



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL REVISION NO. 169 OF 2018

DPP.....APPLICANT

VERSUS

GILBERT M'RINGERA KIUNGU.....1ST RESPONDENT

SALESIO MUTIA M'RINGERA2ND RESPONDENT

RULING

Review of acquittal

[1] I have before me a Notice of Motion dated 23rd March 2018 which is expressed to be brought under **Section 362 and 364 of the Criminal Procedure Code (CAP 75) Laws of Kenya**. The Applicant seeks the court to revise/review and set aside the ruling of 12th March 2018 in Senior Resident Magistrate's Court at Tigania Criminal Case No. 594 of 2011.

[2] The grounds upon which this motion is premised are set out in the application and the supporting affidavit of Samuel Mwika, the complainant. The major ones are:

1. That the trial Magistrate prematurely dismissed the prosecution's case under Section 210 of the CPC despite the prosecution having provided sufficient evidence to warrant the respondents to be put on their defence.
2. That the trial magistrate failed to understand that the prosecution ought to prove its case beyond reasonable doubt and not beyond any shadow of doubt.
3. That the learned trial Magistrate in his ruling heavily relied on submissions of the defence without even testing the defence evidence and weigh it against the evidence by the prosecution.

4. That the trial magistrate made a wrong finding on the type of weapon used in the assault in total disregard of the evidence on record.

Jurisdiction on revision

[3] The above grounds are perfect for an appeal. Should this court entertain the application for revision? The powers of the court on revision is stipulated under Section 364 of the CPC, sub-section 1 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."

[4] The Court of Appeal (Omolo, O'Kubasu & Waki, JJA) **BICHANGE vs. R [2005] 2KLR 4** 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. The Respondent will also be served and will participate fully in the appeal where his acquittal is being challenged. That is my view and position. Accordingly, I think the court is not obligated to revise an acquittal on revision. However, the Applicant may employ other avenues such as appeal to approach the court for orders. For instance, Section 348A of the CPC provides that:

“348A. When an accused person has been acquitted on a trial held by a subordinate 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, the Attorney-General may appeal to the High Court from the acquittal or order on a matter of law.”

[6] From the foregoing, I decline to exercise my power of revision.

Dated, signed and delivered in open court at Meru this 31st day of July 2018

F. GIKONYO

JUDGE

In the presence of:

Mr. Namiti for applicant

Respondents - absent

F. GIKONYO

JUDGE