



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.547 OF 2020**

**WADE COX.....1<sup>ST</sup> APPLICANT**

**GEORGE NATHAN ONYANGO.....2<sup>ND</sup> APPLICANT**

**NICHOLAS NGUMBI.....PRIVATE PROSECUTOR**

**VERSUS**

**GEORGE ODHIAMBO OKELLO .....RESPONDENT**

**RULING**

The Applicants, Wade Cox and George Nathan Onyango, are the complainants in **Milimani Chief Magistrate's Court Private Prosecution Criminal Case No.1 of 2019**. The accused person in the stated case, Walter Odhiambo Okello alias George Odhiambo Okello, was charged with six counts of **stealing by agent** contrary to **Sections 283(b) and 283(c)** of the **Penal Code**. The charges emanated from events that allegedly occurred between 7<sup>th</sup> October 2008 and 16<sup>th</sup> June 2011 where the accused, being the Chairman of Churches of God Kenya, is alleged to have stolen various sums of money by virtue of his capacity as the Chairman of the stated church. The complainants, through their advocate/Private prosecutor Nicholas Ngumbi, obtained leave of court to institute Private prosecution. A warrant of arrest was issued against the accused. On 24<sup>th</sup> October 2019, the matter came up for mention. Both parties were absent. The trial magistrate's court made an order dismissing the case under **Section 202** of the **Criminal Procedure Code** for want of prosecution.

The Applicants made an application to this court, vide a letter dated 20<sup>th</sup> July 2020, seeking to revise the said order of the trial magistrate made on 24<sup>th</sup> October 2019, dismissing the case for want of prosecution. The Applicants' case was that on 17<sup>th</sup> January 2019, the accused person was absent from court when the matter came up for plea. The trial magistrate court issued warrants of arrest against the accused person. The case was fixed for mention on 26<sup>th</sup> February 2019. Both the Private prosecutor and the accused were absent from court on that day. A further mention date of 14<sup>th</sup> May 2019 was set by the trial court. The warrants of arrest against the accused were extended. Again, both parties failed to appear before court on 14<sup>th</sup> May 2019. A further mention date was fixed for 31<sup>st</sup> July 2019. The court did not sit on the stated date and the matter was set for mention on 24<sup>th</sup> October 2019. On 24<sup>th</sup> October 2019, both parties were absent from court. The trial court dismissed the case under **Section 202** of the **Criminal Procedure Code** for want of prosecution.

The Applicants faulted the trial magistrate for dismissing the case in the absence of the accused person. They asserted that **Section 202** of the **Criminal Procedure Code** requires the attendance of an accused person in court, before the court can proceed to dismiss a case for want of prosecution. They averred that the scheduled date was a mention and not a hearing date. The Applicants therefore did not have a notice to appear before court on 24<sup>th</sup> October 2019 for the hearing of the case. They stated that the court had already issued a warrant of arrest against the accused and as such, the trial court ought to have summoned the Director of Criminal Investigations, Central Police Station, to ensure that the said warrant was enforced. They averred that the Private prosecutor had not been informed of the mention date of 24<sup>th</sup> October 2019, and that there was no evidence of service of summons on the Private prosecutor.

They argued that it was not in the interest of justice for a criminal case to be dismissed at its preliminary stages even before an accused person has been arrested and brought before the court to take plea. They averred that their right as victims to participate in the criminal trial had been violated. They urged this court to correct the said injustice and allow the criminal trial to proceed to its conclusion, especially since the accused person had been on the run for a long time, before he was finally arrested on 29<sup>th</sup> June 2010. They pointed out that upon the arrest of the accused person in Kisumu, the Private prosecutor immediately filed an application in court for the transfer of the accused from Kisumu to Nairobi so that he could take plea in the case. In the premises, the Applicants plead with this court to favourably consider their application.

The application was opposed. The Respondent filed grounds of objection to the Applicants' application on the premises that the Applicants ought to have appealed against the decision of the trial court, as opposed to invoking the revisionary jurisdiction of this court. The Respondent was of the opinion that the Applicants' application was frivolous, vexatious and an abuse of the process of the court. The Respondent averred that **Private Prosecution No.1 of 2019** was dismissed by the trial court for want of prosecution due to the numerous times that the complainants and the Private prosecutor were absent from court when the matter was scheduled for mention. He deponed that the court directed summons to be issued to the Private prosecutor on 14<sup>th</sup> May 2019. The said summons were extended on 31<sup>st</sup> July 2019. The prosecutor failed to appear before the trial court. The Respondent further deponed that the word "hearing" is not defined under the **Criminal Procedure Code**. In his view, it encompasses both mentions and hearing dates. The Respondent urged the court to dismiss the Applicants' application since the Applicants approached the court using the wrong procedure. He further contended that the application amounts to an abuse of the court process.

