



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL REVISION NO. 40 OF 2017

REPUBLIC.....APPLICANT

VERSUS

SUNDAY SAMUEL BINGUZO.....RESPONDENT

(From Original Order dated 7th November, 2017 in Criminal

Case No. 817 of 2017 of the Chief Magistrate's Court

at Malindi – C. O. Nyawiri, SRM)

RULING

1. A perusal of the file in Malindi Chief Magistrate's Court Criminal Case No. 817 of 2017 in which the Respondent, Sunday Samuel Binguzo was charged with grievous harm contrary to Section 234 of the Penal Code shows that the following proceedings took place on 7th November, 2017 before C. Nyawiri, Senior Resident Magistrate:

“Prosecutor: I pray for a production order for tomorrow.

Court: No reason has been given to this court why accused is not in court. Consequently, I hereby discharge the accused under section 210 CPC. Right of Appeal 14 days.”

2. The Applicant, the Director of Public Prosecutions wrote to this court through the letter dated 17th November, 2017 seeking revision of the order of acquittal of the Respondent on the grounds that:

“1. The accused person was in custody at Matangani GK Prison after being convicted in CR 771 of 2017 as indicated in the charge sheet.

2. The accused person was absent when he was acquitted and this is against Article 50(2) of the Constitution which requires the accused person to be present.

3. The accused was discharged under section 210 of the CPC and the prosecution had not adduced any evidence against the accused person to enable the court to make such a finding.”

3. In compliance with the requirements of Section 364(2) of the Criminal Procedure Code, Cap. 75 (CPC) I directed that the Respondent be served with the application for revision.

4. On 7th December, 2017 the Respondent appeared before the court and upon the application for revision being explained to him, he indicated that the same could be allowed so that he can take plea.

5. The power of revision is bestowed upon this court by Section 362 of the CPC which provides that:

“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.”

6. The power of revision is thus meant to ensure that proceedings before a subordinate court are legal and in compliance with the tenets of a fair trial.

7. Section 210 of the CPC under which the Respondent was acquitted provides that:

“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.”

8. A reading of Section 210 clearly shows that an acquittal under that section can only occur after the prosecution's case has been closed. It envisages a situation where plea has been taken, the matter fixed for hearing and witnesses have testified.

9. In the case at hand the matter was coming to court for the first time on the 7th November, 2017. The prosecution applied for a production order. The application was not addressed but instead the trial court acquitted the Respondent under Section 210 of the CPC. It is noted that where an accused person is held in prison the only way to have that person attend court is by seeking a production order from the court. The fact that the Respondent was in custody was clearly indicated in the charge sheet. It is therefore ironical that the Magistrate in acquitting the Respondent stated that no reason had been given as to why the Respondent was not in court yet the only person who could have directed for the production of the Respondent was the Magistrate himself.

10. In the circumstances of this case I agree with the Applicant that the acquittal of the Respondent under Section 210 of the CPC was illegal and irregular. I need not say more since the Respondent did not oppose the application for revision.

11. Consequently, the orders issued on 7th November, 2017 are set aside. Malindi CM Criminal Case No. 817 of 2017 is remitted to the Magistrate in charge of Malindi Chief Magistrate's Court who shall place the file before any magistrate of competent jurisdiction, other than C.O. Nyawiri, SRM, who shall issue a production order for the Respondent for purposes of taking plea and disposal of the matter in the manner provided by the law.

Dated, signed and delivered at Malindi this 20th day of December, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT