



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT CRIMINAL REVISION NO. 4 OF 2020

DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT

-VERSUS-

PERRY MANSUKH KANSAGARA.....1ST RESPONDENT/ACCUSED

VINOJI JAYA KUMAR.....2ND RESPONDENT /ACCUSED

WINNIE MUTHONI MUTISYA.....3RDRESPONDENT/ACCUSED

TOMKIN ODO ODHIAMBO.....4TH RESPONDENT/ACCUSED

JACINTA WERE.....5TH RESPONDENT/ACCUSED

WILLIEC OMONDI WERE.....6TH RESPONDENT/ACCUSED

LYNNETE JEPCHIRCHIR CHERUIYOT.....7TH RESPONDENT/ACCUSED

JOHNSON KAMAU NJUGUNA.....8TH RESPONDENT/ACCUSED

LUKA KIPYEGEN.....9TH RESPONDENT/ACCUSED

JUDGMENT

Background

1. This is the third time an application has been made to this High Court in connection with the well-known and highly publicised “*Solai Dam Tragedy case*”. That case in the lower court concerns the privately owned Patel Dam that collapsed on 9th May, 2018, resulting in the raging waters cascading down in a torrent of destruction of downstream villages. In the end, the dam-burst led to 48 known deaths of villagers, and destruction and damage to hundreds of others whose lives were forever altered by the incident. There was a huge public outcry and the matter was of great public interest nationally.

2. Following the incident, the Director of Public Prosecutions instituted criminal proceedings against the accused persons in **MCR No 977 of 2018 R v Perry Mansukh Kasangara & 8 Others**. The charges are stated as follows. As against the 1st -9th Accused 48 counts of manslaughter contrary to Section 202 as read with section 205 of the Penal Code; as against the 3rd -9th Accused a charge of official neglect of duty contrary to section 28 as read with section 36 of the Penal Code; as against the 1st, 2nd, 6th and 7th Accused, a charge of Failing to prepare an Environmental Impact Assessment Report contrary to section 138(b) of the Environmental Management and Conservation Act.

3. In this application, the DPP approached to this court by a letter dated 3rd February, 2020, under certificate of urgency, asking that this Court should:

“...call for and examine the record of MCR No 977 of 2018, Naivasha Law Courts for the purpose of satisfying itself as to the correctness, legality or proper propriety of the trial court’s finding and as to the regularity of its proceedings on the

following grounds...”

The letter was premised on the revision provisions of sections 362, 363 and 365 of the Criminal Procedure Code.

4. There followed fifteen grounds set out in the said letter. The gist of the application is that the DPP is dissatisfied with a ruling dated 3rd February, 2020, by Hon K Bidali, in which the trial court dismissed the case and acquitted the accused persons ostensibly for failure by the prosecution to avail itself to prosecute the case on the day set for the hearing of the trial.

5. On 4th February, 2020, I certified the matter as urgent, called for the lower court file to be availed, and directed the DPP to serve the other parties so as to appear before me for further directions on 11th February, 2020.

6. On 6th February, 2020, the DPP wrote a second letter amending the earlier revision application, and invoking the provisions of Articles 2, 3, 10, 26, 27, 45, 47,48, 50, 159, and 165 of the Constitution, 2010. The expansion of the foundation of the original application from a narrow revision application had the appearance of a quasi-constitutional application.

7. As directed by the court, the respondents filed their responses on diverse dates by way of replying affidavits or grounds of opposition, and they also filed written submissions. The victims filed a digest of authorities with commentary highlights in support of their right to participate in the trial as victims. A hearing was held on 18th February, 2020.

8. Mr Muteti and Ms Mwaniki represented the applicant. Mr Arusei together with Mr Masinde, Mr Mburu and Mr Kiget represented the 1st and 2nd respondents. Mr Mburu also represented the 3rd and 4th respondents. Mr Owuor represented the 5th respondent. Mr Awando represented the 6th Respondent; Mr Omumia represented the 7th respondent. Mr Mburu held brief for Mr Karanja for the 8th respondent; and Mr Malenya held brief for M/s Chimei and Barongo for the Victims.

9. There was no representation for the 9th respondent – indicated in the impugned ruling as James Kavita – as Mr Masinde and the DPP indicated that the said ruling contained his name despite there being a substituted charge sheet indicting one Luka Kipyegon, who was, however, not named a party to the proceedings in the trial court. I have, consequently, named Luka Kipyegon as the 9th Respondent in this judgment.

10. At the hearing all parties made oral submissions.

The Applicant’s representations

11. The applicant’s case before this court has two major prongs. The first is that despite, or rather in addition to, the provisions of Sections 362-367 of the CPC, this Court has a broader constitutional jurisdiction to entertain the revision application; the second is that given that there were serious irregularities in the lower court’s proceedings, this Court has no option but to intervene, as this is not a case that properly fits into a revision nor is it suitable for appeal.

12. On jurisdiction, the applicant invoked Article 2 of the constitution essentially pointing out that the constitution is the supreme instrument for the governance of the nation, that it binds all persons; that no authority may be exercised except in accordance with the constitution; and that its validity cannot be questioned. As regards Article 10, that all persons are bound by the constitution whenever they apply or interpret it, enact or apply or interpret any law or make or implement public policy decisions.

13. The applicant also places heavy reliance on Article 165(3), (6) and (7) of the Constitution. Sub-Article (3) gives the court unlimited original jurisdiction in civil and criminal matters; whilst sub-Article 6 invokes the supervisory jurisdiction of the High Court over subordinate courts. In particular, it was argued that sub-Article 7 entitles the Court to call for the record of proceedings of any subordinate court or authority and make any order or give any direction it considers appropriate to ensure the fair administration of justice.

14. As I understood it, the state was saying that intrinsic to the constitutional argument on the jurisdiction of the courts, is the assertion that such jurisdiction cannot be limited to that circumscribed by the CPC; That the people of Kenya, in exercising their sovereign power in passing the Constitution, deliberately delegated unlimited constitutional authority to the courts to administer justice in the manner provided under Article 165; Thus, that Article 165 overrides or at least runs parallel with the provisions of the CPC.

15. I will return to a discussion of what this understanding means later.

16. On irregularities of the process applied in the trial court, the applicant took the court through the proceedings from 25th July, 2019 to up to 3rd February, 2020, when the trial court’s impugned decision was rendered.

17. The applicant alleges that the proceedings of the trial court show that:

- On 25th July, 2019 the Advocate for the 1st and 2nd Respondents informed the court that he was not ready to proceed as he had reached out to the Office of the Director of Public Prosecutions for Plea Bargaining in the spirit of Article 159 of the Constitution of Kenya, 2010. The hearing was thus adjourned to the 2nd to 6th September, 2019;
- On the 2nd September, 2019 the trial court was informed that the Republic wanted more time to pursue the issue of the Plea Bargaining Agreements which is governed by Section 137A to 137O of the Criminal Procedure Code The hearing was therefore adjourned to the 3rd, 5th and 6th December, 2019.

- At the mention on 4th November, 2019, there being several applications before the trial court, the following directions were given by the court:

"Application to be served to the State plus all accused persons with the N.O.M together with the affidavits withdrawing instructions M.3.12.19 for directions".

- This clearly shows that the trial court vacated the hearing date earlier fixed for 3rd December, 2019.
- On the 3rd December, 2019 the trial court instead of giving directions in accordance with its order of the 4th November, 2019, reserved the matter for Ruling despite having been informed of the Prosecuting Counsel's illness (see hand written proceedings at the back page of page no. 404).

18. The DPP argues that on 3rd December, 2019, the matter was scheduled for Mention for directions and not for a hearing. The Plea Bargaining proposal made to the Office of the Director of Public Prosecutions by the 1st and 2nd Respondents having not been concluded as per Section 137 A to 137 0 CPC, and the Respondents having not informed the trial court of the withdrawal of their offer, they misrepresented the facts to the court when they indicated they were ready to proceed with the hearing. According to the DPP, this amounted to misconduct and unethical behavior by Counsel for the 1st and 2nd Respondents.

19. According to the DPP, on that same date – 3rd December, 2019 – there were pending applications on Victims Representation before the trial court and thus the State would not have completed the mandatory requirement "shall" under Section 137 D (c) CPC without clarification as to who was authorized to represent the victims noting that there were numerous applications before court.

20. The DPP thus questions: how could the matter have been ready to proceed without the issue of victims' representation having been resolved or a chance given to the victims to have the representatives of their choice in court? The DPP contends that under Article 50(7) of the Constitution, there is a constitutional right for a victim to an intermediary as had been sought by the Human Rights Commission.

21. The State further contends that there was no application for adjournment by either party; that no order was given by the trial court to the State to proceed with the matter despite the submissions by one defence counsel that the court directs that the matter proceed there being a competent Prosecutor in court; that the trial court was silent on the matter of illness of one of the Prosecuting Counsel having been duly notified as shown in the hand written proceedings on the back page of 404.

22. On 5th December, 2019, according to the proceedings, an explanation was further advanced as to the absence on the 3rd December, 2019, of all the Prosecuting Counsel, and the trial court misdirected itself and failed to consider the explanations. (see decision in the Role of Counsel in assisting the courts).

23. According to the state, Section 210 of the Criminal Procedure Code on acquittal cannot be made applicable where no evidence had been tendered and neither had the prosecution started or closed its case. Thus the acquittal was highly irregular and illegal as no trial had been held and there was no examination of the evidence. An acquittal cannot therefore stand in law. In this regard, he cited the case of **Reg v Connolly [1964 AC] 1277** where the Court of Appeal in England stated:

"In our judgment a judge is not entitled to refuse the trial of any indictment, be it a first or second indictment, merely because he thinks the trial ought not proceed. He may do this only in accordance with established principles. To hold otherwise involves dangers too obvious to state. Having said in Reg v Middlesex Quarter Sessions (Chairman) Ex parte Director of Public Prosecutions [1952] 2QB, 758, 767, that 'the prosecution had a right to present their case,' Lord Goddard CJ, added in Reg v London (County) Quarter Sessions, Ex parte Downes [1954]1QB. 1,6: Once an indictment is before the court the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) nolle prosequi is entered by the Attorney General, which cannot be done before the indictment is found; or (d) if the indictment disclosed an offence which a particular court has no jurisdiction to try..."

24. In addition, the DPP pointed out that it was curious that in its decision, the trial magistrate determined that:

"I hereby acquit the accused persons under Section 210 of the Criminal Procedure Code".

Yet, in so doing, the trial magistrate also erroneously acquitted an individual, Julius Kavita – who had not yet even taken plea – and yet left out the correct 9th accused person Lucas Kipyegon. For this reason, the DPP argues, the proceedings against the latter, Lucas Kipyegon, are still active.

25. The DPP submitted that the trial court's above order was further irregular as the trial magistrate did not state for which offences or counts he had acquitted the accused persons, as the accused persons were all charged with 48 counts of Manslaughter; and in addition, Accused persons 3 to 9 were also charged with the offence of Neglect of Duty; and Accused persons 1, 2, 6 and 7 were also charged with the offence of Failing to Prepare an Environmental Impact Assessment Report. The acquittal was thus defective as incomplete.