During the hearing of the Application, this court heard oral submission from the Private Prosecutor, Mr. Ngumbi, and from Mr. Otieno for the Respondent. Mr. Ngumbi submitted that **Section 202** of the **Criminal Procedure Code** is not intended to punish a prosecutor for non-attendance in court. He asserted that the said section should not negate the provisions of **Article 50** of the **Constitution** with regard to the rights of a victim in the criminal justice system. He relied on the case of **Prosecutor vs Stephen Lesinko [2018] eKLR** which reiterated the right of a victim to be heard, before an order of dismissal is made by the court. He stated that the revisionary jurisdiction of the High Court is broader than what is provided for under **Section 362** of the **Criminal Procedure Code**. He opined that the court ought to consider all the circumstances of a case in deciding whether to exercise its discretion in light of its revisionary jurisdiction. To this end, he cited the case of **Director of Public Prosecutions vs Perry Mansukh Kansagara & 8 Others [2020] eKLR**. He averred that public interest ought to be considered by the High Court when exercising its revisionary jurisdiction.

Mr. Ngumbi further submitted that the complainants reported the theft of church funds by the Respondent in 2010. The police however failed to arrest and charge the Respondent. The Complainants were given leave to institute Private prosecution proceedings against the Respondent. The Private Prosecutor stated that he annexed all the correspondence with the police with regard to enforcement of the warrant of arrest against the Respondent. He averred that the complainants stand to suffer great injustice if the ruling of the trial court dismissing the charges is not revised. He maintained that the court's supervisory jurisdiction should be exercised to protect public interest. He asserted that the present case is a case of public interest, since the Respondent stole funds from a church which were meant to educate orphans and the disadvantaged persons in society. He submitted that the complainants, being victims of the crime, have the right to seek to prosecute the Respondent. He relied on the Supreme Court decision in the case of **Joseph Lendrix Waswa vs Republic [2020] eKLR**, where the Supreme Court held that victims of crime have a constitutional right to participate in the criminal trial of the accused person. The court in that case set aside an order dismissing the case and reinstated it for trial. Mr. Ngumbi stated that the present case was not dismissed on merit, but on a technicality. He asserted that the overriding objective is substantive justice, and therefore urged this court to reinstate the case before the trial court to allow it to proceed to its conclusion. He averred that the Respondent will not suffer any prejudice if the case is reinstated and tried on its merits.

Mr. Otieno for the Respondent opposed the application. He was of the opinion that this court ought not to entertain the Applicants' application for revision of the order made by the trial magistrate's court. He opined that the proper procedure was for the Applicants to file an appeal to challenge the decision of the trial court to dismiss the case. He relied on the case of **Republic vs John Wambua Munyao & 3 others [2018] eKLR**. The court in the stated case pronounced itself on the scope of the revisionary jurisdiction of the High Court, and held that the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal.

Mr. Otieno submitted that the trial court issued summons to the Private Prosecutor who failed to attend to court. He stated that the Private Prosecutor and the complainants failed to appear before the trial court and prosecute the case for a period of over one year. He asserted that the Private Prosecutor was holding the trial court at ransom: the trial court was right in dismissing the case. He cited the case of **Republic vs Benedict Kalorwe Kaweto [2008] eKLR** where the court held that an accused person has the right, under **Article 50** and **159** of the **Constitution**, to have the trial begin and conclude without unreasonable delay. He further relied on the case of **John Wambua Munyao (supra)** where this court declined to revise orders of the subordinate court based on the fact that failure of the Prosecutor to attend court was just holding the court at ransom and therefore the court had to make a decision.

Counsel for the Respondent further submitted that there is no definition of the word "hearing" under the **Criminal Procedure Code**, and that hearing dates include mention dates. He added that **Section 202** of the **Criminal Procedure Code** does not distinguish between hearing and mention dates. He stated that the police failed to follow up on the complaint since there was no weight in the evidence presented by the complainants. He averred that the Respondent works at Constituency Development Fund (CDF) in Kisumu and that his place of work was known. He asserted that there was a pending civil suit with regard to the same matter as in the present case. He stated that the warrant of arrest against the accused expired when the case was dismissed by the trial court. In the premises, he urged this court to dismiss the Applicants' application.

This court has carefully considered the rival submission made by the parties to this application. From the outset, it should be noted that the Applicant's position as a Private prosecutor is similar to that of prosecutors appearing in court on behalf of the Director of Public Prosecutions. He is required to prosecute the case with diligence. It is the prosecutor who is in charge of preparing witnesses and exhibits to be presented before the trial court. This role includes moving the trial court to fix a hearing for trial. Although the trial court, overall has control of the trial process, it is the Prosecutor who indicates to the court the number of witnesses and their respective order of adducing evidence before the trial. Whereas it cannot be said that the role of the trial court is passive, nevertheless, the Prosecutor is at the driver's seat in requesting the court to summon witnesses, and also prepare the said witnesses to testify before the court.

In the present application, the Private prosecutor sought, and was granted leave to institute Private prosecution after the Director of Public Prosecution indicated that he had no objection. This order was issued on 26<sup>th</sup> July 2018. The Private prosecutor did not file the charges in court until nearly six (6) months later i.e. on 17<sup>th</sup> January 2019. The Private prosecutor appeared before trial court and sought a warrant for the arrest of the accused persons (Respondents). This order was granted in addition to the order that it was the Directorate of Criminal Investigations Office at Central Police Station that was to effect the order. This was rather an unusual request to make. In ordinary circumstances such as the one that faced the Private prosecutor, where the accused person was absent from court, the assistance that was to

be sought from the court was for summon to issue for the accused persons to present themselves to court to answer to the charges, failure of which, then, and only then, will the Prosecutor request for the warrant of arrest to be issued. The unusual step that the Private prosecutor took would later reverberate in the proceedings.

