



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL REVISION NO. 13 OF 2008

REPUBLIC..... APPLICANT

VERSUS

BENEDICT KALOVWE KAWETO ACCUSED

RULING ON A REVISION

1. By letter dated 24/4/2008, and received on 26/5/2008, the Principal State Counsel, Machakos, Mr M.M. O’Mirera, seeks that this court should invoke Section 362 and Section 364 of the Criminal Procedure Code and revise certain orders made on 4/6/2007 and 12/6/2007 by the Resident Magistrate at Kitui Law Courts.

2. I have perused the proceedings in PM’S Court Criminal Case No. 1206 of 2006 and I note that on 27/3/2007, PW1, James Mwanzi, PW2 Dorcas Katheka and PW3 P.C Joel Koske testified. Hearing was adjourned to 4/6/2007 and on that day, the record reads as follows:

“Before me T.M. MWANGI RM

CC – Janet

Prosecutor – I.P Martim (Absent)

Accused – present

Time: 11.58 a.m

Accused – I am ready for trial

Court – The prosecutor having neglected to attend Court so late in the day despite sufficient notice that this court commences its sittings on or before 10 a.m of each working day and Court not having been informed why the prosecutor has so neglected to attend court and 3 witnesses having testified against accused, prosecution’s case is marked as closed. I had also granted a last adjournment and a further adjournment cannot be entertained.

Ruling 12/6/2007. Bond extended to accused person.

T.M. MWANGI

RM”

3. On 12/6/2007, the learned magistrate in his Ruling found that the Republic had failed to make out a prima facie case against the accused person and acquitted him under Section 210 of the Criminal Procedure Code.

4. By his letter aforesaid, learned Principal State Counsel states in part as follows:-

“In our considered view, absence of a prosecutor is as good as having an unqualified person in court in terms of the provisions of section 85(2) of the Criminal Procedure Code. In effect, these proceedings were a nullity and we accordingly apply that the same be so declared.”

5. Section 364 (4) of the Criminal Procedure Code states as follows:-

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

6. Section 362 and Section 364 aforesaid relate generally to the powers of revision that is granted to the High Court generally. The accused person in this case was acquitted by a lawful court and it would be double jeopardy to recall him for trial.

7. Regarding the proceedings of 4/6/2007, it would be expected that in a criminal trial there should be a prosecutor. In this case, the trial magistrate by 11.58 a.m. had not seen a prosecutor in his court and having called out the case, and there being no witness present, he deemed the case as closed and proceeded to write his Ruling. These proceedings were and cannot be a nullity in the absence of an explanation as to where the prosecutor was and where the remaining witnesses were.

8. No court should be held at ransom by the prosecution and each magistrate is entitled to ensure order and decorum in his court.

9. There is nothing to revise in this matter and the matter and I decline to issue any such orders.

10. The matter is deemed closed.

Dated and delivered at Machakos this 3rd day of June 2008.

ISAAC LENAOLA

JUDGE