26. The DPP cited the case of **R v Hasmukh Meghji Shah Nairobi HCCCr Rev No 35 of 1983** where O'Kubasu and Todd (then JJs) stated as follows on section 210 of the CPC on acquittal:

"The above section applies where the prosecution have called witnesses to testify against the accused and after the close of the prosecution case. Clearly that was not the position in the present case. Hence the respondent was not acquitted under the

above section”

Counsel sought to show that the acquittal in the present case was done under section 210 CPC yet no witnesses were called nor did the prosecution close its case. Accordingly, that the acquittal was an irregularity.

27. In summary, the DPP’s case was that: Parties are bound by their pleadings or the positions they asserted during the proceedings; that the prosecution has a right to present its case and once an accused person is arraigned the trial must commence; that an acquittal under Section 210 of the CPC can only occur when a trial has commenced and evidence tendered; that the effort to execute a speedy trial should not be equated to or lead to a bungled trial; that in dismissal of a suit for want of prosecution, the delay must be prolonged and inexcusable; that integrity of the process in determining the question of delay is critical; that the High Court has inherent powers in criminal matters and can, in its revisional jurisdiction, always grant a suitable relief; and that if the court interferes with the trial court’s decision, it can consider the principles applicable in ordering a retrial

28. For all these reasons, and in light of the above alleged illegalities and the irregularities in the proceedings, the DPP prays that this Court do set aside the irregular order passed by the trial court on the 3rd February, 2020. He further seeks an order that file be remitted back for the trial to proceed to its logical conclusion before another court of competent jurisdiction under the laid down principles for vitiation of conviction.

29. In respect of retrial, the DPP cited the case of **Alex Kinyua Murakaru v R [2015]eKLR** which summarized the principles for ordering retrial stated in the cases of **Fatehali Manji v Republic [1966]EA 343**, and **Aloys v Uganda [1972]EA 469** as follows:

“i. That, in general, a retrial will be ordered when the original trial was illegal or defective.

ii. That a retrial will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial.

iii. That it does not follow automatically that a retrial will be ordered where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame.

iv. That each case must depend on its own particular facts and circumstances.

v. And that, an order for retrial should only be made where the interests of justice require it and it should not be ordered where it is likely to cause an injustice to the accused person”

The Victims’ Submissions

30. The victims support the DPPs case through the oral submissions made by Mr Malenya. They relied on the digest of authorities filed. The thrust of their case is that revision will lie where there is a gross error. Such error includes that in this case, the victims have not been heard at all, despite being parties with an interest in the case. They referred to the description of victims as held by the Court of Appeal in the case of **Joseph Lendrix Waswa v R [2019]eKLR** where it was stated:

“The responsiveness of judicial and administrative process to the needs of victims should be facilitated by:

...allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings...

...[noting] that the concept of a watching brief in a criminal trial where an advocate for the victim does not play any active role in the trial process is now outdated...[and that]

The rights granted to victims of offences just like the rights conferred by the Bill of Rights are to be liberally construed.”

31. The victims also referred to the case of **R v James Kiarie Mutungei [2017]eKLR** in which the court set out the scope of jurisdiction to include situations of gross error:

“The interference under section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous...”

32. Counsel argued that the victims had three pending applications, the first dated 26th August, 2019 the second dated 4th November, 2019 and the third dated 28th November, 2019. These not having been heard are still live despite the trial court’s acquittal order. He pointed out that the Constitution at Article 50(9) and the Victim’s Protection Act give the victims of an offence full right to access to justice and to a fair trial, which right should be enjoyed to the greatest extent consistent with the nature of the right in light of Article 20(2) of the Constitution.

33. Counsel took the court through the proceedings to show that Mr Chemei had been ready to prosecute the Kenya Human Rights application for the victims and the trial magistrate deferred this pending a ruling on 5th December, 2019. That ruling was eventually delivered on 3rd January, 2020, and instead acquitted the accused persons.

34. On the question of plea bargaining, counsel pointed out that it appears to have been touted by the counsel for the 1st and 2nd accused but the victims' participation was never sought despite the provisions of section 137D of the CPC. He pointed out to the large mass of people who were in court and stated that most were victims who had been unfairly treated throughout the proceedings as spectators. They sought to have the matter started afresh.

The 1st and 2nd Respondents' submissions

35. Mr Arusei and Mr Masinde, for the 1st and 2nd respondents oppose the application. They rely on their replying affidavit and written submissions. According to counsel, the issue arising is one of jurisdiction. In submissions, counsel re-stated the trial court's decision which acquitted the accused when it concluded as follows:

“...that notwithstanding it is critical to note that on the 3rd of December, 2019 none of the parties sought adjournment and no adjournment was granted. No evidence was tendered by the prosecution. Constructively the prosecution case closes and in the absence of any evidence on record and applying the principles emanating from the authorities referred to earlier in this ruling, I hereby acquit the accused persons under Section 210 of the Criminal Procedure Code.....”

36. The real question in this matter, according to counsel, is whether the High Court has the power to revise an acquittal order, which is a jurisdictional question and a question of law. Counsel submitted that Article 165(6) of the Constitution which donates jurisdiction to the Court to entertain a revisionary application, must be read together with section 362 of the Criminal Procedure Code. This not being a constitutional petition, the court cannot revise an order of acquittal,

37. Counsel submitted that a plain reading of Section 364 of the CPC clearly injuncts the High Court from revising an acquittal order. That what is sought to be revised is an acquittal order under Section 210 of the Criminal Procedure Code.

38. Counsel pointed out that Sec 364 (1) clearly stipulates that the court in exercise of its revisional powers, 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.”

39. It was submitted that the jurisdiction of the court is everything, which is a well settled principle set out in the case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] eKLR** where the court held as follows:

“.....jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law down tools in respect before it the moment it holds the opinion that it is without jurisdiction.....”

40. In addition, it was argued that the Court of Appeal in the case of **Reuben Nyamai Bichange v Republic [2005] eKLR** stated:

“.....But there is still the question of section 364(4) of the Criminal Procedure Code. That section provides:- “364 (4). Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.”

41. In so stating, the Court of Appeal plainly meant that where an accused person has been acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction. In that case, the trial Magistrate had acquitted the appellant on the main charge of defilement under section 145 of the Penal Code. In view of the provisions of section 364(4) of the Criminal Procedure Code, the Appellate court held, Tuiyott, J. had no power and was not entitled to convert that acquittal into a conviction.

42. This position, it was submitted, was further echoed in the case of **DPP vs Gilbert M'ringera Kiungu & Another [2018] eKLR** where the court, relying on the Court of Appeal decision in **Rueben Nyamai**, held that:

“.....The trial Magistrate acquitted the accused under Section 210 of the CPC. Acquittal can only be challenged on appeal and the court will have wide powers to deal with the merits of the appeal and may reverse or alter the acquittal....”

43. Counsel further argued that from the above reading of the law it is clear that the only remedy available in law to the prosecution is to appeal and not to seek revision. On this counsel cited the case of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR**, where the Court of Appeal held as follows:

“.....in our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.....”

44. The trial court having exercised its discretion to determine an acquittal of the respondents, it exercised a discretion it has to deal with the situation where, if on the day fixed for the hearing, the prosecution without any reasonable justification fails to attend court or prosecute its case as was in the instant case the court may acquit the accused person(s). On this counsel cited the case of **Republic v John Wambua Munyao & 3 others [2018] eKLR** the court held:

“The parties named in Section 202 for example, are all complainants and the accused person if the complainant is aware of the hearing date and is absent without explanation, the court may acquit the accused person, unless the court sees some other good reason for adjourning the hearing. The “complainant” in this content has been interpreted to mean the “Republic” in whose name all Criminal Prosecutions are brought and not the victim of the crime who is merely the chief witness on behalf of the Republic.”

“.....Therefore if on the day when a criminal case is fixed for hearing the prosecution without any reasonable justification fails to attend Court, the Court may at its own discretion adjourn the hearing but nothing bars the Court from exercising its discretion and acquitting the accused. The exercise of discretion either way cannot amount to incorrectness, illegality or impropriety on the part of the trial court so as to warrant this Court exercising its revisionary powers to disturb the decision.....”

“.....No court should be held at ransom by the prosecution and each magistrate is entitled to ensure order and decorum in his court. There is nothing to revise in this matter and I decline to issue any such orders.”

“It is therefore my view that the Learned Trial Magistrate was perfectly entitled to proceed in the manner he did and even if this Court would have proceeded differently that does not warrant interference by way of revision as opposed to an appeal...”

45. Counsel pointed out that the discretion of the court to dismiss a criminal matter due to non-appearance of the complainant is unfettered, and relied on the case of **Republic v Judith Achola Mulala [2019] eKLR** where the court observed as follows:-

“.....The discretion to dismiss a criminal matter due to non-appearance of the complainant appears to me to be unfettered. So long as the complainant or prosecutor is not in attendance to prosecute his case, it should be open to the court to dismiss the case, whether or not witnesses had testified. The law does not say otherwise. There could be the practice that the court treats the prosecution case is at an end at that stage and proceeds to determine whether a case had been made out to warrant the accused being put on his defence, but that practice is not supported by the law.....”

46. The court in **Judith Achola** went ahead and delivered itself as follows:-

“.....Overall, it has not been demonstrated that the trial court made any error of law in acting the way it did.....”

“.....There is, therefore, no merit in the revision sought by the prosecution office and I hereby decline to revise the decisions of the trial court in all the eight matters....”

47. According to Counsel, in the present case the trial court exercised its discretion in the matter and acquitted the respondents. Such an exercise of discretion properly grounded in law cannot amount to incorrectness, illegality or impropriety on the part of the trial court so as to warrant the High Court’s exercise of its revisionary powers to disturb the decision.

48. Counsel concluded that the application was not merited and should be declined, pointing out that the applicant’s only recourse is to challenge the trial Court’s decision by way of appeal.

49. Mr Masinde added that as regards the alleged irregularities in the proceedings, the matter was set for pre-trial on 2nd May, 2019, and hearing first fixed for 25th July, 2019. Fresh hearing dates were taken for 2nd September, 2019, but the applicant sought adjournment to deal with the plea bargaining request. Fresh hearing dates were agreed for 3rd December, 2019, and the prosecution asserted that it would be ready for hearing in absence of settlement on plea bargaining. On 3rd December, despite his own initiative to trace Ms Mwaniki for the DPP, she was not around.

50. On the issue of victims, Mr Masinde said that the victims did not ask the court for an expeditious trial; that some victims distanced themselves from their counsel; and that nothing stopped them from giving evidence on 3rd December, 2019 if they genuinely were interested.

The 3rd and 4th Respondents’ submissions

51. Mr Mburu for the 3rd and 4th respondents, and also for the 1st and 2nd respondents commenced by re-stating the arguments of the 1st and 2nd respondents that the Respondents having been acquitted Section 364 1(b) of the Criminal Procedure Code barred the High Court from altering or reversing that order.

