



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL REVISION NO. 216 OF 2018

REPUBLIC.....PROSECUTOR/APPLICANT

VERSUS

MARTHA WAMBUI NGATIA.....REPOENDENT

(Revision on the orders issued by the Hon. F. Macharia SPM in Karatina SPMCR 208 of 2018)

RULING

On 7th May 2018 the accused/ respondent herein Martha Wambui Ngatia took plea before Hon. F. W. Macharia SPM, on four counts:-

1. Obstructing police officer contrary to section 103 (a) of the National Police Service Act 2011.
2. Malicious damage to property contrary to section 339(1) of the Penal Code.
3. Resisting arrest contrary to section 253 b of the Penal code.
4. Creating disturbance in a manner likely to cause a breach of the peace contrary to section 95(1) (b) of the Penal Code.

She pleaded not guilty to all charges.

The matter was fixed hearing on 10th July 2018. The state was ready to proceed but since the prosecution had not supplied her with witness statements as required by Article 50 of the Constitution, the matter could not proceed. It was adjourned to 14th September 2018.

On that date, at the call over, the prosecution indicated it had 3 witnesses and was ready to proceed. The Accused told the court she had a lawyer but he was not in court.

In its ruling on the accused's submission, court observed that the matter had been adjourned two months earlier at the behest of the accused who ought to have got counsel if indeed she intended to have one and in any event there was no advocate on record. The court decided that the matter would proceed. At 9:50am the matter was called up for hearing. The record shows that the prosecutor stated:-

"I am not ready to proceed. The witnesses who are police officers have been summoned by the OCS for an operation. I pray for an adjournment.

Accused- I leave it to court"

This prompted court to again determine whether the application for adjournment was deserved. The court found that the action of the witnesses who were police officers to leave barely 40 minutes after the matter had been confirmed for hearing amounted to *"belittling the court processes and taking it for granted"*. The trial magistrate expressed the view that the officers' *"obligations towards the court is no inferior that (sic) their other obligations"* that there was no emergency to warrant the pulling out of witnesses from the case. The *"application for adjournment [was] disallowed.* There being no witnesses the trial magistrate made the order that:

"It is also deemed that there is no evidence against the accused person and she is hereby acquitted under s.210 of the CPC in all counts. Right of Appeal within next 14 days"

This provoked the letter dated 21/12/18 from the ODPP headed

“REQUEST FOR REVISION UNDER SECTION 362 AS READ WITH SECTION 364 OF CRIMINAL PROCEDURE CODE, CAP 75 OF THE LAWS OF KENYA.”

The ODP expressed dissatisfaction with the finding of the trial magistrate. The prosecution complained that the accused was acquitted under s.210 of the CPC despite the fact that the prosecution had not called any witnesses, after their request for adjournment was denied. Further that the accused had been allowed an adjournment earlier- but state was not allowed an adjournment when they needed one; that officers were called to attend to

“An operation regarding the Alcoholic Drinks Control Act No.4 of 2010 following an Executive directive and as part of the Multi-agency operations of the same.

The prosecution’s application therefore was for the court to exercise its supervisory powers, under s.364 of the CPC and re-open the case in the interests of justice.

Mr. Magoma for the state arguing that application submitted that the trial magistrate erred in dismissing the case for prosecution without giving the prosecution the opportunity to be heard yet witnesses were available but had left because of other duties. That all the state was seeking was justice.

In opposition, Mr. Muhoho for respondent submitted that it was admitted that state had not called any witnesses, there was no evidence tendered, hence the logical conclusion was that there was no evidence and s.210 came to play.

That the state had not demonstrated the illegality/lack of correctness of the decision, the orders sought were not available, and that in any event, s.364 (b) was clear there could be no revision of an order of acquittal and the only available option was an appeal as provided for under s.348A of the CPC.

In response Mr. Magoma argued that state was relying on s.362 in that the trial magistrate had committed an error.

The issue for determination is whether the trial magistrate’s order of acquittal is revisable under sections 362 and 364 of the Criminal Procedure Code.

