



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL REVISION NO. 17 OF 2019**

**THADEUS MUNGWANA CHETEMBE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**REVISION**

1. This matter has been brought to my attention by Mr. Patrick M. Gumo, Senior Assistant Director of Public Prosecutions who is seeking that the court exercises its powers of revision over the Butere Criminal Case No. 574 of 2018 and set aside the orders issued therein by the trial magistrate, Hon. F. Makoyo, SRM. The grounds in support thereof are that the witnesses have been heard in the matter. That on the 8/7/2019 the matter came up for hearing before the trial magistrate but the prosecutor who was in conduct of the matter was away on maternity leave. That the learned magistrate proceeded to deal with the matter in the absence of the prosecutor and in the absence of the accused person. The magistrate thereupon proceeded to close the prosecution's case and accordingly acquitted the accused under Section 210 of the Criminal Procedure Code.

2. The learned senior Assistant Director of Public Prosecutions submits that the trial magistrate erred in discharging the accused on account of the absence of the prosecutor. That he erred in conducting the proceedings in the absence of the accused person. That the trial court failed to take into account the fact that there is a shortage of prosecutors and that Ms. Murunga who was conducting the matter was away on a 6 months maternity leave. That the proceedings were thereby irregular.

3. This court has powers under Section 362 of the Criminal Procedure Code to 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.

4. The accused in the case was facing a charge of assault contrary to Section 251 of the Penal Code. The learned trial magistrate dealt with the matter in the absence of the accused. The only time when a trial court in a criminal matter can hear the matter in the absence of an accused person is, as provided by Section 99 of the Criminal Procedure Code, where the accused is facing an offence punishable only by a fine or by a fine or imprisonment not exceeding three months. In the case against the accused the offence he was facing was punishable with imprisonment for a period of upto 5 years. The trial magistrate was thus duty bound to ensure the presence of the accused person before conducting any proceedings in the matter.

5. It is irregular for a trial court to conduct criminal proceedings in the absence of a prosecutor. It is the Director of Public Prosecutions or a person appointed by him who has powers to conduct a prosecution under the provisions of the Criminal Procedure Code. A trial without a prosecutor is thus a nullity.

6. The learned trial magistrate made an order that he was closing the prosecution case and proceeded to acquit the accused. This was arrogating unto himself both the prosecutorial powers and powers of judgment. A trial court cannot exercise both powers.

7. In the foregoing the court finds that the learned trial magistrate erred in conducting the trial in the absence of the court's prosecutor and in the absence of the accused person. It was irregular to acquit the accused under Section 210 of the CPC when the prosecution was not there to close its case. There are sufficient grounds for this court to exercise its powers of revision over the matter. In the premises the order made by the trial court acquitting the accused under Section 210 of the CPC is hereby set aside on account of irregularity. I direct that the file in Butere Criminal Case No. 574 of 2018 be re-opened and for the case to proceed before another magistrate of competent jurisdiction other than Hon. F. Makoyo, SRM.

**Delivered, dated and signed at Kakamega this 24<sup>th</sup> day of July, 2019.**

**J. NJAGI**

**JUDGE**