52. Counsel submitted that since the High Court’s jurisdiction in review does not apply to an acquittal pursuant to Section 364 (1) (b), it must be read with Section 348 A of the CPC on appeals. The Applicant having failed to exercise its right of appeal and having preferred a revision where an appeal lies, this is an abuse of the Court process.

53. This court, counsel added, is being called upon to exercise its jurisdiction under Section 362 of the CPC on grounds of: Correctness of the proceedings; Legality; Propriety of any finding, sentence or order recorded or passed; and as to the irregularity of any proceedings. However, Counsel argued, these do not apply where there is an acquittal and where an appeal lies.

Counsel cited in support, the following authorities: **Joseph Mbuvi v Republic Criminal Revision 4 of 2019 High Court Machakos; Republic v Martha Wambui Criminal Revision 216 of 2018 High court at Nyeri; D.P.P. v J. Achola Criminal Revision 5 of 2019 High Court at Kakamega and D.P.P. v G. Kiungu & Another Criminal Revision 169 of 2018 High Court at Meru.**

54. Counsel also cited the case of **Speaker of the National Assembly v Njenga Karume Civil Application no. 92 of 1992 Court of Appeal Nairobi** which held that where there is a clear procedure for redress prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed. In light of the failure by the Applicant to follow the due procedure laid down under Section 348 A CPC, this is fatal to the revision, which should be dismissed.

55. Finally, it was argued that in any event that the grounds of Revision do not capture irregularity, incorrectness or raise any substantive complaint, and that the grounds given for the proposed revision amount to calling upon this Court to manage the Lower court.

The 5th Respondent's submissions

56. Mr Owuor for the 5th respondent submitted that the application by the DPP for revision of orders of the Chief Magistrate Naivasha issued on 3rd February, 2020 had been brought under Sections 362, 364 and 365 of the Criminal Procedure Code. He did not make mention the DPP's amended letter dated 6th February, 2020 expanding the premises of the State's application that invoked the various provisions of the Constitution.

57. Counsel urged that the Court 's powers as found in Section 364 (1)(b) of the CPC only allowed revision in the case of:

“(a) any other order other than an order of acquittal....”

58. He further submitted that the other issue arising concerns the situation where an appeal arises from a finding or order of a subordinate court and no appeal is brought, then revision proceedings cannot be sustained at the insistence of the party who could have appealed. On this he cited **R v Mohamed Rageshide (2016) eKLR**. where Dulu, J dealt with the issue and referring to Section 348 A of the CPC, stated clearly that:

“ the state is not allowed to appeal on the issue of sentence but only from an acquittal or from an order refusing to admit or dismissing a charge by a subordinate court”

59. Further, Counsel pointed out that Kimaru, J. was called upon by the state in **Criminal Revision No. 147 of 2016, R v Samuel Karongo Rurigi** to set aside an order of acquittal under section 202 of the CPC, but declined on the ground that the court did not have jurisdiction to set aside an order of acquittal in an application for revision, since that remedy is only available for the prosecution by way of appeal against the decision.

60. The 5th Respondent therefore urged that the application lacked merit as this was not a proper case for revision, and that the Court should dismiss the same.

The 6th Respondent's submissions

61. The 6th respondent did not file written submissions. Mr Awado relied on the replying affidavit filed, and orally submitted that the only recourse open to the applicant once an acquittal is entered is an appeal. Section 364(4) of the CPC was referred to. On the issue of plea bargaining, the 6th respondent stated that he was not party to the issue and no submission was warranted.

62. Counsel pointed out that the accused cannot be held up indefinitely in a case that has no movement as Article 50 granted a right to accused to a fair and expeditious trial. In this case, no justifiable reason for delay was given.

The 7th Respondent's submissions

63. Counsel submitted on the issue of alleged irregularities of proceedings, that the Applicant had sought an adjournment on 2nd September, 2019 to pursue a plea bargaining deal with the 1st and 2nd Respondent when this matter had been set down for hearing. This adjournment was not opposed by the Respondents and the matter was set down for hearing on 3rd December, 2019 giving the Applicant ample time to prepare and proceed with the hearing on 3rd December, 2019.

64. On 3rd December, 2019 the Applicant's representatives failed and or neglected to appear in court prompting the Respondents' counsels to apply to have the Accused persons' acquitted. The trial Court was considerate enough to place the file aside to give the Applicant ample time to enter appearance and requested the Counsel present to try and contact the Applicant. Mr. Masinde contacted the Applicant who informed him to contact Mr. Owiti of the DPP's office, who had been in conduct of this matter previously, and was to handle the same on the said 3rd December, 2020 as the Applicant Counsel herein Ms. Mwaniki was indisposed, Mr Masinde informed Court of the same.

65. The Applicant had Ms. Langat to hold her brief but the former had no instructions on proceeding with the matter thus she contacted the Applicant who did not respond and therefore informed the trial Court, therefore she had no instructions on the matter to hold brief.

66. Consequently, the Respondents requested that the trial Court acquit them due to the nature and manner in which the Applicant's Counsel was conducting the matter, and subjecting the Respondents to anguish, violation of **Article 50 and 159 (2) of the Constitution of Kenya**

(2010).

67. On the issue whether the applicant acted in good faith, Counsel referred to the **John Munyao** case (supra) where Odunga J held:

‘No court should be held at ransom by the prosecution and each magistrate is entitled to ensure order and decorum in his court’.

68. They also cited the dicta of Lenaola J (as he was then) in the case of **Benedict Kolorwe Kaweto (supra)** as follows where the prosecution’s application for revision was dismissed:

“...therefore if on the day when a criminal case is fixed for hearing the prosecution without unreasonable justification fails to attend Court, the Court may at its own discretion adjourn the hearing but nothing bars the Court from exercising its discretion and acquitting the accused. The exercise of discretion either way cannot amount to incorrectness, illegality or impropriety on the part of the trial court so as to warrant this Court exercising its revisionary powers to disturb the decision.

69. With regard to the absence of Ms. Mwaniki on the hearing day, and the allegation that the trial Court was informed of her indisposition, counsel dismissed the argument as no medical evidence was tendered to support the said allegations of illness, save for the fact that she sent a message to Mr. Masinde.

70. Counsel further urged that judicial notice ought to be taken to the fact that it had been 18 months since the 7th Accused took plea in the lower court trial, and that the numerous adjournments granted in favour of the Applicant thus prejudicing the 7th Accused; and that on 3rd December 2019, the February, 2020, the Counsel for the Accused persons’ were present and ready to proceed in the presence of the Accused persons’ in court thus this application was brought in bad faith.present.

71. Counsel finally asserted that the Court ought to be guided by the case of **Republic v Abdikadir Ahmed Mohamed [2013] eKLR** where Mutuku, J, held that the court will not be party to any delay in the conclusion of a case and invoked Article 50 (2) (e) and 159 (2) of the Constitution stating as follows:

“to allow a case to go on and on without concluding it, especially when it is obvious that the officers responsible for securing the attendances of witnesses have failed in so doing, can be termed as unreasonable delay.”

72. For all those reasons counsel stated that the Court has discretion as guided by the law to carry out justice for all parties as guided by the law and public policy this Revision ought to be dismissed and the acquittal upheld.

The 8th and 9th Respondents’ submissions

73. Counsel for these respondents stated that although the High Court has wide powers in its revision jurisdiction, it could not convert and order of acquittal to one of conviction. Thus, argued counsel, once there is a conviction, the court’s review jurisdiction is ousted irrespective of the merits. Counsel cited *Bichange v Republic* 2005] 2 KLR where the Court of Appeal explained that the import of section 363 CPC is that:

“...where an accused person has been acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction”

74. Like the other counsel, the 8th and 9th respondents’ counsel were of the view that the exercise of the court’s jurisdiction in the affirmative on revision, will necessarily set aside the acquittal

75. The respondents took the court through the proceedings in detail, pointing out that it was the absence of the prosecutor on the hearing, that prompted the trial court to order the closure of the prosecution case, leading to the acquittal of the respondents. counsel

76. It was further argued that the delays by the prosecution affected the expeditious administration of justice. Relying on **R v Abdikadir Ahmed [2013]eKLR**, counsel pointed out that trials must be heard and concluded in the shortest time possible to ensure fair trial, a fundamental right guaranteed by the constitution.. on these grounds too, they sought that the applicants’ application be disallowed.

Applicant’s response

77. Mr Muteti for the DPP in response to the parties’ submissions stated that: under Section 89(5) of the CPC it was clear that it is in a case where the formal charge does not disclose an offence that the trial court can refuse to admit the charge; that for section 210 of the CPC to be invoked there must be either a trial and summing up of evidence availed before the court can dismiss the case and acquit;

78. Further, Counsel argued that on revision a court exercises appellate powers in line with Article 165 of the Constitution. As such, that the law must be construed in line with the transitional provisions in Section 7 of the 6th Schedule to the Constitution, even if Parliament has slept on its job and has not amended the CPC to comply with the Constitution.

79. With regard to the procedural irregularities in the proceedings pointed out in the application, the DPP stated that these had gone

unanswered by the respondents. The only cure for irregularity, he said, was revision not appeal. He reiterated that the case of **R v Wambua (supra)** supported the position that where there are glaring omissions or acts in the proceedings, revision is the applicable remedy.

80. Counsel pointed out that the principle that where there is a clear procedure for redress prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed in the **Karume case (supra)** relied on by the respondents was not applicable in light of the new constitution. Here, the proceedings show that the trial court had not heard on the plea bargaining agreement, had not concluded on pending applications, and in this case there was a prosecutor present, but the matter was clearly not for hearing on the 3rd December, 2019, and there was no delay by the prosecution.

81. Finally, the DPP argued that the majority of decisions cited concerned revision. He urged the court to follow the **Meghji Shah** case.

Issues for determination

82. I have listened to the parties and carefully considered their submissions and the documents availed, herein. I also called up the lower court file and carefully perused the trial court's bulky hand-written proceedings and filings. The issues which appear to me are for determination are as follows:

- a. Whether this court has Jurisdiction to hear the matter
- b. If not, what must the court do?
- c. If so, what remedies are available to the applicant

Analysis and Determination

On Jurisdiction

83. As I understand the case, the competing positions on jurisdiction are as follows.

84. That under the Constitution, this Court has unlimited competency to hear the present application because of its unique nature and the Court's unique inherent jurisdiction; and that this position pertains notwithstanding anything in the Criminal Procedure Code that may delimit or disqualify the application from being heard. On the other hand, the opposing school of thought is that the provisions of the Criminal Procedure Code are clear: A revision application under Section 362-366 has limitations. The insurmountable limitation in this case is that the trial court acquitted the accused persons in exercise of a power it has; having done so, the High Court is barred by Section 364(2) (d) CPC from exercising revisional power to revise an acquittal, as the only remedy available in such a case is an appeal.

