REPUBLIC OF KENYA

IN THE HIGHC OURT OF KENYA

AT CHUKA

MISC. CRIMINAL APPLICATION NO. 43 OF 2019

IN THE MATTER OF SECTION 162 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF AN APPLICATION FOR REVISION

BETWEEN

PETER MUNGAI KIRERA...1ST APPLICANT

MOSES NDUNG'U KIRERA..2ND APPLICANT

RULING

1. The application pending before this court is a Notice of Motion brought under **Section 362 and 364 of the Criminal Procedure Code**. The applicant seeks an order that the court do call for and examine the proceedings in **Criminal Case No. 1151/2013 Republic –v- Patrick Gitonga Harun** for the purpose of satisfying itself as to the legality correctness, propriety of the decision of Hon H.M. Siika, Resident Magistrate made on 4th December 2013 to dismiss the case and discharge the accused set aside the order then place the matter before magistrate for hearing and determination.

2. The grounds in support of the application are as set out on the face of the application and they are as follows.

a) The case in the court below concerns the estate of the late Shadrack Kirera

b) The applicants are administrators of the estate of the late Shadrack Njoka Kirera.

c) The interested party was charged with offence of forcible detainer contrary to section 91 of the Penal Code as count 1 and cutting down trees contrary to section 334 © of the Penal Code as count 2.

d) On 4th December 2013, the Honourable H.M Siika R.M, without any prompting is recorded as having said:-

" COURT- The court has noticed that the complainant herein PETER MUNGAI KIRERA has no locus standi to charges against the accused as the parcel MAGUMONI/ITUGURURU/244 is registered in his late father's name SHADRACK NJOKA KIRERA and he has never taken out letters of administration or a limited grant AD COLLIGENDA BONA. For the reason I dismiss the case and discharge the accused."

e) It is difficult to establish from the record how the learned trial magistrate "noticed" that the complainant lacked locus standi.

f) Locus standi as a concept is immaterial in the matter that was before the learned magistrate and most certainly of succession thereof. It is equally a mystery how the magistrate. In the absence of any evidence was able to reach the conclusion that the complainant had not obtained letter of administration.

g) The learned magistrate had no jurisdiction to "dismiss the case and discharge the accused" and would not invoke any provision of the law thereof.

h) The accused was not acquitted but discharged.

i) The order of the magistrate was and is a nullity.

The application is supported by the affidavit of Peter Mungai Kirera sworn on 5th December 2019. The gist of contention by the applicant is that the interested party had been the subject of **Criminal Case No. 1151/2013** where he was charged with two offences, namely:-

1) Forcible Detainer Contrary to **Section 91 of the Penal Code.**

2) Cutting Down Trees Contrary to Section 334(c) of the Penal Code.

On the first count the particulars are that;

> ***" Between the year 2011 and October 2013 at Itugururu Location, in Tharaka Nithi County being in possession of Land Parcel No. Magumoni/Itugururu/244 of peter Mungai Kirera on behalf of the family members without color of right held the possession of the said land in a manner likely to cause a breach of peace by cutting down the trees tilling and planting tobacco on the said land."***

On the 2nd count, the particulars are that between the year 2011 and October 2013 at Kaugu village, Itugururu Location within Tharaka Nithi County, jointly with others not before court, willfully and unlawfully cut down a total of 455 different species of trees all valued at Kshs.190,150.45 the property of Peter Mungai Kirera on behalf of the family members.

3. On 4th December 2013 the trial magistrate without any prompting made an order that –

> ***" The court has noticed that the complainant herein Peter Mungai Kirera has no locus standi to charges (sic) against he accused as the parcel Magumoni/Itugururu/244 is registered in his late father's name Shadrack Njoka Kirera and he has never taken out letters of administration or a limited grant ad colligenda bona. For this reason I dismiss the case and discharge the accused."***

The applicant was aggrieved by this order and has urged the court to exercise its supervisory jurisdiction under **Section 362 of the Criminal Procedure Code** and call for the lower court record to satisfy itself with the correctness of the order

4. The applicant urges the court to find that the order made by the trial magistrate was alien to criminal jurisdiction as the issue of locus standi applies in civil jurisdiction.

