

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

Revision Case 246 of 2006

BORNFACE ODUOR AKIVINGA

BENARD WANZALA OKEELO.....APPLICANTS

VS

REPUBLIC.....RESPONDENT

REVISION

This matter has been brought before me for revision pursuant to the provisions of section 364 of the Criminal Procedure Code section 3(1) of which provides:

“In the case of proceedings 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 any other order than order of Acquittal, alter or revise the order.”

The undisputed facts are that the prosecution closed its case on 10th June, 2003. The court then invoked the provisions of section 211 of the Criminal Procedure Code.

Subsequently, on the 19th day of November 2003, the learned trial Magistrate J. N. Makut, on application by the defence ordered that the case do start – denovo.

On 5th May 2006, the prosecution, being aggrieved by the said order, applied for revision of the order of 19th March, 2003.

I am alive to the law that section 18 of the Magistrate’s Courts Act vests me with supervisory powers over subordinate courts. I am equally aware that the Chief Justice by a directive, has emphasized the supervisory role of the High Court over subordinate courts.

Against that backdrop, I am persuaded that I have jurisdiction to review the order of Mr. J. N. Makut made on 19th November 2003.

By record of proceedings, the case had reached advanced stage-defence case. In my view, this is a matter in respect of which the Magistrate should have ordered the trial to proceed from the defence stage in conformity with section 200 of the Criminal Procedure Code. I am of the persuasion that it was a grave error in law to hold that the trial should start – denovo, when prosecution witnesses who gave evidence attendance cannot be procured without unnecessary delay not to mention that the exhibits produced have been misplaced.

Accordingly, in exercise of my powers under section 18 of the Magistrate’s Court’s Act and section 364 of the Criminal Procedure Code, I order that the proceedings in Busia PMCC No.246/2003 do proceed

from the defence stage before a DM.II or a Magistrate of concurrent jurisdiction based at Busia Principal Magistrate's Court. A date for the hearing to be taken on a priority basis.

A copy of this order to be served upon the Principal Magistrate, Busia for compliance. Another copy to be served upon the defence counsel.

DATED and DELIVERED at BUSIA this 22nd day of December, 2006.

N.R.O. OMBIJA

JUDGE

Mr Ashioya for Mr. Okule for the applicant.

NA for state.