85. At the outset, I see two strands of jurisdiction discussed in and emanating from the parties' arguments: The first strand is that which invokes the application of *Revisional Jurisdiction* of the High Court under the CPC; and the other strand is that which invokes the application of *Supervisory Jurisdiction* of the High Court under the Constitution.

86. Section 366 CPC 2010 (as revised) refers to the revision jurisdiction exercised under the provisions of section 362-366 CPC which is in respect of *criminal matters* only, as revisional jurisdiction. It is that section which in fact ascribes the name to this type of jurisdiction. the section reads:

“366. All proceedings before the High Court in the exercise of its revisional jurisdiction may be heard and any judgment or order thereon may be made or passed by one judge:

Provided that when the court is composed of more than one judge and the court is equally divided in opinion, the sentence or order of the subordinate court shall be upheld.” (emphasis added)

87. On the other hand, Supervisory Jurisdiction is that jurisdiction which is embedded in the Constitution under Article 165(6) and (7), and entitles the High Court to call up *any proceedings* of any subordinate court, tribunal, authority or body.

88. The two forms of jurisdiction are clearly defined or described, on the one hand in the CPC, and on the other hand in the Constitution, and both are distinguishable in law. It is thus essential to discuss the issue of jurisdiction in light of the law and the two schools of thought emanating from the arguments of the parties.

89. At the outset, it is critical to note that the importance of the discussion on jurisdiction arises because if the court has no jurisdiction, it must lay down its tools forthwith. On this, the parties readily cited the *locus classicus* on jurisdiction, namely the Court of Appeal case of **Owners of the Motor Vessel “Lillian S” (supra)** where it was famously stated:

“ I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”

See Words and Phrases Legally defined – Volume 3: I – N Page 113

It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

90. Instructively, too, the Supreme Court has plainly held that outside of the four corners of a statute or of constitutional provisions, a court has no jurisdiction. This was stated in the case of **Samuel Kamau Macharia & Another v KCB Ltd & 2 Others [2012] eKLR**, where the Supreme Court held:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

91. The Supreme Court stated in Petition No. 5 of 2015 **Republic v Karisa Chengo & 2 others [2017] eKLR** that jurisdiction is the court’s power to entertain, hear and determine a dispute before it, when it stated as follows:

“[34] The starting point, in the resolution of this appeal, is, in the circumstances, to determine the meaning of the term “jurisdiction”. We will then examine the jurisdiction of the three superior Courts and that of the individual Judges of those Courts, and end with a determination of whether or not the respondents were accorded a fair trial in that context.

[35] In the above regard, we note that in almost all the legal systems of the world, the term “jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

From these definitions, it is clear that the term “jurisdiction”, as further defined by The Black’s Law Dictionary, 9th Edition, is the Court’s power to entertain, hear and determine a dispute before it.”

92. Having earlier noted that from the parties’ arguments two forms of jurisdiction are evident – namey, statutory revisional jurisdiction and constitutional supervisory jurisdiction – I commence with a discussion on the court’s *Revisional Jurisdiction*.

Revisional Jurisdiction of the Court

93. As earlier stated Revisional Jurisdiction – as properly named under section 366 of the CPC – is the High Court’s jurisdiction described in **section 362 CPC** that entitles the High 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 such subordinate court.”

94. Although the parties did not avail background information on or the history of Revisional Jurisdiction in order to give context and perspective, I consider it important for this discussion, and it was readily available.

95. Historically, Revisional Jurisdiction of the High Court was first introduced in Kenya pursuant to the EA Order in Council, 1897, by which various Indian statutes were made applicable in what was then British East Africa (the East Africa Protectorate). Amongst these statutes was the **Indian Code of Criminal Procedure, Act No V of 1898**, under which its provisions in Chapter XXXII on *reference and*

revision became applicable in the Protectorate. Because of their foundational importance, the appropriate provisions (Sections 435-442) of the **Indian Code of Criminal Procedure 1898** are reproduced below as follows:

“435. (1) The High Court or any Sessions Judge or District Magistrate, or any Sub-divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself 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 such inferior Court.

(2) If any Sub-divisional Magistrate acting under sub-section (1) considers that any such finding, sentence, or order is illegal or improper, or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit, to the District Magistrate.

(3) Orders made under sections 143 and 144 and proceedings under Chapter XII, and section 176 are not proceedings within the meaning of this section.

436. When, on examining the record of any case under Section 435 or otherwise, the Session Judge or District Magistrate consider that such case is triable exclusively by the Court of Session, and that an accused person had been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged:

Provided as follows:-

- a. That the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made;**
- b. that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence.**

437. On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate, by himself or by any of the Magistrates subordinate to him, to make and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204, or into the case of any accused person who has been discharged.

438 (1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining, under section 435 or otherwise, the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail, or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Session Judge under this chapter in respect of any case which may be transferred to him by the Sessions Judge.

439 (1) In the case of any proceeding the record of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by section 195, 424, 426, 427 and 428, or on a Court by section 338, and may enhance the same sentence; and, when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

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

(3) Where the sentence dealt with under this section has been passed by Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under section 273, shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(5) Where, under this Code, an appeal lies, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

440. No party has any right to be heard, either personally or by pleader, before any Court when exercising its powers of revision:

Provided that the Court may, if it thinks fit, when exercising such powers hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439 sub-section (2).

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under Section 435, the Magistrate may submit the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the Court shall consider such statement before overruling or setting aside the said decision order.

442. When a case is revised under this chapter by the High Court, it shall, in manner hereinbefore provided by section 425, certify its decision or order to the Court by which the finding, sentence, or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decisions so certified; and, if necessary, the record shall be amended in accordance therewith.”

96. From the above provisions, a number of important characteristics are evident as regards Revisional Jurisdiction in its original application in Kenya. These include that Revisional Jurisdiction:

- a. It is, or was, founded on statute (the Indian CPC);
- b. It granted a power to call for and examine the record of proceedings (sec 435(1)),
- c. It permitted a Judge to call up only those proceedings that were before an inferior *Criminal Court* (sec 435(1));
- d. It was a power available to a Sessions Judge and also a District Magistrate, or any Sub-divisional Magistrate empowered by the Local Government (sec 435(1));
- e. It allowed a Session Judge or District Magistrate, if, on examining the record of any case under Section 435 or otherwise, he considered that such case was triable exclusively by the Court of Session, and that an accused person had been improperly discharged, the court could commit such person for trial provided that the accused was availed an opportunity of showing cause why committal could not occur (sec 436) (a));
- f. It empowered the High Court or the Sessions Judge, on examining any record under section 435, to direct the District Magistrate or other subordinate magistrate court to make further inquiry (sec 437);
- g. An inferior court’s proceeding could be called up for revision by the High Court on its own initiative, or it could be reported to the Court for orders or it could otherwise come or be brought to the Court’s knowledge (sec 439(1));
- h. The Court of Revision could enhance a sentence (sec 439(1));
- i. The Court of Revision could not make an order to the prejudice of the accused unless he had an opportunity of being heard (sec 439(2));
- j. The High Court exercising revision power was not authorized to convert a finding of acquittal into one of conviction (sec 439(4));
- k. No party had any right to be heard, either personally or by pleader, before any court when exercising its powers of revision provided that the Court, if it thought fit when exercising such powers, could hear any party (sec 440).

97. As an example of how Revisional Jurisdiction was exercised in the Kenyan courts at that time, two cases reported in the **EA Protectorate Law Reports 1897-1905** are instructive: In **Gasi wa Jaka v Magato Manzi Cr R 2/1904** an accused person had been convicted for enticing away a married woman. The court (Cator and Hamilton JJs) stated:

“In exercise of our powers of revision, we quash the conviction and direct the release of the accused”.

It was noted that this revisional action arose after:

“the case having come to the notice of the High Court”

98. Another old case was **Rex v Kufa Kulala and 10 Others Cr R 6/1904**, where eleven coast natives were sentenced to one month’s hard labour and a fine by the Collector at Nairobi. The case was **“brought to the notice of the High Court”** and dealt with by that court under their powers of revision. The Court revised the Collector’s decision and sentence, and released the accused persons holding that the accused were porters on a Registration List and that:

“the employer having engaged the men as porters cannot prosecute for breach of contract if he thereafter puts them to other work”.

99. Most of the characteristics of Revisional Jurisdiction were retained in the subsequent amendments to the Indian Criminal Procedure Code. The first Kenyan statute on criminal procedure was the **1930 Civil Procedure Ordinance, Act No XI of 1930** which adopted, but also made the first substantive amendments to, the Indian Criminal Procedure Code. The Revisional Jurisdiction provisions were encapsulated in sections 347-352 of the 1930 Ordinance.

100. In the **1948 Criminal Procedure Ordinance**, which was re-named Chapter 27 Laws of Kenya, the provisions on Revisional

Jurisdiction were retained and contained in sections 361-366 of that Ordinance. The content of the revisional jurisdiction provisions did not change substantially.

101. By the time of independence, the 1948 Civil Procedure Ordinance was in force, and was adopted as part of independent Kenya's statutes. Despite numerous amendments to the statute over the years, Revisional Jurisdiction has been retained.

102. The present provisions for Revisional Jurisdiction are in sections 362-367 of the Criminal Procedure Code, Chapter 75, Laws of Kenya. They read as follows:

“362. 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. (1) A subordinate court of the first class may call for and examine the record of any criminal proceedings of a subordinate court of a lower class than it and established within its local limits of jurisdiction, for the purpose of satisfying itself as to the legality, correctness or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings.

(2) If a subordinate court acting under subsection (1) considers that a finding, sentence or order of the court of lower class is illegal or improper, or that the proceedings were irregular, it shall forward the record with its remarks thereon to the High Court.

364. (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.

(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.

365. No party has a right to be heard either personally or by an advocate before the High Court when exercising its powers of revision: Provided that the court may, when exercising those powers, hear any party either personally or by an advocate, and nothing in this section shall affect section 364 (2).

366. All proceedings before the High Court in the exercise of its revisional jurisdiction may be heard and any judgment or order thereon may be made or passed by one judge:

Provided that when the court is composed of more than one judge and the court is equally divided in opinion, the sentence or order of the subordinate court shall be upheld.

367. When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.”

103. It is clear that whilst Revisional Jurisdiction in the Kenya Protectorate, and later in the Colony, permitted a High Court judge to exercise any of the powers conferred on a Court of Appeal by section 195, 424, 426, 427 and 428, or on a Court by section 338 – except that it could not “*convert a finding of acquittal into one of conviction*” –there was no provision prohibiting the Court from dealing with a finding of acquittal. That is, the Supreme Court was not barred from revising a finding of acquittal.

104. This situation pertained until 1930 when, by section 349(1)(b) of the Indian CPC Ordinance, 1930, the Supreme Court was prohibited from revising an order of acquittal. That prohibition was retained in the 1948 CPC Ordinance in section 363(1)(b). Under section 364(1)(b)

of the present CPC Cap 75, the prohibition was retained and disallows the High Court from entertaining a revision of an order of acquittal.