5. The applicant submits that the trial magistrate did not indicate the provision of the law under which she relied on to terminate the case on her own motion and discharged the accused who is the interested party in this case. He has raised an issue that in a charge of forcible detainer ownership is not an ingredient. That even if no letters of administration had been issued, the offence was committed.

6. The respondent filed written submissions which he also highlighted in court through Mr. Momanyi a prosecutions counsel. He had also filed an affidavit sworn on 25th February 2020 and also associated himself with the affidavit of the Interested party.

7. The gist of a contention by the respondent is that the applicant is guilty of latches as he has approached the court with in-ordinate delay. He submits that although there are no specific timelines for seeking orders of revisions, it has to be made within reasonable time. He has relied on various authorities and urges the court to find that a delay of seven years unreasonable and violates the right of the Interested Party under **Article 50(2) (e) of the Constitution**. He submits that litigation must come to an end. That the decision of the trial magistrate was correct as the charge of forcible detainer requires that a complainant be legally entitled to the land and in the case the owner was deceased. That the person named as the complainant had not taken out letters of administration.

8. I have considered the application and the averments in the affidavits and all the submissions. The issue which arises for determination is revision. The Constitution gives the High Court Supervisory Jurisdiction over **Subordinate Courts. Article 165 (6) & (7)** the Constitution provides:-

> ***" (6)The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***
>
> ***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."***

These powers are also provided under the **Criminal Procedure Code.** The powers of Revision are provided under S**ection 362 & 364 of the Criminal Procedure Code** as follows:-

"362. Power of High Court to call for records

> *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.*

363. ….

364. Powers of High Court on revision

(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;"

*Clearly, the court has jurisdiction under the Constitution and statute to revise the order before the Sub-ordinate court. The only question is whether the court will, exercise that jurisdiction. That discretion is to be exercised judicially in the light of the settled principles of the court with regard to the nature of order sought to be revised. The High Court has discretion and whether the decision is "**a finding, sentence or order which is manifestly incorrect.**"*

It is trite that, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts of omissions but should not be employed as a substitute for an appeal.

In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person. This was the holding by the High Court of Malaysia in **Public Prosecutor vs. Muhari bin MohdJani and Another [1996] 4 LRC 728 at 734, 735:**

"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 untrammeled and free, so as to be fairly exercised according to the exigencies of each case".

Turning now to the matter at hand, the duty of this court is to satisfy itself as '*to the correctness, legality, or propriety of any finding, sentence or order recorded or passed'.* The interested party was charged with the offence of Forcible Detainer contrary to section 91 of the Penal Code which reads as follows:

"Any person who, being in actual possession of land without colour of right, holds possession of it, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land is guilty of the misdemeanour termed forcible detainer;" the second count being;

The second count was:-

" Cutting trees contrary to section 334(c) of the Penal Code which provides that:

" Any person who willfully and unlawfully sets fire, cuts down , destroys or seriously or permanently injures – (c) any standing trees, saplings or shrubs whether indigenous or not under cultivation, is guilty of a felony and liable to imprisonment for 14 years."

The case was dismissed by the trial court on it's own motion after having noticed that the complainant lacked locus standi to charges against the accused as the parcel MAGUMONI/ITUGURURU/244 was registered in his late father's name Shadrack Njoka Kirera and that he had never taken out letters of administration nor grant *Colligenda Bona*. And it is for this reason that the court dismissed the case and thereafter discharged the accused.

The main questions that arise from the holding of the court is whether the reason given by the court holds in the field of criminal litigation

The respondent argued that for the offence of forcible detainer to hold, the complainant thereof needs to show that he/she is a person entitled by law to the possession of the land thereof whilst in regard to the second count, the respondent further argued that the only way through which the applicant could have been in possession of the land would have to be by acquisitioning the grant of letters and or the grant ad litem

Section 91 of the Penal Code only requires the aspect of possession.

The question that therefore arises is determining the difference between possession and ownership.

According to the Black's Law dictionary, the word possession means to occupy in person; to have in one's actual and physical control; to have the exclusive detention and control of; whilst ownership means the complete dominion, title, or proprietary right in a thing or claim.