On perusal of the trial court's proceedings, it was apparent the case was mentioned several times by the court but unfortunately, neither the Private prosecutor nor the accused persons were present in court. This was despite the fact that the Private prosecutor was present in court when the first mention date was fixed i.e. on 26<sup>th</sup> February 2019. Subsequently thereafter the matter was mentioned on 14<sup>th</sup> May 2019, 31<sup>st</sup> July 2019 and lastly on 24<sup>th</sup> October 2019 when the trial court dismissed the case under **section 202 of Criminal Procedure Code** for want of prosecution. In all these subsequent appearances, the Private prosecutor did not appear in court. This court did not discern a cogent reason for the Private prosecutor's failure to attend court. From the submission made, by the Private prosecutor, his explanation for failure to attend court was the mistaken expectation that it was the duty of the trial court to inform him when the case was listed for mention. This court's understanding of the situation is rather different; it was the Private prosecutor who was supposed to follow up with the court to ensure that the charges laid against the Respondents is diligently prosecuted.

The Private prosecutor's position is similar to that of a Litigant in the civil case. Such Litigant is expected to pursue the prosecution of his case as held by court in **Samuel Kipsang Kitur & Another Vs Eunice Kitur & 2 Others [2005] Eklr:**

***“Cases are owned by Litigants and not by their Advocates. It behooves a Litigant to closely follow the progress of his case. A Litigant should always be vigilant in pursuit of his case to its conclusion. He cannot leave such responsibility to his Advocate. It will not do for a Litigant whose case has been dismissed due to his failure to attend court to bring up the excuse that he was to informed of the date the case was fixed for hearing by his Advocate”***

The Private prosecutor was therefore the one who was required to follow up the status of the case. It was apparent that the Private prosecutor failed to check the status of the case until when he appeared before the court on 8<sup>th</sup> July 2020 after the accused person's arrest on 29<sup>th</sup> June 2020 in pursuant to a belated execution of the warrant of arrest which had earlier been issued by the court. If the Private Prosecutor was diligent, he would have perused the court's file and realized that the warrants of arrest that he was seeking to have enforced had expired with the dismissal of the case on 24<sup>th</sup> October 2019, about eight months earlier.

The Applicants have asked the court to overlook the mistake of the private prosecutor and be persuaded by the broader interest of justice; that the complainant lost a colossal sum of money due the Respondents alleged theft, and further that court should lean towards determining cases on its merits rather than on legal technicalities. They took issue with the fact that the trial court dismissed the case under **Section 202** of the **Criminal Procedure Code** which mandates that such a case be dismissed if the complainant is absent from court but the accused is present. The Applicant argued that since the Respondent (accused person) was not present before the court, then the court could not dismiss the case for want of prosecution. A further issue that the Applicants raised is the complaint that the case was dismissed when the case had been listed for mention and not hearing.

The Applicants would have had a case if it was established to the satisfaction of this court that the Respondent had been served with the summons to appear before the court to answer to the charges and had failed to appear. The Applicants would have relied on **Section 202** of the **Criminal Procedure Code** if they established that they were present in court or were prevented from being present in court on account of a reasonable or justifiable excuse. In the present case, it was abundantly clear that the Private prosecutor did not offer a reasonable excuse for his failure to attend court for a cumulative period of one year and four months before he made the application to have the case reinstated to hearing.

In the course of the hearing of the application, it became apparent that the Applicants had already filed a civil suit against the Respondent seeking the recovery of the sums allegedly stolen from the complainant. The suit is pending hearing and determination before the court. That being the case, it cannot be said that the Applicants have no legal remedy.

Finally, does this court have jurisdiction to grant the orders sought by the Applicants? It should be noted that the effect of the trial court issuing the orders under **Section 202** of the **Criminal Procedure Code** was the acquittal of the Respondent. Does this court have jurisdiction to reverse an order of acquittal in an application revision predicated under **Section 362** and **364 (1) (a)** and **(b)** of the **Criminal Procedure Code**? The answer is provided by **Section 364** which provides thus:

**“(i) in the case of a proceeding in a subordinate court, the record of which has been called for as which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –**

**a. In the case of a conviction, exercise any of the powers conferred on it as a Court of Appeal by Sections 354,357 and 358, and may enhance the sentence,**

**b. In the case of any other orders other than an order of acquittal, alter and reverse the order**

**c. ....”**

**(underlining mine)**

This court therefore lacked jurisdiction to grant the orders sought by the Applicants even if the court was minded to grant the application for revision on account of the acquittal of the Respondent by the trial court.

In the premises therefore, it is clear that the application for revision cannot be allowed. It is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2020

L. KIMARU

JUDGE