105. Thus, as argued by the respondents, the Revisional Jurisdiction of the High Court under the present CPC can be properly entertained pursuant to section 364(1)(b):

“in the case of any other order, other than an order of acquittal...”

so as to alter or reverse such an order. Acquittal orders are thus out of bounds.

106. The numerous authorities available on this point including those cited by the respondents, all uphold this finding. I therefore find and hold that in the present case, this Court has no Revisional Jurisdiction to interfere with the trial court’s order which expressly acquitted the accused persons pursuant to section 210 of the CPC.

107. I now move to discuss Supervisory Jurisdiction of the High Court

Supervisory Jurisdiction of the High Court

108. In discussing constitutional supervisory jurisdiction, it is necessary to consider it in its historical context, in the same manner as when discussing revisionary jurisdiction. The Supreme Court has consistently urged that in interpreting the constitution, the historical perspective is an important consideration. For example, the Supreme Court *In the Matter of the National Land Commission, Sup. Ct. Advisory Opinion No. 2 of 2014; [2015] eKLR*, stated at para. 281 of its opinion that:

“The Constitution is to be interpreted in a holistic manner that entails reading it alongside other provisions, and considering the historical perspective, purpose, and intent of the provisions in question.”

Similarly, in *Republic v Karisa Chengo & 2 Others [2017] eKLR* the Supreme Court stated:

“[46] From the above perspective, we are therefore obliged to take into account the history and context as well as the various constitutional provisions that are in dispute in this matter”

109. Historically, the High Court of Kenya in one form or another has held unlimited original jurisdiction in civil and criminal matters since 1897. See: East Africa Colony Order-in-Council 1897. In the EA Order in Council 1902, the relevant Order 15 provided as follows:

15.—(1.) There shall be a Court of Record styled " His Majesty's High Court of East Africa " (in this Order referred to as the High Court) with full jurisdiction, civil and criminal, over all persons and over all matters in East Africa.

(2.) Such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure, Criminal Procedure, and Penal Codes of India, and the other Indians Acts which are in force in East Africa at the commencement of this Order, except so far as may be otherwise provided by law.

110. The full jurisdiction of the High Court of East Africa included jurisdiction exercised in conformity with the Civil Procedure and Criminal Procedures and Penal Code of India. The 1902 Order, at Order 28 repealed the EAO-I-C 1897.

111. Under the Kenya Colony Order - In - Council, 1921, Her Majesty’s Supreme Court was established as Kenya became a Colony and Protectorate of the British. By Order 14 of the Order, the Supreme Court was given:

“...full jurisdiction civil and criminal over all persons and over all matters in the Colony”

In the said Order-In-Council of 1921, Order 14(6) thereof provided that:

“Courts subordinate to the supreme Court and courts of special jurisdiction may be constituted by or under the provisions of any ordinance as occasion requires”

However, that Order did not specifically avail the Supreme Court any supervisory jurisdiction over the subordinate courts.

112. As the Kenya Colony drew to a close and independence beckoned, Section 171 of the 1963 Independence Order–In–Council (the Independence Constitution) again established the Supreme Court, with:

“...unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

This provision made it categorical in the terms of the constitution, that the Supreme Court’s jurisdiction could emanate from either the constitution or from any other law.

113. For the first time and more to the point, however, section 175(2) of the Independence Constitution provided specifically for

constitutional Supervisory Jurisdiction in the following terms:

“(2) The Supreme Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court.”

114. Alongside the grant of supervisory jurisdiction to the Supreme Court, the Chief Justice was also granted discretionary powers under Sec 178(3) to make rules of practice and procedure with respect to such jurisdiction. The section provided:

“(3) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on it by subsection (2) of this section.”

115. Notably, these provisions on Supervisory Jurisdiction were carried into the 1969 Constitution as Sections 65(2) and 65(3). The only difference was that the Supreme Court was again renamed the High Court.

116. In addition to supervisory jurisdiction, other forms of constitutional jurisdiction that were conferred upon the Supreme Court, or the High Court, as the case may be, were:

- Jurisdiction in respect of protection from deprivation of property (Order 19(2) 1963 Constitution; and Section 75(2), 1969 Constitution)
- Jurisdiction on enforcement of fundamental freedoms (Order 28(2) -1963; and Sections 84(1) & (2) - 1969 Constitution)
- Reference or referral jurisdiction (Order 175, 1963); and Section 84(3) - 1969)
- Any other Jurisdiction conferred by any other law (Order 171, 1963; Section 60(1) - 1969 Constitution)

117. Under the sections in the constitution on Supervisory Jurisdiction, there was a power for the Chief Justice to make rules **“with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred”**. I was, however, not able to readily find cases in which supervisory jurisdiction was specifically invoked and applied since 1963. This may be a result of the fact that no rules of practice and procedure were made by the Chief Justice, until 2006.

118. However, there are cases in which the High Court declined to exercise Supervisory Jurisdiction due to the alleged lack of rules. For example, in **Joseph Maina Mbacha and Others v Attorney General, Nairobi High Court Miscellaneous Application No. 356 of 1989** the High Court (Dugdale, J), following **Kamau Kuria v the Hon. Attorney General, High Court Misc. Civil Case No. 551 of 1988 (unreported)** declined to enforce section 84 of the repealed Constitution of Kenya. That provision granted original jurisdiction to the High Court to enforce *Fundamental Rights and Freedoms of the Individual*. The court held that section 84 of the Constitution was “inoperative”. The Court premised its conclusion on its finding that no rules of procedure had been enacted to enforce the Bill of Rights. Accordingly, it dismissed the case filed for lack of jurisdiction. The Bill of Rights enforcement jurisdiction of the Court was therefore rendered dead-letter law.

119. A situation where a constitutional provision could not be applied or enforced for lack of jurisdiction by the court empowered under it, is necessarily oxymoronic. For if the power is contained in the constitution to do something, that in itself constitutes the inherent authority of the court to do or enforce the thing, unless the constitution itself imputes limitations. So that, in my view, the existence of a jurisdiction in the Constitution, without more, and unless otherwise curtailed, circumscribed or limited by the Constitution itself, constitutes an inherent power to the court to act upon and exercise that jurisdiction. This is an important principle that underlies exercise of constitutional power.

120. Within that context, I understood the DPP’s submission in this application to be that he was in a conundrum: revision under the CPC was not quite the appropriate or preferred mode of approach to the court, yet the court’s constitutional jurisdiction in the matter could clearly avail. This is what I understood him to mean when he said in oral submissions:

“We have founded our application on Article 165(6) and Sec 362CPC”

In that regard, the question that would then arise is: by what means or procedure would the Court be approached by a party?

121. I think, without making any finding on it at this point, that in terms of the pursuit of substantive justice the court can be approached by any available procedure when, as a matter of law what is sought is the appropriation or enforcement of a constitutionally available jurisdiction or a constitutional right. In that light, a party seeking enforcement under a constitutional provision could be forgiven for approaching the court by any available procedure. Whilst ordinary rights can be defeated for failure to follow procedure, historically, procedural requirements often do defer to constitutionally granted rights.

122. Under the repealed constitution, it was not until 16th February, 2006 that Chief Justice Gicheru made and published rules for the enforcement and protection of fundamental rights under Legal Notice No 6 of 2006. The Rules are titled: **“The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006”**.

123. In the Constitution 2010, this problem of absence of rules specifically to operationalize the Bill of Rights was cured by the provisions of Article 22(3) which made it mandatory for the Chief Justice to make rules for enforcement of the Bill of Rights. Such Rules were made and published in L.N. 117/2013 by Chief Justice Mutunga. They are entitled: **The Constitution of Kenya (Protection of Rights and**

Fundamental Freedoms) Practice and Procedure Rules, 2013 (referred to as 'the *Mutunga Rules*').

124. Since the *Mutunga Rules* were made pursuant to Article 22(3) as read with Articles 23 and Article 165 (3) (b) of the Constitution they are, quite properly, not described as rules made for the exercise of the Court's Supervisory Jurisdiction. This fact gives further credence to the understanding of Supervisory Jurisdiction as being not merely an appellate or revisional type of jurisdiction as envisaged under Sections 362-367 of the CPC, but it is a distinct jurisdiction to supervise subordinate courts and tribunals in exercise the Court's authority to **"make any order or give any direction it considers appropriate to ensure the fair administration of justice"** in the terms prescribed in Article 165(7) of the Constitution.

125. From Rule 1 on the scope and objectives of the *Mutunga Rules* their overriding objective is to facilitate access to justice for all persons. Thus, sub-rule 4 requires the court to in exercise of its jurisdiction to facilitate the just, expeditious, proportionate and affordable resolution of all cases. Sub rule 7 provides that the court shall pursue access to justice for all persons including the poor, the illiterate, uninformed, unrepresented and persons with disabilities

126. Returning to Supervisory Jurisdiction of the High Court, the provisions under the Constitution 2010 do not require that there be rules enacted by the Chief Justice for the enforcement or operationalization of Article 165(6) and (7) of the Constitution. This is distinctly unlike the position in the repealed constitution (section 65) where the requirement of rules of procedure and practice for the exercise of Supervisory Jurisdiction was placed upon the discretion of the Chief Justice.

127. What emerges is that the people of Kenya did not intend that Supervisory Jurisdiction be exercised subject to rules enacted by the Chief Justice. They had the experience of this constitutional jurisdiction being treated as dead-letter law, and were averse to the past experience.

128. As matters stand, under the Constitution, 2010 there is certainly no bar to exercise of the Supervisory Jurisdiction under Article 165(6), even in the absence of rules of practice. However, it may indeed be prudent – for orderliness in the exercise of Supervisory Jurisdiction – that there should be either legislative guidance or rules by the Chief Justice presumably under section 10 of the Judicature Act *"for regulating the practice and procedure of the High Court"*. But the absence of such rules cannot be a ground to pre-empt the High Court from invoking its express constitutional mandate and obligation to exercise its Supervisory Jurisdiction.

129. Supervisory Jurisdiction in Article 165(6) and (7) is indeed vested in the High Court in precisely the same manner that the High Court is vested with all its other forms of jurisdiction: unlimited original jurisdiction in criminal and civil matters (Art 165(2)(a)); or jurisdiction to determine cases on infringement of fundamental rights (Art 165(2)(b)); or appellate jurisdiction (Art 165(2)(c)); or constitutional interpretation jurisdiction (Art 165(2)(d); and under Art 165(2)(e) any other jurisdiction conferred by legislation – such as, for example, Revisional Jurisdiction conferred under the CPC.

130. All the aforesaid jurisdictional powers are conferred on the High Court without any constitutional qualification, except that in the case of Supervisory Jurisdiction, there is the qualification in Article 165(6), namely, that the jurisdiction may not be exercised over anything done by a superior court. That is the only qualification – or to put it more accurately, that is the only constitutionally recognised qualification – for the exercise of the High Court's Supervisory Jurisdiction. Contrariwise, jurisdiction conferred by legislation may place numerous qualifications and conditions on its exercise.