For starters the prosecution argued that the trial magistrate acted unfairly by not extending an adjournment to them as she had done for the respondent. However, the record will show that at the first hearing the Prosecution was at fault for failing to comply with the constitutional requirement to supply the accused with the witness statements and documentary evidence they intended to rely on. The case could not have proceeded without the accused being aware of what she was facing.

On the second hearing date the record shows that the court declined to adjourn the case in the first instance when the accused attempted an application to adjourn the same on the ground that her advocate was not in court. The prosecution’s application for adjournment was denied in the same breath soon thereafter hence I did not find any evidence of unfairness on the part of the magistrate in this regard.

Section 210 of the CPC provides for the “**Acquittal of accused person when no case to answer**” as follows:

*If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court **shall dismiss the case and shall forthwith acquit him.***

It is correct that the prosecution did not present any evidence. The Section starts with ‘if’. In this case, prosecution had the opportunity to present the evidence. They did not. The trial court was of the view that they had no evidence to present and deemed their failure to present the evidence as lack of evidence to support the charge. She proceeded to dismiss the charge and to acquit the accused. The determination of the correctness or otherwise of all this must be looked at in light of the statutory provisions on revisionary powers of the High Court.

Section **362** of the CPC provides for the **Power of High Court to call for records** in the following terms:

*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 mine)*

It is the case for the prosecution that this court can order for the reopening of the case for the prosecution by exercising the powers under section 362 together with the **Powers of High Court on revision** as provided for under section **364** of the same act as follows:

(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—

(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 order other than an order of acquittal, alter or reverse the order. (emphasis mine)

(2)

(3)

(4) *Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.*

(5) *When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.*

I agree that that would be tenable except that the provisions of section 364(1) (b) clearly **exempt an order of acquittal from review**. An order to reopen the case for the prosecution would be tantamount to a reversal of the order of acquittal as it would put the accused person in the position before the acquittal. An acquittal is given very special treatment as is seen at s. 364(4) wherein the court is prohibited in no uncertain terms from tampering with an acquittal on revision.

In **DPP v Gilbert M'ringera Kiungu & another [2018] eKLR** the Judge cited the Court of Appeal (Omolo, O'Kubasu & Waki, JJA) in **BICHANGE vs. R [2005] 2KLR 4** which explained the relevance of Section 364(4) as follows:

“The meaning of this section is plain. Where an accused person has been acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction. The trial magistrate had acquitted the appellant on the main charge of defilement under section 145 of the Penal Code. In view of the provisions of section 364(4) of the Criminal Procedure Code, Tuiyot, J had no power and was not entitled to convert that acquittal into a conviction.”

[5] The trial Magistrate acquitted the accused under Section 210 of the CPC. Acquittal can only be challenged on appeal and the court will have wide powers to deal with the merits of the appeal and may reverse or alter the acquittal.

See also **Sebastian Miriti v SRM Tigania Law Court & another [2018] eKLR** where the Judge acknowledged that the powers of revision are limited in as far as an order of acquittal is concerned.

The prosecution is not left without remedy. In as far as this matter is concerned the option available to the prosecution is an appeal as provided for under section 348A of the CPC which provides for the **Right of appeal against acquittal, order of refusal or order of dismissal**

*(1) When an accused person has been **acquitted on a trial held by a subordinate court** or High Court, or where **an order refusing to admit a complaint or formal charge, or an order 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 and law.*

(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately. (emphasis added)

It is in exercise of the appellate jurisdiction that this court is empowered to revise so to speak an order of acquittal. Within that that court can exercise all the powers under section 354(3).

*(bb) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon **reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High court thereon to the subordinate court for determination, whether by way of rehearing or otherwise**, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as High Court may think fit;*

(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit;

It is clear in my view that a reading of s. 348A and s. 354(3) (bb) and (c) it is in the exercise of this court's appellate jurisdiction that the orders sought by the DPP could be granted. This court has no powers to reverse and order of acquittal on revision.

I find the application for revision to be incompetent and the same is rejected accordingly.

Dated, delivered and signed at Nyeri in open court this 30th Day of April 2019.

Mumbua T Matheka

Judge

In the presence of:

Court Assistance: Juliet

Prosecutor MR GITONGA holding brief for Mr. Magoma for state

Respondent present

Counsel for Respondent MR. MUHOHO

Judge