that the remedy available to the applicant (State) lies in an appeal, not revision, as clearly stated at Section 348 A(1) Criminal Procedure Code, that:

that (1) when an accused person has been acquitted on a trial held by a Subordinate Court or High Court dismissing a charge, has been made by a Subordinate Court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be from the acquittal or order on a matter of fact of law -----

see Director of Public Prosecutions –v- Jackson Cheronno (supra).

17. The revisionary jurisdiction exists in all orders, interlocutory or final, or the Subordinate court Save that an order of acquittal may not be revised.

To that extent, I find and hold that the Revision application filed herewith is outside this court’s revisionary jurisdiction. The jurisdiction of

a court comes from the Constitution and Statute law, and by principles laid out in Judicial precedent – Re the matter of Independent and Boundaries Commission (2011) eKLR.

A court cannot confer on itself any jurisdiction. Without jurisdiction, a court must down its tools as anything done without jurisdiction is nothing, its null and void – Samuel Kamau Macharia –v- Kenya Commercial Bank Ltd & 2 Others (2012) eKLR.

18. The upshot is that this revision application lacks merit. It is dismissed.

Orders accordingly.

Dated, Signed and Delivered at Kerugoya this 17th Day of December, 2020.

J. N. MULWA

JUDGE