131. In respect of the Court's jurisdiction other than Supervisory Jurisdiction, there are of course the constitutional limits to its jurisdictional mandates set out in the provisions of Articles 165(2)(c) and 165(5) which expressly limit the High Court's exercise of those other forms of jurisdiction. These two articles provide that the High Court has: no jurisdiction to hear an appeal from a tribunal appointed under Article 144 for removal of a President; and no jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court or those matters falling within the jurisdiction of the courts with equal status of the High Court. There is, however, no legal limitation placed on supervisory jurisdiction, which is clearly a distinct form of constitutional jurisdiction endowed upon the court in addition to other forms of jurisdiction.

132. There is a clear contrast between Supervisory Jurisdiction and Revisional Jurisdiction that is often overlooked and remains disguised when, in many authorities, the underlying perception is propagated that the High Court's Supervisory Jurisdiction under Article 165(6) and (7) is, in essence, *operationalised* or given practical effect by the Revisional Jurisdiction provisions of sections 362-367 of the CPC. This has been stated for example, in one of the authorities cited in the case of **R v John Wambua Munyao (supra)**, namely, in **R v Samuel Gathuo Kamau [2016] eKLR** where the court said:

"Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. It does not include on (sic) any perceived power to make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect to conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal Procedure Code). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See Article 165(7) of the Constitution and Section 362 and 364 of the Criminal Procedure Code." (emphasis added).

133. This view appears to have been borrowed from other common law jurisdictions that appear to consider revisionary jurisdiction as somewhat equivalent to supervisory jurisdiction. This is the case, for example, in Malaysia where the High Court of Malaysia in **Public Prosecutor v. Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735** stated:

"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”.

134. In Kenya, however, the constitution takes a completely different approach by conferring a unique supervisory jurisdiction that is not limited to criminal proceedings and expands the scope of the High Court’s power to “*make any order, or give any direction it considers appropriate to ensure the fair administration of justice*”. This is an overriding constitutional edict.

135. It is clear that, in our jurisdictional system the proper place of Revisional Jurisdiction is that it is a statutory jurisdiction conferred on the High Court by legislation. It is also trite that legislative conferment of jurisdiction is duly acknowledged in the Constitution under Article 165(3)(e) as a distinct form of jurisdiction where it is described as:

“(e) any other jurisdiction, original or appellate, conferred on it [the High Court] by legislation”

136. In respect of Supervisory Jurisdiction, the High Court (Organisation and Administration) Act No 27, 2015, gives the statutory operational basis for the Court’s exercise of Supervisory Jurisdiction in that it echoes the constitutional provisions. This is in section 5 of the Act where it is provided as follows:

“5. The Court shall exercise —

(a) the jurisdiction conferred to it by Article 165(3) and (6) of the Constitution; and

(b) any other jurisdiction, original or appellate, conferred to it by an Act of Parliament”.

It is noteworthy that the High Court (Organisation and Administration) Act places an obligation on the High Court to exercise the jurisdictions under Article 165(3) and (6), and also any other jurisdiction conferred by statute. Thus constitutional Supervisory Jurisdiction and statutory Revisional Jurisdiction are distinctly and separately exercisable by the High Court.

137. Section 12(3) of the High Court (Organisation and Administration) Act makes another mention of supervisory jurisdiction where it provides:

“12(3) The filing of appeals, bail applications, and references from the subordinate courts, tribunals and other bodies or authorities within the regions designated by the Chief Justice under the Rules, shall be made at the High Court station with the corresponding supervisory jurisdiction”.

138. All these provisions are made as to operationalise the Court’s constitutional and statutory jurisdiction. In addition, the Chief Justice made Rule 20 in the High Court (Organisation and Administration) (General) Rules, 2016 L.N. 134/2016. The rule is under Part IV titled “*Supervisory Jurisdiction of the Court and Appeals from Subordinate Courts*”. Rule 20(1) creates, for administrative purposes, regions under which the High Court exercises supervisory jurisdiction as follows:

“20. Filing of appeals, bail applications and references from subordinate courts.

1. Subject to the Practice Directions issued by the Chief Justice, the filing of appeals, bail applications and references from subordinate courts, tribunals and other bodies or authorities within regions designated under the Schedule shall be made to the respective High Court Station Registry with corresponding supervisory jurisdiction according to the established judicial administrative regions set out in the Schedule.”

139. Thus an appeal, reference or request arising, for example, out of an action in the subordinate court in Engineer would be filed in Naivasha, not in Nairobi or Mombasa. This might be called territorial supervisory jurisdiction.

140. More significantly, however, and more relevant is that the High Court Rules recognise the wide scope of the Court’s constitutional Supervisory Jurisdiction by encapsulating and repeating in Rule 20(2) the content and effect of Article 165(6) in the following terms:

“20(2) Despite paragraph (1), the supervisory jurisdiction of the Court over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function as contemplated under Article 165(6) of the Constitution is not limited, and in particular the Court may—

(a) call for the record of any proceeding before any subordinate court, body or authority exercising a judicial or quasi-judicial function; and

(b) make an order or give any direction it considers appropriate to ensure the fair administration of justice.”

141. The ultimate effect of these provisions of statutes governing the operations of the High Court of the High Court (Organisation and Administration) Act and Rules is that, even operationally under the legislation specifically enacted after the promulgation of the Constitution and in pursuance of it, the Supervisory Jurisdiction of the High Court is recognised as a specific jurisdiction distinct from other jurisdiction conferred on it by an Act of Parliament. Thus, the statutory Revisional Jurisdiction conferred on the Court by the Criminal Procedure Code cannot be equated to Supervisory jurisdiction. I think enough has been said on the nature and place of supervisory and revisional jurisdiction.

142. In light of the foregoing discussion, I am unable to take the position that supervisory jurisdiction under the constitution is operationalised by the provisions of sections 362-367 of the CPC. The constitutional and statutory provisions in issue are too disparate to support that view. I am also of the view that there is a sound constitutional and statutory basis for holding that the Court's Supervisory Jurisdiction can and may be exercised beyond the narrow constraints of the provisions of any statute including sections 362-367 CPC in criminal matters. I so hold

Conclusions from the discussion on Revisional Jurisdiction and Supervisory Jurisdiction

143. What is clear from the foregoing analysis of the history and law and the present statutory provisions is that: statutory Revisional Jurisdiction concerns a narrow scope of review over criminal proceedings as set out in sections 362-367 of the CPC. On the other hand, constitutional Supervisory Jurisdiction confers on the High Court an extremely broad-based authority with which to call up proceedings of both civil and criminal matters from all subordinate courts, tribunals and authorities (except superior courts) without limitation. No limitations of timeframe or nature of the case are imposed on the High Court's jurisdiction; the authority may be exercised at any time; and given there are no limits as to who should invoke the power, presumably it may be invoked at the instance of either the Court or upon being moved by a party.

144. It was earlier pointed out that in Colonial Kenya (see: **Gasi wa Jaka case** (supra)) the "court's attention" could be drawn to a matter even under statutory Revisional Jurisdiction, and the Court would act. This makes sense given that there are matters where grave injustices in subordinate courts or tribunals come to the attention of the High Court through media reports and the Court attends to them by way of revision after calling for the lower court file.

145. There is a clear basis to hold that if the High Court calls up the proceedings of a subordinate court under its constitutional Supervisory Jurisdiction, it is empowered to go beyond what the Court in its statutory Revisional Jurisdiction can do under the CPC. In exercise of its constitutional jurisdiction under Article 165(7) the High Court is empowered to:

"make any order or, give any direction it considers appropriate to ensure the fair administration of justice".

This blanket authority is necessary because it is, after all, a general supervisory power.

146. There is a statement in the American case of **Gallagher v Gallagher, 212 So.2d 281 (1968) Court of Appeal of Louisiana, Second Circuit** which I quote here merely for the directness with which it elucidates the import of the nature of constitutional supervisory jurisdiction:

"... The grant of supervisory jurisdiction to the intermediate appellate courts was intended to be as broad as their appellate jurisdiction; and if any court of appeal would have appellate jurisdiction over the final judgment in any case, it has supervisory jurisdiction to review any order or action of the trial court in that case, regardless of connexity with the merits of the case. Any other construction of the constitutional provision would not only render the supervisory jurisdiction of the intermediate appellate courts shadowy and uncertain, but would serve to defeat the purpose of that grant of supervisory jurisdiction".

I think the above statement of the court well reflects the nature of the supervisory jurisdiction under our Constitution given its unlimited scope and breadth of remedy.

147. In stark contrast, statutory Revisional Jurisdiction is intended only to be a check on the correctness, legality or propriety of a lower court's finding sentence or orders and regularity of its proceedings. In this regard, I agree with Odunga J where he stated as follows in **R v John Wambua Munyao** (supra):

"It is therefore clear that the powers of revision under section 362 of the Criminal Procedure Code are only to be invoked to enable this Court satisfy 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 subordinate court. Therefore, if out of anger the Court makes a decision which wanting in its correctness, legality or propriety or the proceedings are irregular, this Court no doubt will step in and correct the same."

148. That Article 165(6) and (7) is not limited to calling up proceedings for the purposes stated in section 162 of the CPC, and neither are the orders that can be made under Art 165(6) and (7) limited as are those under the CPC, this undoubtedly confirms the distinctions between the two types of jurisdiction.

149. It is trite that where there is a divergence or conflict between a statutory provision and a constitutional provision, the constitutional provision prevails in accordance to the doctrine of constitutional supremacy provided for in Article 2. The supremacy paradigm was alluded to by the DPP in his submissions. Any other position would have to involve judicial craft. Supervisory Jurisdiction grants broad and far-reaching express and unlimited powers to the High Court. They cannot in the same breath be limited by the statutory provisions of the CPC on Revisional Jurisdiction

Supervisory Jurisdiction and its application in the circumstances of the case

150. The question that now needs an answer is: under what circumstances can the High Court in a criminal matter call up the record of proceedings of a criminal case and intervene in exercise of its constitutional Supervisory Jurisdiction? I can readily identify the following as situations which would merit the court's intervention and in which the court should not hesitate to invoke its constitutional supervisory power. I can think of several situations:

- a. Where there are special or exceptional circumstances that cannot be addressed through the statutory revisional powers of the court without undue expense or delay;
- b. Where there is clear and irrefutable evidence of a violation of the rights of a person whose representation is permitted in law;
- c. Where the public interest element of the case is so substantial that the court would be deemed as abetting an injustice if it did not intervene to correct the situation.
- d. In any event, the overriding principle in all cases is that the court must act only with the objective of ensuring “*the fair administration of justice*”;

This list showing rationale for intervention is of course not exhaustive.

151. Where, or if, it is intended to exercise Supervisory Jurisdiction under the Constitution, I think the following safeguards should be observed:

- i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court’s independence in the conduct and management of its proceedings
- ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question
- iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;
- iv. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;
- v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice;

152. The above situations are not exhaustive neither are they unique to only the exercise of Supervisory Jurisdiction.

153. In light of the foregoing, I find and hold that this court has and can exercise a distinct constitutional Supervisory Jurisdiction that is broader than the statutory Revisional Jurisdiction applicable under the CPC. The question is whether in the circumstances of this case the court should exercise its Supervisory Jurisdiction.

