

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

REVISION NO. 1 OF 2011

REPUBLIC.....RESPONDENT

-VERSUS-

ISAAC RHENUS OMOLLO.....APPLICANT

ORDER ON REVISION

Isaac Rheanus Omollo, hereafter “*the applicant*” was charged before the Senior Resident Magistrate’s Court, Homabay with the offence of malicious damage to property contrary to section 339(1) of the **Penal Code**. He pleaded not guilty to the charge and his trial commenced in earnest on or about 7th December, 2009 when the complainant in the case testified. Three other witnesses subsequently testified. After the 4th prosecution testified on 28th September, 2010, the prosecutor applied that the complainant be recalled so that he could identify some exhibits. The application was opposed by **Mr. Nyauke**, learned counsel for the accused. In a ruling delivered on the same day, the learned magistrate stated thus, “...*under section 150 of the CPC it is stated that the court shall in the interest of justice recall a witness if this shall be in the interest of justice. The rule however does not give specific circumstances under which this law may be applied. The procedure taken (sic) owing to the negligence on the part of the prosecution will however weaken the prosecution case as the complainant has just walked into the court. I will however grant the order sought but reluctantly which order I make to the (sic) interest of justice...*”.

It is this order that the applicant has come to this court to have vacated or rescinded by way of revision on the grounds that the complainant having closed his testimony without producing exhibits, cannot be recalled to produce the same.

Pursuant to section 362 of the **Criminal Procedure Code**, I have called for the record of the subordinate court in this matter for purposes of satisfying myself as to the correctness, legality or propriety of the order complained of by the applicant. Thus I will be justified in interfering with the said order if it is demonstrated that the order made was incorrect, illegal, laced with impropriety or that the proceedings leading to the order were irregular. I do not discern any such misgivings in the circumstances of this case. The learned magistrate explained himself and rightly so in my view, why he had to make the order. Section 150 of the **Criminal Procedure Code** is very clear. It grants the trial court power to recall a witness at any stage of the trial if his evidence appears to it to be essential to the just decision of the case, with the rider of course that the defence will be entitled to cross-examine such recalled witness. Nowhere in that provision of the law is it provided that a witness who has completed his testimony cannot be recalled as the applicant seems to suggest. The order made by the learned Magistrate and which is sought to be impugned was correct, legal, and regular. Neither were the proceedings leading to the making of the order laced with impropriety. The court did not say that the applicant will not be entitled to cross-examine the complainant once recalled. Thus no prejudice will be occasioned to the applicant if she is recalled. The law allows it.

Accordingly, revision sought is denied.

Revision dated, signed and delivered at Kisii on this 2nd day of June 2011.

ASIKE- MAKHANDIA
JUDGE