



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Onyango (Criminal Revision E052 of 2021)  
[2023] KEHC 2654 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2654 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL REVISION E052 OF 2021  
WM MUSYOKA, J  
MARCH 24, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**PATRICK OCHIENG ONYANGO ..... RESPONDENT**

*(Revision arising from ruling delivered on 20th March 2020 in  
Mumias Criminal Case No. 568 of 2016, Republic vs. Patrick Ochieng  
Onyango, by Hon. W Cheruiyot, Senior Resident Magistrate)*

**RULING**

1. The court file in respect of Mumias SPMCCRC No 568 of 2016 was placed before me, vide a letter from the Director of Prosecutions, dated November 25, 2021, for revision of orders made on September 2, 2019, by Hon W Cheruiyot, Senior Resident Magistrate.
2. The trial had commenced on February 21, 2017. 10 witnesses testified before Hon CC Kipkorir, Senior Resident Magistrate. She then went on transfer, and the matter was taken over by Hon Cheruiyot, on July 11, 2019. When section 200 of the [Criminal Procedure Code](#), Cap 75, Laws of Kenya, was read and explained to the accused person, he opted to have the matter start afresh or de novo. The prosecution protested. The court exercised discretion in favour of the accused.
3. The prosecution was unhappy with that direction, hence these revision proceedings. On September 2, 2019, the Advocate prosecuting submitted that the prosecution case was on its tail end, and the offences had been committed some while ago, in 2011 and 2012. In the letter of November 25, 2021, it was protested that some of the witnesses had relocated to other jurisdictions and some were dead, the offences had been committed some while back, and the case was on its tail end.
4. Section 200(3) of the [Criminal Procedure Code](#), which empowers the court to order a trial to *commence de novo*, extends the privilege to an accused person, when the trial has to be taken over by a succeeding



magistrate, following either transfer or death or exit from service, to request for a recall of witnesses, whether some or all of them. It is a right accruing only to the accused, and the court has the discretion to accede to it or to decline it. The Code is not clear on the factors the court may consider in either allowing or declining it, but the issues that the prosecution is raising could be some of them.

5. Revision, under sections 362 of the *Criminal Procedure Code*, empowers the High Court to intervene on grounds of illegality or impropriety or incorrectness or irregularity. In this case was there illegality or impropriety or incorrectness or irregularity in the order of September 2, 2019? I do not think so. The accused person had a right to ask that the matter starts de novo, and the trial court had discretion to accede to that request or to turn it down, in this case it exercised the same in favour of the accused. Was the exercise of discretion improper or illegal or incorrect or irregular? I doubt that the High Court can intervene, in exercise of its revisional powers, to assess whether discretionary power has been used properly. Any party aggrieved by exercise of discretion, ideally should appeal against the impugned order.
6. I do not see any error or illegality or impropriety or incorrectness or irregularity in the said order, I have no basis for revising it under section 364 of the *Criminal Procedure Code*. I decline to grant the orders sought by the Director of Public Prosecutions. I hereby, accordingly, order that the court file in Mumias SPMCCRC No 568 of 2016, be returned to the said court for finalisation of the matter. It is so ordered and directed.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF March 2023**

**W MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

Ms. Kagai, instructed by the Director of Public Prosecutions, for the Republic.

Mr. Osango, Advocate for the accused person.