154. Upon a careful perusal of the record of proceedings, I note as follows with regard to hearing dates and failure of the trial to take off. The main trial was first fixed for hearing for five days to start on 27th July, 2019, and 2nd 3rd 5th and 6th September, 2019. On 27th July, the trial was adjourned at the instance of the defence as Counsel for 1st and 2nd Accused stated they were in negotiations for amicable settlement. There was no opposition to the adjournment, and the trial was adjourned to 2nd September, 2019.

155. I have noted from the proceedings that at the hearing of 27th July, 2019, the state counsel Ms Mwaniki stated:

“If we do not have a settlement we will proceed on 2/9/2019” (page 352 proceedings)

This means that the state was, or would be, ready to prosecute the case by 2/9/2019.

156. When the matter came up on 2nd September, 2019, the state counsel indicated that she was not ready to proceed for the sole reason that she was still pursuing the plea bargaining/settlement issue of Accused 1 and 2. On that basis, none of the parties objected to the taking out of the hearing. New hearing dates were fixed for 3rd 5th and 6th December, 2019

157. On 3rd December the prosecution counsel who was present was not the one in conduct of the case. He stated in open court that he did not know where the prosecution counsel handling the case was, and that he had texted her. He received a response that she was indisposed only after all parties had argued against adjournment. He reported this information to the court.

158. I find that in general the content and sequence of events as set out in the trial magistrate’s ruling is generally accurate. However, I note the following issues of serious concern, with critical consequential implications, connected to the complaints by the DPP.

159. The first concern is the issue of Victim participation in the proceedings: It is true that some counsel who acted for various victims acted in an unwarranted manner by haphazardly filing and withdrawing applications to act on behalf of various victims, the trial court disposed of some such applications. By the time of the final ruling leading to acquittal, one Victim application dated 26th August, 2019 and filed on 27th August, 2019 remained unresolved, although the final ruling gave the impression that all such applications had been fully dealt with.

160. The application filed on 27th August 2019 was for six victims identified in the annexures to the supporting affidavit of Ronald Onyango. The application was heard on 2nd September, 2019. The trial court reserved 8th October, 2019 for the ruling. When that date arrived, the court deferred the ruling to 4th November, 2019. On that date, an application to watch brief for victims was filed by the Kenya Human Rights

Commission. In addition, two affidavits filed by two of the victims for whom Ronald Onyango was acting sought to disengage their counsel's services. Orders were given for service of the affidavits on the other parties and directions were ordered to be taken on 4th November, 2019. That was probably a mistake in dates, as the order was itself given on 4th November. In any event, the next court appearance was 3rd December, 2019. As earlier noted, the dates 3rd, 5th and 6th December, 2019 had also been previously fixed on 2nd September, 2019, for the hearing of the main trial.

161. At the appearance on 3rd December, 2019, there was no discussion concerning the Victim application. Instead, issues concerning the absence of the DPP on the date of commencement of the hearing of the trial arose and took centre stage, leading ultimately to the trial magistrate reserving ruling on the absence of the DPP to 5th December, 2019. There was no mention of the Victim application. On 5th December, the ruling on absence of the DPP was deferred to 20th January, 2020. The trial court did not sit on 20th January, 2020, and directions were given for a mention on 3rd February, 2020.

162. On 3rd February, 2020 the ruling on absence of the DPP was delivered. I have read it and it contains no determination on the Victim application filed on 27th August, 2019. In a subsequent ruling of 5th February, 2020, the trial magistrate sought to respond to the DPPs concern that a ruling on the victim application was still outstanding, after termination of the proceedings against the accused. This is what the trial magistrate ruled:

“Concerning the application dated 26th August, 2019; for avoidance of doubt in the application dated 26th August, 2019, Ronald Onyango Advocates had applied to come on record as watching brief for the interested parties. Attached to the application were instructions from his instructing clients. Then on 4th November, 2019, the alleged instructing clients filed affidavits in court indicating inter alia that they would find alternative ways of representing themselves. The court then rendered its decision on 4th November, 2019...”

163. I have perused the ruling of 4th November, 2019 (pages 386-387 proceedings). It is clear in the said ruling that the trial court noted that **“two of the so-called victims”** filed withdrawal affidavits. That left four victims in the application. The ruling then issued directions that:

“i. The affidavits [of withdrawing victims] filed in court on 8th October (sic - they are dated 8th October, 2019) be served upon all the parties, and

ii. The directions be taken on 4th November, 2019”

164. As earlier stated, the date given for directions was a mistake as that was the very same date the ruling on directions was being made. The result is that the application regarding the remaining four victims is still unresolved.

165. In addition, a Victim application for 189 victims verified by the Kenya Human Rights Commission and filed on 28th November, 2019, by Allamano Advocates also remains unresolved. Attached to the application is a ten-page list containing names and signatures of the proposed victims. Mr Chimei for the victims stated on 3rd December, 2020, that he was ready to serve the application. The court stated that it would give directions on the application on 5th December, 2019.

166. On 5th December, the victims were unrepresented in court and no mention was made of the application of 28th November, 2019. The next appearance in court was on 20th January, 2020, on which date the court was not sitting and a mention for directions was given for 3rd February, 2020.

167. In the trial court's ruling of 3rd December, 2019, there were the following remarks concerning the said Victim application:

“On the 3rd December 2019 Mr. Chimei holding brief for Mr. Alamano for the applicants in the notice of motion dated 4th November 2019 and 28th November 2019 informed the court that they now wished to withdraw the notice of motion dated 4th November 2019. Of course this was after the defence had raised objections and filed affidavits opposing the motion dated 4th November 2019. This conduct by counsel appearing for the purported applicants clearly amounts to an abuse of the court process. The applicant in the notice of motion dated 4th November 2019 whimsically appeared to be filing and withdrawing motions. This action was of course causing unnecessary delay and expense and was bordering on a waste of judicial time. In this ruling part of the directions I shall render are that no party is at liberty to file any application as watching brief for the complainants or victims in this matter without first seeking leave of court.”

168. Despite the remarks of the court, the trial magistrate did not finally dispose of the application of 28th November, and no directions on service of the same were given. In addition, although the court intimated that it would give directions that *“that no party is at liberty to file any application as watching brief for the complainants or victims in this matter without first seeking leave of court”*, it is not clear whether that was itself the substantive direction or whether the substantive direction was to feature elsewhere in the ruling. Nowhere is that direction seen thereafter.

169. Consequently, when on 5th February, 2020, the issue concerning the pending application of 28th November was raised in court, the trial magistrate ruled:

“As concerning the notice of motion dated 28th November, 2019. This was dealt with comprehensively in the ruling delivered on 3rd February 2020. For avoidance of doubt, the record is as follows; on the 4th November, 2019, the firm of Alamano &

Associates filed an application seeking to join Kenya Human Rights Commission on behalf of the victims. Then on, 28th November, 2019, the said firm filed a Notice withdrawing the application dated 4th November, 2019. On the same date the said firm filed another application seeking to join Kenya Human Rights Commission on behalf of the victims. There were objections to this application and the court dealt with the issue comprehensively in the ruling delivered on 3rd February, 2020.”

170. I have already set out the appropriate portion of the ruling of 3rd February, 2020, and I do not see in it any conclusive determination on the said application. In any event the application was never served on the other parties or argued at any stage.

171. One can appreciate that in a case concerning such a large-scale and serious tragedy with many fatalities and casualties, as this, there will be jostling by lawyers in the effort to clinch sufficient victims or claimants to form the bulwark of a potential public interest or class case subsequent to the criminal trial. Thus, lawyers will seek to position themselves accordingly in the criminal case, in anticipation of representing victims in subsequent civil suits. I suspect that this is the reason that many victim applications were being filed, withdrawn, re-filed and challenged. That is to be expected in such cases, and the trial court must of course effectively manage the process so that the substantive trial is not overrun or jeopardised by disorder in victim involvement. Nevertheless, victim rights must not be ignored or overlooked to the point where the victims have had no voice whatsoever in the criminal case prior to the acquittal of the accused persons.

172. The overall effect of the omissions to resolve the pending Victim applications is that the victims’ constitutional right to participate in the criminal trial have been violated; and with the acquittal of the accused, the victims are now left entirely high and dry. This is an injustice that this Court cannot ignore or pretend can only be resolved by an appeal that may not be concluded for many years to come given what is known of our backlogs and the vicissitudes of the adversarial process.

173. In the eyes of an ordinary citizen an acquittal at the preliminary stages of a trial is akin to a determination without the benefit of a full hearing of the evidence on the facts that caused the case to be commenced in the first place. Because he is closely connected to the trial by the fact that he was somehow injured, it is not enough for a victim to be told merely that the criminal case in respect of which he has a keen interest ended because the prosecution counsel they saw in the hearing somehow wasn’t ready. In **High Court Revision No. 9 of 2018, Prosecutor v Stephen Lesinko [2018] eKLR**, the court made the important observation, with which I agree, that:

“the victim and the complainant have a compelling interest to know the outcome of the criminal case against the accused and it is improbable to answer this concern with the answer that the prosecution did not attend proceedings.”

174. The second concern is the issue of the acquittal pursuant to section 210 CPC: There is no dispute that the main hearing had been fixed for 3rd, 5th and 6th December, 2019. All parties were present when the dates were taken. The victim application discussed above, was also pending ruling which did not happen, without explanation. A second application had not been served.

175. On 3rd December, 2019, the file was called out and the hearing was allocated for 10.55am. When the time came, Mr Masinde for Accused 1&2 said he had reached out to Ms Mwaniki (DPP) who was in conduct of the prosecution, and she said she was not around and referred him to another state counsel Mr Owiti. Mr Masinde complained that the court was being held at ransom. The State Counsel present, who is not named, said that he had texted Ms Mwaniki and had not received a response. That sparked discussion on the absence of the DPP on the date fixed for trial. Mr Mburu for Accused 3 and 4 said it appeared that the DPP had lost interest in the case, and he sought a speedy trial and that his clients be discharged from the requirement to report to the DCI. He also sought directions on the pending ruling for the Victim application dated 26th August, 2019; Mr Owuor for Accused 5 associated himself with counsel’s submission; Mr Awandu for Accused 6 sought that the charges against the accused be dismissed; Mr Owore for Accused 7 associated himself with other counsel; Mr Karanja for Accused 8&9 spoke of the absence of the DPP as a show of contempt to the court. The Prosecution Counsel in reply informed the court that he had now received a message that Ms Mwaniki was indisposed.

176. Mr Chemei, who was present and holding brief for Mr Allamano who had filed applications for victims dated 4th November and 28th November, 2019, said that the application dated 4th November had been withdrawn, and a fresh application dated 28th November had been filed. He said was ready to serve it on the parties.