In the case of ***Richard Kiptalam Beingo –v- Republic (2015) eKLR:***

It was stated:-

" A literal reading of Section 91 of the Penal Code shows that the prosecution will only prove an offence of forceful detainer against an accused person if it demonstrates that:

> ***(a) A person has actual possession of land;***
>
> ***(b) The person has no right over the land***
>
> ***(c) The act of possession is against the interests of the legal owner or the person legally entitled to the land, and,***
>
> ***(d) The act of possession of the land, therefore, likely to cause a breach of peace reasonable apprehension of the breach of the peace.***

It is apparent that an offence under Section 91 of the Penal Code \revolves around the possession and ownership of land.

The issue of ownership was discussed in the case of ***Albert Ouma Matiya –v- Republic H.CCR Appeal No.8/2012,*** Justice Kimaru where the Judge held that in order to establish the charge of forcible detainer under **Section 91 of the Penal Code:-**

" The prosecution must establish that the accused is in actual possession of the parcel of land which he has no right to hold possession of. The prosecution will establish this if it is adduces evidence which proves that the accused has no title or legal right to occupy the land. Secondly, the accused must be in occupation of the land in a manner that is likely to cause reasonable apprehension that will be a breach of peace against the entitled by law to the possession of the land. (underlining mine)."

" As noted the issue of ownership of the land in issue had not been resolved and as at the time of the appellant's prosecution it was pending for determination in a civil court; it cannot therefore be said that the prosecution had proved that the appellant had no title or legal right to occupy the land."

From the wording of **Section 91 of the Penal Code** and what is emerging from the above decision, where the person is charged with the offence of forcible detainer, and the issue of ownership of the land cannot be established to the standard of beyond any reasonable doubt required in criminal trials and conviction, it cannot be sustained.

The claim of legal ownership by the complainant and not possession must be established. On the other hand the person commits the offence if he is in possession of the land without colour of rights and against the interest of the legal owner or the person legally entitled to the land.

The power of the office of the Director of Public Prosecution was the subject of discussion in the case ***Director of Public Prosecution vs Nairobi Chief Magistrate's Court & Another (2016) EKLR.*** In that case the learned judge was discussing the right of a complainant who wished to withdraw a complaint without the consent of the prosecution. This is how the court discussed the power of DPP which is relevant here: -

"Regarding the proper procedure for withdrawal of a complaint therefore, case law has also provided a particular direction. Dulu J in Johnstone ***Kassim Mwandi & Another vs Republic [2015] eKLR*** *stated in that regard: -*

"The court has no power to withdraw a criminal case on the direct request of the complainant, unless he/she is the prosecutor. Such request has to pass through the DPP."

Similarly, Nyakundi J in ***Republic vs Faith Wangoi [2015] eKLR*** *held:*

"I am of the considered view and in applying the law that the form the instructions should have taken in withdrawing a complaint is through the prosecutor. In practice the courts have always acted on the word of the prosecuting counsel or public prosecutor who controls and guides criminal proceedings."

I agree with the Learned Judges' dispositions on the subject and I dare add that it only makes sense that although a person who reports a crime may seek to withdraw his complaint, the DPP, in whose name the criminal proceedings began and could be sustained, must be a part of the withdrawal process in a considerable manner. Indeed, the Constitution grants the DPP powers to institute, undertake, take over, continue and discontinue proceedings in ***Article 157 of the Constitution*** *which provides thus:-*

"….(6)The Director of Public Prosecutions shall exercise state powers of prosecution and may:-

> ***(a) Institute and undertake criminal proceedings against any person before any court other than a court martial in respect of any offence alleged to have been committed."***
>
> ***(b) To take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority or to discontinue at any stage before judgment is delivered any such criminal proceeding instituted it undertaken by himself or any other person or authority."***

The power to continue proceedings must emphatically include the powers to rightfully oppose applications for withdrawal of complaints as such applications, if unopposed, may cause proceedings to be improperly discontinued.

In a major twist in regard to this case, the prosecution never withdrew the criminal case 43/2019, the court instead terminated it on its own motion. In the same breadth, in the current application, the prosecutor being the respondent herein, points out that the case has been over taken by events and thus they are not ready to continue litigating the matter.

