



**Kavuu v Republic (Criminal Review 211 of 2022)
[2023] KEHC 17241 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL REVIEW 211 OF 2022**

SM GITHINJI, J

MAY 8, 2023

BETWEEN

DENNIS MUSYOKI KAVUU APPLICANT

AND

REPUBLIC RESPONDENT

(Criminal revision from the original conviction and sentence in criminal case No. 428 of 2018 of the Chief Magistrates Court at Malindi)

RULING

1. By a letter dated November 24, 2022, the applicant, through his advocates, applied for review and setting aside of judgment under section 362 of the *Criminal Procedure Code*, following his conviction and sentence in Malindi Chief Magistrates Court Criminal Case No. 428 of 2018.
2. Briefly, the history of the issues are that the applicant was charged with the offence of stealing motor vehicle contrary to section 278 A of the *Penal Code*, whereby it was stated that on July 16, 2016, at Timboni village within Watamu Location, the applicant stole two tractors registration numbers KCTB 994P and KCTB 993P all valued at Kshs. 2,900,000 the property of Adil Osman. The Applicant was also charged with an alternative charge of handling stolen goods contrary to section 322 (1) as read with sub-section 2 of the *Penal Code*.
3. The applicant was released on bond and the hearing kicked off on June 11, 2019 when one witness testified. PW2 testified on September 19, 2019. The hearing was adjourned to November 21, 2019 when the prosecution failed to proceed. On all these occasions, the applicant and his advocate were present. The matter was adjourned to April 30, 2020 when the court did not sit due to the covid-19 pandemic. Thereafter, the applicant never appeared in court and warrants of arrest were issued on October 22, 2020.



4. On July 22, 2021, the applicant's advocates informed the court that the applicant was sick and bed ridden and would be able to attend court as from mid-August. Thereafter, the matter was mentioned twice; On the second time being December 23, 2021, when the trial court directed that the matter proceed in the absence of the applicant. Thereafter, the matter was again mentioned twice when the prosecution failed to proceed. On June 28, 2022, the matter proceeded in the absence of both the applicant and his advocate. In sum, three prosecution witnesses testified in the absence of the applicant.
5. Judgment and sentence were passed on September 22, 2022 and October 13, 2022 respectively in the absence of the applicant, by the Hon. D. Wasike. She found the applicant guilty of the offence in the main charge and sentenced him to serve 3 years imprisonment with no option of fine.
6. The powers of the High court in revision are contained in section 362 through to 367 of the *Criminal Procedure Code* (cap.75). Section 362 specifically provides as follows: -

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.”

7. The question that arises therefore is whether the proceedings against the applicant are right, bearing in mind the provision of section 206(1) & (2) of the *Criminal Procedure Code* which reads; -
 1. If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.
 2. If the court convicts the accused person in his absence, it may set aside the conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.”
8. The meaning of the above provisions is that a trial court can proceed in the absence of an accused person only when an accused person is charged with a misdemeanor but not a felony. Section 4 of the *Penal Code*, cap 63 defines a misdemeanor and a felony as follows; -

Felony” means an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more;

“Misdemeanour” means any offence which is not a felony;

9. The offences with which the applicant was charged fall under the description of a felony for reasons that the main count attracts an imprisonment term of 7 years; while the alternative charge expressly states under section 322(2) that a person who handles stolen goods is guilty of a felony. The trial magistrate was therefore not entitled to proceed as she did, in the absence of the applicant.
10. Prior to the Covid-19 pandemic, it is evident that the applicant religiously attended court and it appears to me that on most days thereafter, the matter could not proceed due to the prosecution's failure to avail witnesses. In any event, the applicant's advocate informed the trial court that the applicant was indisposed and bed ridden. These were evidently circumstances beyond his control.



11. I have perused the medical reports. The applicant at one point suffered covid-19 complications and on December 3, 2021 was diagnosed with respiratory tuberculosis. He was cleared fit to resume work on June 23, 2022, only five days before the hearing proceeded.
12. In the interest of justice and the applicant's right to be present throughout his trial as envisaged under section 194 of the Criminal Procedure Code and article 50(f) of the Constitution of Kenya which states that an accused person should be present when being tried, unless his conduct makes it impossible for trial to proceed, I find a weighty cause to review the said trial against him.
13. The upshot is that the conviction and sentence is hereby quashed and an order for a retrial before the Chief Magistrates Court, Malindi granted.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF MAY, 2023

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S.M. GITHINJI

JUDGE

In the Presence of; -

Ms Tonia Mwanja for the Applicant

Ms Ochola for the ODPP

Mention before the Chief Magistrate on 11/5/2023.

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S.M. GITHINJI

JUDGE

8/5/2023

