



**Ndung'u v Republic (Criminal Revision E001 of 2024)
[2024] KEHC 9458 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL REVISION E001 OF 2024
AK NDUNG'U, J
JULY 25, 2024**

BETWEEN

CHARLES KIMANI NDUNG'U APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. Charles Kimanui Ndungu was charged with defilement contrary to Section 8(1) as read with Section 8(3) of *Sexual Offences Act*. He denied the offence and the matter proceeded to hearing before Hon. Obulutsa, Chief Magistrate who was transferred when the matter was at submissions on no case to answer.
2. The matter was *vide* an order of court dated 4/1/23 re-allocated to Hon. Larabi RM who on the evaluation of the evidence presented proceeded to acquit the accused under Section 210 of the *CPC*.
3. Aggrieved by that order, the complainant through her counsel seeks a review of those orders vide a letter dated 14/2/24 citing reasons that Section 200 of the *CPC* was not complied with and that the ruling delivered failed to meet the legal threshold and was unreasoned.
4. The application was canvassed by way of written submissions.
5. The application seeks the exercise of the court's supervisory powers, under Section 362 of the *CPC* and re-open the case in the interests of justice.
6. I have considered the application, the submissions on record and the applicable law.
7. Section 362 of the *CPC* provides for the Power of High Court to call for records in the following terms:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or



propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. (emphasis mine)

- (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. (emphasis added)
- (2)
- (3)
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction. (emphasis added).
- (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.”

8. The powers of review are thus not in doubt except that the provisions of Section 364(1) (b) clearly exempt an order of acquittal from review.

9. In *DPP v Gilbert M'ringera Kiungu & another* [2018] eKLR the Judge cited the Court of Appeal (Omolo, O'Kubasu & Waki, JJA) in *Bichange v R* [2005] 2KLR 4 which explained the relevance of Section 364(4) as follows:

“The meaning of this section is plain. Where an accused person has been acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction. The trial magistrate had acquitted the appellant on the main charge of defilement under section 145 of the Penal Code. In view of the provisions of section 364(4) of the Criminal Procedure Code, Tuiyot, J had no power and was not entitled to convert that acquittal into a conviction.”

- (5) The trial Magistrate acquitted the accused under Section 210 of the CPC. Acquittal can only be challenged on appeal and the court will have wide powers to deal with the merits of the appeal and may reverse or alter the acquittal.”

10. (See also *Sebastian Miriti v SRM Tigania Law Court & another* [2018] eKLR where the Judge acknowledged that the powers of revision are limited in as far as an order of acquittal is concerned).

11. The prosecution is not left without remedy. In as far as this matter is concerned the option available to the prosecution is an appeal as provided for under Section 348A of the CPC which provides for the Right of appeal against acquittal, order of refusal or order of dismissal

- (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the



High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.

(2) If the appeal under subsection (1) is successful, the High Court or Court of Appeal as the case may be, may substitute the acquittal with a conviction and may sentence the accused person appropriately. (emphasis added)”

12. It is in exercise of the appellate jurisdiction that this court is empowered to revise so to speak an order of acquittal. Within that that court can exercise all the powers under Section 354(3).

“(bb) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as High Court may think fit;

(c) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit;”

13. An order to reopen the case for the prosecution would be in my view an illegal expedition as it would amount to a reversal of the order of acquittal as it would put the accused person in the position before the acquittal. An acquittal is given very special treatment as is seen at Section 364(4).

14. With the result that the application for revision has no merit. The same is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAHURURU THIS 25TH DAY OF JULY 2024

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A.K. NDUNGU

JUDGE