Criminal process is not all and only about the fair trial of the accused; there is also the interest of the complainant victim of the criminal offence as attested to the emerging judicial system of recognition of the victim's interest by such legislation as Victim Protection Act No. 17 of 2014, particularly **Section 4 (2) (b)** thereof) and the very provision for victim impact statements in criminal proceedings.

The issue herein is whether the circumstances of the matter does justify a revision by a superior court from subordinate court. On this issue I draw guidance as elucidated in the case in the case of **Republic –vs- James Kiarie Mutungei [2017] eKLR** Nyakundi J held thus:

> ***"The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or*** *suo moto* **made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question...."**

Trial magistrate is an impartial arbiter and he/she cannot jump into the arena of conflict. There is no law which gives jurisdiction to trial magistrate to terminate a case pending before her on her own motion and unilaterally discharge the accused. Although there are provision in the **Criminal Procedure Code** which allow a magistrate to discharge an accused person, such orders can only be made upon an application by state or on an objection by the accused e.g an objection that a charge sheet is defective. In all these situations, the court has to be moved. Where the magistrate decides to discharge an accused, then the provision of the law must be clearly stated. The reason for discharge must be stated as it forms the basis for termination and the action must be based on an existing provision of the law.

I find that the order made by the trial magistrate was made without jurisdiction and was incorrect and irregular and is good for revision by this court. The magistrate was in error to state that the applicant required a grant of letters of administration which was not the relevant grant in the circumstances. The relevant grant was ***"ad litem."***

I have considered whether the remedy is to order the matter to proceed. The complainant (PW1) when he testified before the trial court stated that the land be longed to his deceased father and he had not obtained the letters of administration therefore the title deed was in the name of the deceased. What comes to my mind is that the charges which were preferred against the accused could not be sustained in the manner in which they were presented. The law makes it an offence for a person to intermeddle with the estate of a deceased person. **Section 45 of the Law of Succession Act** provides:

> ***" (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.***
>
> ***(2) Any person who contravenes the provisions of this section shall- (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."***

The effect of this section is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized by the law to do so. Such authority emanates from a grant of representation and any person who handles estate without authority is guilty of intermeddling and makes it a criminal offence. The alleged actions by the interested party disclose the offence of intermeddling under **Section 45(2) of the Law of Succession Act**. The actions violated **Section 45(2)** and brought them within the preview of the Criminal Law. It would be futile to remit the matter to the magistrate for hearing without the charges being amended.

I must also consider the issue of revision in the light of the fact that the impugned order by the trial magistrate was issued over seven years ago. The respondent has submitted that the charges have been overtaken by events and that the application ought to have been filed without unreasonable delays. He submits that **Article 50 (2) (e)** of the Constitution gives an accused person the right to a fair trial which includes the right – ***"to have the trial begin and concluded without unreasonable delay",*** He has relied on the case of ***Director of Public Prosecutions –vs- Peter Mucharo Kombo & Another (2018) eKLR*** where the court held-

> ***As regards to the case of revision of finding, sentence or order of the trial coaurt, ther is no time limit for the application for revision under Section 362 of the Criminal Procedure Code, but consistent with the constitutional principle of justice without undue delay, the application must be made within a reasonable time.***

The counsel has also relied on the case of ***Republic –v- Attorney General & Another, Baps International Limited (Interested Party) Ex parte (2020) eKLR*** where it was stated-

> ***The concept of what is reasonable time is flexible, and will depend on the circumstance of a case, as held in Law Society of Kenya v Attorney General &2 others [2016] eKLR. Relevant circumstance include the nature of the matter to which the inaction relates, any mitigating circumstances on the part of the decision make, and adverse consequences of delay, and the need to ensure fairness. In the present case it is not disputed that the 2nd Respondent sought to extend the time in which to issue directives on change of name after a period of eight (8) years from the date of registration of the Applicant. The 2nd Respondent did not give any reasons for the delay in so acting, and the only explanation given was that there was an inadvertent error on its part in registering the name.***

The applicant submits that it is the respondent who has created the mess. The Interested Party contends that the applicant did not file an

appeal or application for revision in good time and has not offered an explanation for the delay. He avers that the application is an after thought.

