



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL REVISION NO. 89 OF 2016**

**REPUBLIC.....APPLICANT**

**VERSUS**

**MATHEW OCHIENG MUNGA.....RESPONDENT**

**RULING ON REVISION**

This revision originates from a letter dated 26th September 2016 by Hon. D. Orimba, the Principal Magistrate at Kangundo Law Courts, who forwarded the file for **R vs Matthew Ochieng Munga, Kangundo Criminal Case No. 115 of 2016** to this Court for directions. The accused person in that case was arraigned in Court on 11th February 2016 and charged with the offence of threatening to kill contrary to section 223(1) of the Penal Code. The particulars of the offence were that on diverse dates between 25<sup>th</sup> January 2016 and 27<sup>th</sup> January 2016 at an unknown place within the Republic of Kenya, using his mobile phone number 0713-xxxxxx, he issued death threats to Nicholas Kikola Mbiti through his mobile number 0729-xxxxxx saying that unless the said Nicholas Kikola Mbiti withdrew the abduction case pending in court he was going to kill him.

The accused person pleaded not guilty to the offence and after several adjournments the case was set for hearing on 23<sup>rd</sup> September 2016 before Hon. M. Chesang R.M. On that day the learned trial magistrate ruled as follows:

**I note that this accused was charged under section 223(1) of the Penal Code. My interpretation is that the accused ought to have been charged in the Machakos High Court under this section, and not in the Magistrate’s Court. As this Court has no subject matter jurisdiction, the accused is at liberty unless otherwise lawfully held.**

I note in this regard that the jurisdiction of Courts for offences under the Penal Code is set out in section 4 of the Criminal Procedure Code as follows:

**“Subject to this Code, an offence under the Penal Code (Cap. 63) may be tried by the High Court, or by a subordinate court by which the offence is shown in the fifth column of the First Schedule to this Code to be triable.”**

Under the fifth column of the First Schedule of the Code, the offence of threats to kill under section 223 of the Penal Code is to be heard and tried by subordinate Courts of the first class. The trial magistrate therefore had jurisdiction to hear the said case, and the order to set the accused person at liberty was therefore made in error and was not supported by any law. In addition the said liberty was not an acquittal as there is no law allowing for, or cited by the learned magistrate that provides for an acquittal in the circumstances of the case, and as no hearing took place.

I am alive in this regard to the provisions of section 364 of the Criminal Procedure Code which state that the powers of the High Court on revision are 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.**

**(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:**

**Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.**

**(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.**

**(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.”**

In the instant case the trial Magistrate did not hear the case as required by law, there was no acquittal. In addition the requirement to give the accused person an opportunity to be heard is not applicable in the circumstances as no decision was made by the trial court as regards his guilt or otherwise. I accordingly set aside the order of the trial magistrate, and the prosecution is accordingly at liberty to bring fresh charges for the said offence on the same facts against the accused person.

This ruling and orders to be furnished to the Hon. M. Chesang, Resident Magistrate at Kangundo Law Courts; the Respondent herein namely Mathew Ochieng Munga; and the Directorate of Public Prosecution without delay.

**DATED AT MACHAKOS THIS 31<sup>ST</sup> DAY OF OCTOBER 2016.**

**P. NYAMWEYA**

**JUDGE**