

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 415 OF 2016

THE DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

ANTHONY OCHIENGRESPONDENT

RULING

The Applicant came to this court by way of two letters dated 8th and 9th November, 2016 filed by Daniel Karuri, Senior Assistant Director of Public Prosecution and Claire N. Kituyi, Prosecution Counsel respectively. Both letters asked this court to call for files in **Milimani Criminal cases No. 257 of 2016 and 1699 of 2016** for purposes of revising orders of Hon. P.M Mugure, SRM issued on 8th November, 2016 in **Cr. Case NO. 257 of 2016 – Republic vs Anthony Ochieng Joel**. The effect of the said order/ruling was a refusal to consolidate the said matter with **Cr. Case No. 1699 of 2016 R. Vs Eliud Butali Khaemba**.

As at the date of the first letter, Cr. Case No. 257 of 2016 had been scheduled for hearing on the same date, 8th November, 2016 and 11th November, 2016. The prosecution applied for a consolidation of the said matter with Cr. Case No. 1699 of 2016. The court declined to allow the application and asked the prosecution to proceed with the witness who was present in court. The matter was then scheduled for hearing at 2.00 p.m. Despite the order that the matter must proceed with the witness present, the prosecutor, at 2.50 p.m. informed the court that he would not be able to proceed. The record of proceeding shows that at 3.35 p.m., the court noted that the prosecutor was adamant to proceed and on his failure to obey the court order, ordered the prosecution case closed. The learned magistrate then invited the respective counsel to submit. No submissions were made. Consequently, the Applicant herein was acquitted under Section 210 of the Criminal Procedure Code.

In the first letter of 8th November, 2016, the Applicant's main prayers was that the court stays the proceedings scheduled for 2.30 p.m. on ground that the trial court had improperly declined the prosecution's application to consolidate the matter with Cr. Case No. 1699 of 2016. After the matter proceeded the second letter was written with a view to recalling the ruling which acquitted the Applicant under Section 210 of the Criminal Procedure code. Consequently, the court would re-open the prosecution case. Suffice it to note, the Applicant is of the view that consolidation of the two cases was justified because the evidence that would be tendered and witnesses who would testify were the same. Further that the offences in both cases were committed within the same transaction and the complainant was the same, Kenya Revenue Authority. In any event, an application for consolidation of the two cases would not have been made earlier because the accused in Cr. Case No. 1699 of 2016 had not yet taken plea. It is worthy to note that plea in the latter case was taken on 31st October, 2016 and an application for consolidation with case no 257 of 2016 made on 8th November, 2016.

This court has called for the original record in both cases. I have compared the proceedings in Cr. Case No. 257 of 2016 and the record of this court. This court gave an *ex-parte* order of stay of proceedings in Cr. Case No. 257 of 2016 at 3.15 p.m. The proceedings acquitting the Applicant were recorded at 2.59 p.m. Therefore, as at the time the stay order was given, the Applicant had already been acquitted. It then behoves this court to give regard to the law so as to satisfy itself as to whether a remedy of revision lies where an acquittal has been passed. The relevant provision is Section 364(1)(b) and (4) of the Criminal

Procedure Code, the same provide 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 –

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

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

Consequently, the law is quite categorical that where an order of acquittal has been passed, this court cannot exercise its powers of revision. As such, case No. 257/2016 in which the Applicant was acquitted under Section 210 of the Criminal Procedure Code cannot be consolidated with Criminal Case No. 1699 of 2016.

In the result, the application herein lacks merit and the same is hereby dismissed.

DATED AND DELIVERED THIS 11TH DAY OF APRIL 2017

G. W. NGENYE – MACHARIA

JUDGE

In the presence of

1. M/s Lang’o for the Applicant.

2. Mr. Odhiambo for the Respondent.