The law does not give a time frame for filing an application for review under **Section 362 & 364 of the Criminal Procedure Code**. The constitutional principle under **Article 50 (2) (e) of the Constitution** is that criminal matter must begin and conclude without unreasonable delay. The applicant has not offered any explanation for the delay. I hold he view that a delay of seven years which is not explained is no doubt unreasonable. The applicant ought to have filed the application timeously. It is a principle of Equity that delay defeats equity, Equity aids the vigilant and not the indolent. The applicant slept then on his rights for too long. To order the case to be revived after a period of seven years goes against the Constitutional principle that a trial should start and conclude without unreasonable delay. The Interested Party has a right to a fair trial which this court should guard. The application has been overtaken by events due to the delay. **Section 364 Criminal Procedure Code** gives this court wide powers on revision Under Article **259(8) of the Constitution** it is provided that;

> "***If a particular time is not prescribed by this constitution for performing a particular act, the act shall be done without unreasonable delay."***

The issue of unreasonable delay has been discussed variously by the Court of Appeal and this court. In the case of ***Charo Karisa Salim -v- Republic Court of Appeal, Mombasa (2016) eKLR*** the court considered the violation of the right of accused to a fair trial under **Section 77(1) of the Retired Constitution** owing to in ordinate delay. The court stated;

> " **Section 72(5)** of the former Constitution recognized the right of an accused person to be tried fairly within a reasonable time; and that unless charged with a capital offence. The accused would be released either unconditionally or upon reasonable conditions, which included conditions that would ensure that he appeared at a later date for trial or for proceedings preliminary trial.

By way of comparison, **Article 50(2) (e) of the Constitution** of Kenya, 2010, simply recognizes the right of an accused person to a fair trial which includes the right ***"to have the trial begin and conclude without unreasonable delay."*** The Constitution and the former constitution do not define the period that would constitute unreasonable delay. The Constitution does not provide for the consequences of failure to conclude a trial without unreasonable delay.

In other jurisdictions with similar provisions in their laws the courts have, through judicial innovation developed an interpretation that weighs various factors before setting a presumptive ceiling beyond which the delay would be considered unreasonable. Section 11(b) of the Canadian Charter of Rights and Freedoms, for instance, provides in part that;

> ***" 11. Any person charged with an offence has the right***
>
> ***a. ………………………………***
>
> ***b. To be tried within a reasonable time:***

This provision has been the subject of far-reaching judicial interpretation and innovation. In the famous **Canadian Court case of R-v-Morin (1992)** S.C.R. 771, the court declared as a guide that the threshold of a reasonable time within which a criminal trial must be concluded is 8 to 10 months in the provincial courts (trial courts) and an additional 6 to 8 months in the superior courts, (dealing with trials and appeals), from the date the accused is arraigned before the court that is a total of 14 to 18 months. Just this month, on 8th July 2016 the same Supreme Court, in ***Jordan -v- Republic S.C.C 27 of 2016***, where the appellant's trial had been delayed for 4 years between charges and the end of trial, by a majority of 5-4 set new framework under **section 11 (b)** aforesaid, holding that it would be a rebuttable presumption of unreasonable delay if the accused person was to wait for his trial to be concluded for a period in excess of 18 months in cases tried in the provincial courts and 30 months for cases in the superior courts, thereby expanding the presumptive ceiling set in the **Morin** case (supra).

The presumption of unreasonableness would be rebutted if there are exceptional circumstances which are shown to be beyond the Crown's control. The court also held that where it is demonstrated that Section **11(b)** has been infringed, the remedy is to stay proceedings and set the accused at liberty.

We have cited the two Canadian authorities merely to illustrate the importance of timely dispensation of justice as one of the ballmarks of a free and democratic society, to draw a parallel with the provisions of Article 50 (2) (e) aforesaid and to confirm that the Article is not a mere pious aspiration on papers; that by requiring that a trial must begin and conclude without unreasonable delay, the people of Kenya through the Constitution expect the criminal justice system to bring suspects to trial expeditiously because delays in a trial have far reaching ramifications to the accused persons, the victim, the families, witnesses and even the general public. Article 50 is therefore an important safeguard to prevent any oppressive incarceration and to minimize anxiety on the part of the accused person. It is perhaps informed by the time honoured Chapter 40 of the 1251 Magna Carta which stipulated that;

