



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
HIGH COURT CRIMINAL REVISION NO 2 OF 2016

(From an Order in Murang'a CM Criminal Case No 1095 of 2011 – T. Nzyoki, Ag. SPM)

REPUBLIC.....APPLICANT

VERSUS

SAMWEL MALEGWA KIMANI.....RESPONDENT

R U L I N G

1. This request for revision was made by the trial court in *Murang'a CM Criminal Case No 1095 of 2011 (Republic –vs- Samwel Malegwa Kimani)* who was being tried for the offence of grievous harm contrary to section 234 of the Penal Code. The trial magistrate (T Nzyoki, Ag SPM) had taken over the case from a previous trial magistrate (A L Oso, SRM). The trial court referred the matter to this court for revision by an order dated 24/06/2014 in the following terms –

“I have perused the typed proceedings and note that on 29th November 2012 prosecution witness PW2 Peter Mwangi Kinyua was stood down during the cross-examination owing to a problem of the court cells. The witness was to be further cross-examined on 5th April 2012; however he never attended court and the court allowed an adjournment.

Although the matter regarding the part cross-examination of PW2 was well within the knowledge of the prosecutor I.P Juma, the accused and the defence advocate Mr. Mwaniki after the transfer of the previous trial court Honourable Juma E. Oso to where the witness was never recalled for cross-examination. The prosecution proceeded to close its case and this court on 21/4/2014 placed the accused on his defence.

It is only after the proceedings of the previous trial court were typed and while perusing the court file for purposes of writing the judgment I discovered the above anomaly. In the circumstances of the case I shall refer the matter to the High Court for purposes of revision with a view to sure inadvertent mistake so as to enable the defence recall the witness PW2 for purposes of further cross-examination. Meanwhile the matter is stood over for a mention on the 27/8/2014 awaiting the outcome of the revision. The order herein shall be typed forthwith”.

2. Failure to recall PW2 for cross-examination appears to have been inadvertence on the part of the court as well as prosecution and defence counsels. The prosecution case was therefore closed prematurely on 25/03/2014.

3. Although the Accused was put to his defence and presented his defence by way of sworn evidence and

called one witness, the aims of justice will be better served by vacating the order of 25/03/2015 and all subsequent proceedings in order to reopen the prosecution case so that PW2 is recalled for further cross-examination. The proceedings can then continue to their logical conclusion.

4. I will therefore make the following orders in revision –

- (a) The order of 25/03/2014 by which the prosecution case was closed is hereby set aside.
- (b) All the proceedings after that date are hereby vacated.
- (c) Murang'a CM Criminal Case No. 1095 of 2011 is hereby remitted to the lower court for the prosecution to recall its PW2 for further cross-examination.
- (d) Thereafter the retrial shall proceed to its logical conclusion.

Those will be the orders of the court.

DATED AND SIGNED AT MURANG'A THIS 16TH DAY OF NOVEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 18TH DAY OF NOVEMBER 2016