



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**[CORAM: A. C. Mrima, J.]**

**MISC. CRIMINAL REVISION APPLN. NO. 1 OF 2019**

**JOHN MWIKWABE MURIMI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. **John Mwikwabe Murimi**, the Applicant herein, was charged in *Kehancha Senior Principal Magistrate's Court Criminal Case No. 466 of 2018* (hereinafter referred to as '**the Criminal Case**'). The Applicant faced the charge of *Greivous Harm*. The particulars of the offence were that '*On the 7<sup>th</sup> day of May 2017 at Kombe village in Kuria West Sub-County, within Migori County, unlawfully did greivous harm to Fred Gati.*'

2. The Applicant denied the charge and was tried. At the close of the prosecution's case the trial court, *Hon. L. N. Mesa Principal Magistrate*, found that no *prima facie* case had been established by the prosecution and acquitted the Applicant under **Section 210** of the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya.

3. The court however made the following further order: -

**Nevertheless, the evidence of the prosecution witnesses established a prima facie case for the offence of criminal negligence contrary to Section 243(e) of the Penal Code for which he is placed on his defence.**

4. It is that further order that elicited this revision.

5. The Applicant moved this Court by way of a Notice of Motion dated 22/02/2019. It was filed on 22/02/2019. The application sought the following orders: -

**1. THAT this application be certified urgent and heard ex-parte in the first instance.**

**2. THAT the court file in Principal Magistrate Court at Kehancha Criminal Case No. 466 of 2018 (Kehancha Law Courts) be called to the High Court of Kenya at Migori for examination and revision.**

**3. THAT the Honourable Court be pleased to examine and revise the order issued by the Honourable trial magistrate L. N. Mesa (PM) Principal Magistrate at Kehancha Criminal case No. 466 of 2018 putting the accused person on defence for a charge he did not take plea on requiring him to defend himself on a different offence and substitute it with an order of no case to answer and accordingly acquit the accused persons of all the charges.**

**4. THAT pending the hearing and determination of the instant Revision application there be a stay of the proceeding in the Principal Magistrate's Court Criminal Case No. 466 of 201 (Kehancha Law Courts) Republic vs John Mwikwabe Murimi.**

6. The application was supported by the affidavit of the Applicant.

7. Directions were taken and the application was heard by way of oral submissions. **Mr. Mwita Kerario** appeared for the Applicant whereas **Mr. Kimanthi**, Learned Senior Principal Prosecution Counsel appeared for the Respondent. Counsel for the Respondent did not oppose the application.

8. I have carefully perused the application. The crux of the matter is whether the trial court was within the law in placing the Applicant on his

defence on a charge which the Applicant was not, in the first instance, formally charged with.

9. The power of this Court to supervise the subordinate courts on revision is provided for in **Article 165(6)** and **(7)** of the **Constitution** and in **Section 364** of the **Criminal Procedure Code**. The purpose is to ensure checks and balances on the administration of justice in the subordinate courts. **Article 165(6)** and **(7)** states as follows: -

**(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 considered appropriate to ensure that fair administration of justice.**

10. **Section 364** of the **Criminal Procedure Code** provides as follows: -

**(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.**

**c) in proceedings under section 203 or 296(2) of the Penal Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the Court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.**

**(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.**

**Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.**

**(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.**

**(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.**

**(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**

11. A person can only be charged before a Court of law for an offence known in law. **Article 50** of the **Constitution** provides for the right to a fair trial. The provision provides an array of rights to an accused person. The law hence requires that every trial must be held within the confines of not only the said Article but the entire **Constitution** as a whole.

12. Some of the rights under **Sub-Article (2)** includes the right of an accused person to be informed of the charge and be provided with sufficient detail to answer it. That is under **Sub-Article 2(b)**. **Sub-Article 2(c)** provides that an accused person must be given adequate time and facilities to prepare a defence. **Sub-Article 2(j)** calls for evidence in support of the charge to be provided to an accused person in advance.

13. In this case the Applicant was rightly charged with the offence of grievous harm. It is an offence known in law. He was tried and at the close of the prosecution's case the court found no evidence to place the Applicant on his defence. The court rightly acquitted the Applicant under the law.

14. I will now ascertain whether the Applicant was rightly placed on his defence for the offence of *criminal negligence* contrary to **Section 243(e)** of the **Penal Code**. By juxtaposing the provisions of the **Constitution** which I have referred to above with the charge of criminal negligence, it comes out clearly that there is a clear infringement of the **Constitution**. None of the said provisions of the **Constitution** were in any way complied with.

15. I must however point out that a trial court may at the end of a trial convict an accused person on a charge which the accused person was not charged with in the first instance. That is the realm of cognate offences. However, there are clear conditions which must be fulfilled for a court to convict on a cognate offence. (See **Migori High Court Criminal Appeal No. 68 of 2018 Joseph Amunga Ochieng vs. Republic (2019) eKLR**).

16. Having carefully considered the matter before me, I, with utmost respect, do not find the order by the trial court placing the Applicant on his defence on a charge he was not formally charged with to be in tandem with the law. The order transgresses **Article 50** of the **Constitution**. Any further order which may be made on the basis of the impugned order can only remain a nullity. That is why the proceedings in the Criminal Case must be terminated.

17. Consequently, the following final orders do hereby issue: -

**(a) The order made on 17/01/2019 in Kehancha Senior Principal Magistrate's Court Criminal Case No. 466 of 2018 placing the Applicant herein on his defence for the offence of criminal negligence is hereby declared a nullity and is accordingly set-aside.**

**(b) The Applicant herein who is the accused person in Kehancha Senior Principal Magistrate's Court Criminal Case No. 466 of 2018 shall stand acquitted under Section 210 of the Criminal Procedure Code for the offence of grievous harm. He is hereby set at liberty forthwith unless otherwise lawfully held.**

**(c) Any security documents deposited in the trial court shall be released to the depositor.**

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 10TH DAY OF FEBRUARY, 2020.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered in open Court and in the presence of: -**

**Mr. Mwita Kerario** Counsel instructed by Messrs. Kerario Marwa & Company Advocates for the Applicant.

**Mr. Kimanthi**, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

**Evelyne Nyauke** - Court Assistant