



**Republic v Gitonga (Criminal Revision E244 of 2024)
[2024] KEHC 13701 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13701 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E244 OF 2024
DKN MAGARE, J
NOVEMBER 5, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

DENNIS WARURU GITONGA RESPONDENT

RULING

1. This is a ruling over a Notice of Motion application dated 29/8/2024 by the Applicant seeking to review the finding of the trial court acquitting the Respondent under Section 204 as read with Section 176 of the *Criminal Procedure Code*. The order to be reviewed was made by the trial court Hon. M. Okuche (SPM) in Nyeri CMCR No. E1020 of 2023.
2. The application instituted vide the letter dated 29/8/2024 addressed to this Court sought revision on the basis that the prosecutor applied for termination of the charges without verifying from the Complainant if the sum of money had been paid by the accused person who was meant to offset the loan owed or the amount misappropriated by the accused.
3. The case of the Applicant is therefore that the amount of money paid was for repaying a loan and not compensation of the alleged misappropriated funds. The Applicant sought to set aside the order of Acquittal under section 204.
4. The Respondent filed a replying affidavit sworn on 22/10/2024 opposing the application for review. It stated that the Respondent paid the disputed amount up to a sum of Kshs. 1,823,407.37 to repay the sum of Kshs. 1,769,068 that was listed in the charge sheet and the same was not for settling a loan.
5. He also submitted that there was no basis for revision. His case was that the court had allowed the application and the court cannot reverse the same.



Analysis

6. The issue is whether the decision of the trial court acquitting the Respondent under Section 204 of the *Criminal Procedure Code* should be reviewed. The Application for withdrawal was made by the Applicant on the basis of a letter by the complainant. The prosecutor in court was alive to the dispute as to the loan. The Applicant submitted that the prosecutor acted on instructions he had at the time. The said instructions have since changed. Circumstances of the change was hazy.
7. The Respondent maintains that the state waited for a whole year to file the application, which was not copied to the advocates on record in the lower court. The Respondent maintained that the loan arrears were shared between guarantors on 28/6/2024 and as such the sum paid cannot be said to be for the loan.
8. I agree with the Respondent that the application by the Applicant in the lower court was truthful. The application was made in the lower court after the parties were engaged in alternative dispute resolution or alternative justice system.
9. There was annexure to the replying affidavit showing that the loan was paid off and that there was no debit of the various sums all totaling to Ksh 1,823,407.37 on 20/1/2023, 4/7/2023, 5/7/2023, 20/7/2023 and 17/7/2023. The application is thus disingenuous and an affront to the values that underlie an open and democratic society based on human dignity, equality, equity and freedom.
10. Pray, why will the office of the director of public prosecution succumb to pressure and bring such a baseless application! They are the ones who made the application. The court allowed the same. There are no factors outside the knowledge of both parties. What the state is asking me, is to find that the court should have refused their own application. The application was legitimately made and the magistrate properly and legality allowed the same. I have perused the entire record in the lower court file with a view of satisfying myself 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 the subordinate court. I find and hold that the court below proceeded with professional meticulousness and propriety in the recording of proceedings. The record was complete, correct and reflected the proceedings of the day.
11. The revisionary powers permit this Court to 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, as provided under Section 362 of the *Criminal Procedure Code* 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.
12. The Respondent was charged with the offence of stealing contrary to Section 281 of the *Penal Code*. The particulars of the offence were that on diverse dates between 12/11/2021 and 16/1/2023 while being employed as cashier with New Fortis Sacco Society Nyeri Branch stole KShs. 1,769,067 the property of the said New Fortis Sacco Society. The Respondent was apprehended, pleaded not guilty and was released on cash bail pending trial on 7/7/2023.



13. Parties agreed to refund the money as a precondition for withdrawal. This was done and as such basis was laid for withdrawal under section 204 of the criminal procedure code. The withdrawal was thus proper and well founded.
14. Article 157(11) however enjoins the Applicant to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process while exercising the powers conferred by the *Constitution*. The powers were properly exercised by the prosecution counsel in court. The court also followed proper procedures.
15. What appears to have transpired is that the Complainant had a second thought and wanted to have a second bite on the cherry. Article 157(10) provides that The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority. In this case, the Applicant has not lived to their calling as there appears to be a change of heart with pressure from the complainant. Parties must learn to live with choices they make. The case is concluded and the respondent acquitted.
16. It appears that the Applicant approached this court on the position that it was in error to inform the lower court that the amount was settled. That the settled amount was in respect of a loan and not the allegedly stolen amount for which the accused was charged. This court is persuaded that the revisionary powers are paternal or supervisory in nature in order to correct or prevent miscarriage of justice. In the High Court of Malaysia in *Public Prosecutor vs. Muhari bin Mohammed Jani and Another* [1996] 4 LRC 728 at 734, 735 it was stated as doth:

“The powers of the High Court in revision are amply provided under section 325 of the *Criminal Procedure Code* subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”
17. It is not in dispute that the Respondent paid amounts in excess of Kshs. 1.8 million towards settlement of the monies allegedly stolen and it is on this basis that the Prosecutor moved the court and indeed the court acquitted the Respondent. There was no abuse of discretion on part of the trial magistrate acquitting the Respondent under Section 204 as read with Section 176 of the *Criminal Procedure Code*.
18. The Applicant has not persuaded me that the trial court committed any error to be revised by this court. I therefore find that the move by the Applicant cannot vitiate the acquittal of the Respondent because the amount was paid. Any dispute as to the loan can be addressed through a different forum and is not properly before this court.
19. In the circumstances, I find no reason to revise the finding of the trial magistrate.

Determination

20. I therefore make the following order: -



- a. The application for revision dated 29/8/2024 is hereby dismissed.
- b. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 5TH DAY OF NOVEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for the Applicant

Mr. Wahome for the Respondent

Court Assistant – Jedidah