> ***" to no one will we sell, to no one deny or delay right or justice."***

It appears to us that the same complacency displayed in the trial of this appellant is no different from the experience elsewhere. The Judges in **R-v- Jordan** case (supra) observed that;

> ***" (4) Our system, however, has come to tolerate excessive delays. The circumstances in this appeal are illustrative. Notwithstanding a delay of over four years in bringing a drug case of modest complexity to trial, both the trial judge and the Court of Appeal were of the view that the appellant was tried within a reasonable time. Their analyses are reflective of doctrinal and practical difficulties plaguing the current analytical framework governing Section 11(b). These difficulties have fostered a***

culture of complacency within the system towards delay."

The Court of Appeal declined to order a retrial and instead allowed the appeal and set the appellant free.

The delay in this matter prejudices the interested party. The ramifications of the delay determines whether or not the proceedings are to be halted. The interested party has averred in his affidavit that he stands to be lightly prejudiced and suffer great loss.

The Court of Appeal in Julius Kimani Mbugua -v- Republic quoted by ***Justice Mumbi Ngugi in Daniel Kipkemoi- v- Republic (2018) eKLR*** identified the principles to be considered in determining a matter where it is alleged that there has been inordinate delay that has violated the right to fair trial. It is noted that the right to a trial within a reasonable time is part of international human rights law. It is not, however an absolute right as it must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.

The court observed that in determining whether the right has been violated, the approach is not by mathematical or administrative formula but rather by judicial determination which require the court to consider all the relevant factors within the context of the whole proceedings. What is ***"reasonable time"*** would need to be considered against the particular circumstances of each case, in the context of the domestic legal system, and against the prevailing economic, social and cultural conditions.

The court further enunciated the principle that the allegation that there has been inordinate delay should be raised at the earliest opportunity, but that the right is to trial without undue delay. It is not a right not to be tried after undue delay. Even where it is demonstrated that there was inordinate delay, if the applicant is already convicted, the quashing of a conviction is not considered a normal remedy. The court would be required to consider another appropriate remedy, taking into account the fact that the applicant has been proved guilty of a serious crime, and it would be inappropriate to unleash such a criminal back to society.

In this case, the proceedings were terminated. The applicant has come to court with unreasonable. He has relied on Embu High Court Civil Case No. 6/2016 which was concluded on 4/10/2016 and temporary letters of administration issued on 5/7/2018. He took over four and two years respectively to move the court. He is clearly guilty of latches and unexplained inaction.

The fact that there is no time frame for seeking revision **under Section 362 of the Criminal Procedure Code**, as a general rule the party must move the court without unreasonable delay. I hold that the delay of seven years which has not been explained is unreasonable. The court must balance the rights of the interested party and those of the applicants. The revision orders as provided under **Section 364 (1) (b)** are:-

> ***" In the case of any other order other than order of acquittal, alter or reverse the order."***

The power to institute and undertake criminal proceedings as well as to take over and continue any such criminal proceedings is bestowed on the Director of Public Prosecutions (D.P.P.). This is under **Article 157** of the Constitution (supra). It is upon the D.P.P. to decide how to continue the prosecution as the powers of this court are limited to alter or reverse the impugned order. However, since this matter has come to my attention, I should deal with it in view of the apparent delay in bringing the application. The Director of Public Prosecution has stated that the charges have been overtaken by events. This does not display a willingness to continue with the proceedings.

In conclusion:

I order that;

1) The order by the trial magistrate issued in ***Criminal Case No. 1151/2013 Republic -v- Patrick Gitonga Harun*** which dismissed the case and discharged the accused is reversed and set aside.

2) There was unreasonable and unexplained delay in bringing this application, the charges as presented were not proper for the reasons which I have stated and may have been overtaken by events. There may be other legal alternatives. I find that the prayer for the court to order the matter to proceed is without merits as it will violate the rights of the interested party to a fair trial. That prayer is dismissed.

Dated, signed and delivered at Chuka this 2ND day of March 2021.

L.W. GITARI

JUDGE

2/3/2021

Ruling has been read out in open court.

L. W. GITARI

JUDGE