177. At the end of this discussion, the trial court stated that it would give **“directions”** on 5th December, 2019. So that the matters pending before the trial court were now as follows: first, the pending ruling or directions in respect of the Victims’ application dated 26th August, 2019; second, the question of the absence of the DPP; third, the fresh Victim application dated 28th November, 2019

178. Eventually, the ruling impugned herein was read on 3rd February, 2020. In it, the trial magistrate expresses the difficulty he found himself facing, resulting in his having to exercise his discretion to close the prosecution case and acquit the accused under section 210 of the CPC. In his ruling he explained his action, inter alia, as follows:

“That notwithstanding it is critical to note that on the 3rd of December 2019 none of the parties sought an adjournment and no adjournment was granted. No evidence was tendered by the prosecution. Constructively the prosecution case closes and in the absence of any evidence on record, and applying the principles emanating from the authorities referred to earlier in this ruling, I hereby acquit the accused under section 210 of the Criminal Procedure Code”

179. There can be no doubt, whatsoever, that the trial magistrate is entitled to exercise his discretion in making the decision as to how to move forward a trial, including its termination. Nevertheless, his discretion must be exercised judiciously, and as far as possible in accordance with the provisions of the law, if any, under the circumstances of the case. What options were available to him at the hearing?

180. Section 202 CPC allows a court to dismiss a case for non-appearance of the complainant. There is some jurisprudence on the question whether the complainant is to be deemed as the victim of the crime, or whether the state can be described as the complainant. In a case like the present one where 48 people were killed and their families affected, these victims are all complainants but are represented by the state through its complaint as described in section 2 of the CPC. For this purpose, the DPP was the complainant and it is sufficient to note that since a Prosecution Counsel was present on 3rd December – although not being the specific counsel in conduct of the matter – the DPP was present by delegated authority pursuant to section 22(2) Office of the Director of Public Prosecutions Act No 2, 2013. That section provides that:

“(2) Any power exercised or functions performed under this Act by a prosecution counsel or a member of staff of the Office shall be deemed to have been exercised or performed by the Director.”

181. A Prosecution Counsel is defined in section 2 of the ODPP Act as including:

“the Director of Public Prosecutions, every legally qualified member of the office and any other legally qualified person appointed by the Director under this Act to undertake any prosecution under his or her general or special instructions”.

182. Thus, whenever a prosecution counsel appears in a matter his appearance must be construed to be on behalf of the DPP as complainant. In this case, therefore, due to the DPP’s presence at the hearing, Section 202 CPC was not applicable.

183. Section 203 CPC provides for the court to proceed to hear the case if both parties are present. This provision could have been invoked by the trial court as the accused and the DPP were present. The trial court did not invoke the section, however.

184. Section 205 CPC allows for adjournment of a hearing by the court to a certain time and place, but for no more than thirty days. The court had the option to invoke this provision and adjourn to the afternoon or the following day which was also set aside for this hearing. The court did not invoke this section, either.

185. The last part of section 206(1) CPC, provides that if at the time or place to which a hearing has been adjourned “*the complainant does not appear the court may dismiss the charge with or without costs*”. This provision would apply if no prosecution counsel appeared at all at the adjourned hearing. If, however, a prosecution counsel appeared, then the court would be entitled to invoke Section 203 CPC to: deem the state as properly represented by delegation; and the matter as having proper appearance of parties; and it would then proceed with that prosecution counsel’s participation going on record.

186. In the case of witness absence or other reasonable cause to be recorded in the proceedings, Section 283 CPC avails the court power to postpone or adjourn the trial at its discretion on such terms as it thinks fit, and for such time as it considers reasonable. This provision was not applicable in this case because there was no indication of witness absence by the prosecution.

187. In the end, the trial court opted to invoke Section 210 CPC. That provision, as earlier stated and highlighted in the Court of Appeal case of **R v Hasumukh Meghji Shah (supra)** applies where the prosecution has called witnesses to testify against the accused and after the close of the prosecution case. Clearly, that was not the position in the present case. The record does not show that any witnesses were called for in court, or that it asked the Prosecution Counsel to make representation in that regard, or that the prosecution was asked to commence its case and declined. From this perspective, I seriously doubt that the trial court was entitled – in the specific circumstances of this case – to posit that “*constructively*” the prosecution case closes, as the case was not commenced and there were the clear alternative statutory options available to the trial court under sections 203 and 206 CPC.

188. In light of the foregoing, I am not satisfied that the trial court was entitled to record an acquittal by construction under section 210 of the CPC.

189. The third concern is the acquittal of all but one of the accused: The 9th accused identified in the impugned ruling of the trial court is one Julius Kavita. The proceedings of 9th July, 2018, show that Ms Mwaniki for the DPP applied orally for amendment of the Charge sheet to substitute the name of Luka Kipyegon for that of Julius Kavita. The court allowed the substitution and lifted the warrant of arrest against Julius Kavita. Luka Kipyegon then took plea on the same day. It is not clear from the proceedings how his bail or bond issues were dealt with, but on the same date, bail was paid into court in the amount of Kshs 2,500,000/- on his behalf.

190. However, in the impugned ruling of 3rd February, 2020, the trial court did not include or refer to Luka Kipyegon. The DPP at a mention on 5th February, 2020, raised the anomaly, and sought a hearing date for this accused person. The trial court took judicial notice that this court had called up the file, and that the parties had agreed that the file be placed before this Court prior to any orders on the DPPs application,

191. The position is therefore that there now remains one accused person subject of the trial. This is obviously an undesirable and untenable position. Whilst it appears that it probably arose due to an inadvertent error, there could be serious legal complications and a negative public perception of the courts and the administration of justice if the DPP appeared with a determination to proceed with witnesses at any future hearing.

192. The fourth concern I have relates to the public interest and the promotion of public confidence in the administration of justice. Every state organ is enjoined, when applying, interpreting or implementing the constitution, the law or public policy to ensure that that the national values and principles of governance are taken into account (Article 10 constitution). These include the rule of law, human dignity, equity protection of the marginalised – such as the numerous poor and illiterate villagers who were the victims of the dam burst. Further, judicial authority is to be exercised upon the principle, inter alia, that justice shall be that justice shall be administered without undue regard to procedural technicalities, and so that the purposes and principles of the constitution are protected and promoted. Finally, that in construing

the constitution, as I have done in respect of Article 165(6) and (7) on supervisory jurisdiction, the court is enjoined to promote the purposes, values and principles of the constitution, and to interpret it in such a way that the interpretation: advances the rule of law, develops the law and contributes to good governance.

193. All these have been carefully taken into account in reaching the decision that I have arrived at herein: that supervisory jurisdiction under the constitution is so broad as to eclipse the narrow constraints of revisionary jurisdiction under the CPC. In light of the foregoing, it is necessary in this case to adopt an approach whose outcome has far reaching constitutional consequences. That is the direction I have taken.

194. As noted herein, I have found that there is no statute law governing the scope and parameter of the application of supervisory jurisdiction under the constitution. It is recommended that the criminal law be reformed to take into account the radical and expansive implications of the provisions of Article 165(6) and (7) of the constitution in respect of supervisory jurisdiction.

195. In light of and for all the foregoing reasons, there is no doubt in my mind that the trial court's decision cannot be left to stand, as is. What is the proper way to proceed should the trial court's decision be overturned? It appears to me that the most appropriate way to proceed would be to order the trial to proceed under the watch of another trial magistrate. The trial had not yet formally kicked off in the sense that no witness testimony had commenced.

196. Thus, this trial would not have to commence de novo, and the considerations that courts take into account for starting hearings de novo would not need to be invoked, as the trial had not really commenced. All witnesses are still available and their memories of the events of the material day in May 2018 are not too far in the rear view mirror. Also, the interests of the victims would be well served by a fresh trial. To cap it all, and very significantly, the administration of justice would be well served, as public confidence will be promoted since the numerous victims of this catastrophic incident will at last have their day in court.

Disposition

197. For all the foregoing reasons, I do not think that to uphold the trial court's Ruling dated 3rd February, 2019 would ensure the fair administration of justice.

198. Accordingly, the prosecution's application succeeds under the provisions of the Court's Supervisory Jurisdiction in Article 165(6) and (7) and the trial court's acquittal decision delivered on 3rd February, 2020, is hereby set aside.

199. I am aware that the reading of this decision is by teleconference and amid the constraints in the country wrought by the coronavirus pandemic, that has destabilized and scaled down the normal workings of the courts.

200. Accordingly, the orders which I consider appropriate to ensure the fair administration of justice in the circumstances are as follows:

1. The decision of the trial magistrate acquitting the 1st to 8th respondents named herein is hereby declared void and set aside;
2. A retrial is ordered before a magistrate other than Hon K Bidali in respect of all the persons accused in the trial that have taken plea. For the avoidance of doubt, nothing herein prevents the DPP from enjoining other persons for trial herein;
3. The lower court file shall be placed before the Chief Magistrate for re-allocation for hearing of the case forthwith at the earliest opportunity taking into account the scaled down activities of the court and the current national constraints on citizen movement due to the covid pandemic;
4. Bail and bond terms in force in respect of the accused persons immediately prior to the Ruling dated 3rd February, 2020, are hereby reinstated and shall forthwith apply;
5. This court having noted that the DPP had affirmed his readiness for trial as far back as 25th July 2019, the substantive trial shall be commenced without undue delay taking into account the scaled down activities of courts nationwide, and in such manner as to comply with the emergency proclamations made regarding movement and workings of the courts as a result of the covid pandemic;
6. In light of the fact that three sessions of dates fixed for trial have previously been adjourned or aborted, the hearing shall, as far as possible proceed on a day-to-day basis with any adjournment not exceeding thirty clear days pursuant to section 205(1), and subject thereto to Section 283 of the Criminal Procedure Code;
7. The pending applications by or on behalf of Victims, namely, Notice of motion dated 26th August, 2019 and filed on 27th August, 2019, and the Victims notice of motion filed on 28th November, 2019, shall be heard and determined prior to the commencement of the hearing of the substantive trial;
8. The trial court shall manage Victim participation applications and engagement with all due expedition, and in such a manner that such applications and the participation of victims are neither jeopardized nor jeopardize the continuance of the substantive trial.

Administrative directions

201. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom video/tele-conference with the consent of the parties noted

hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

202. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

203. Orders accordingly.

Dated and Delivered in Nairobi by teleconference this 9th Day of April, 2020

Signed

RICHARD MWONGO

JUDGE

Attendance list at the Video/teleconference:

1. Alexander Muteti for the Applicant ODPP,
2. F. I. Mburu holding brief for Mr Masinde for the 1st and 2nd Respondents
3. F. I. Mburu for the, 3rd and 4th Respondents
4. Achieng' Owuor for the 5th Respondent
5. F. I. Mburu holding brief for Mr Were for the 6th Respondent
6. Mr Orare for the 7th Respondents
7. F. I. Mburu holding brief for Mr Kahiga for the 8th and 9th Respondents
8. Mr Malenya holding brief for Mr Chimei for the Victims
9. Mr Ronald Onyango for the Victims
10. Court Clerk – Quinter Ogutu