



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.322 OF 2019**

**JACINTA ANYAGO OBUNGU.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Jacinta Anyago Obungu, is aggrieved by the decision of the trial Magistrate which placed her on her defence. The Applicant was charged with two counts of **careless driving** contrary to **Section 49(1)(9)** of the **Traffic Act**. After hearing the prosecution witnesses during trial, the trial Magistrate held that the Prosecution had established a *prima facie* case that on 30<sup>th</sup> June 2015 at about 1940 hours along Donholm Mara Estate within Nairobi County, the Applicant, while driving motor vehicle registration number KCC 278L Mitsubishi Station Wagon, drove the same without due care and attention, while driving the said motor vehicle at a high speed, as result of which she lost control and knocked down two pedestrians thereby causing them to sustain serious injuries. The Applicant was placed on her defence.

The Applicant faults the trial court for placing her on her defence. The Applicant's application for revision of that decision has two main planks; that the trial court failed to consider the fact that she was not served with the mandatory notice of intention to prosecute under **Section 50** of the **Traffic Act** within fourteen (14) days of the occurrence of the accident. The Applicant placed reliance on the case of **Mmbururu Kiago vs. Republic [1932] eKLR** which declared any trial commenced in respect of a traffic offence under **Section 49** of the **Traffic Act** before compliance with **Section 50** of the **Traffic Act** to be fatally defective and to be unsustainable. The Applicant further faulted the trial Magistrate for failing to properly evaluate the evidence adduced by the prosecution witnesses, which in her opinion, failed to establish that it was the Applicant's motor vehicle that caused the accident or that the Applicant, if at all, had driven the said motor vehicle in a careless and reckless manner that caused the said motor vehicle lose control. In essence, it is the Applicant's contention that there was no basis, either factually or legally for the trial court to place the Applicant on her defence. The Applicant therefore requested the court to invoke its revisionary jurisdiction under **Section 362** of the **Criminal Procedure Code** and set aside the order placing her on her defence and instead substitute it with an order acquitting the Applicant of the charges.

The Prosecution opposed the application. Mr. Momanyi for the State submitted that the fact that the Applicant had been placed on her defence does not mean that she will eventually be found guilty. The trial court was yet to weigh the evidence and reach a definitive determination in respect of the charges brought against her. He was of the view that the issues raised by the Applicant were prematurely before this court because a definitive determination had not been made by the trial court. In essence, learned Prosecutor was saying that the Applicant had jumped the gun and filed the present application before the trial court reached a verdict which could be challenged before this court. He therefore urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. The issue for determination by this court is whether the Applicant properly invoked the revisionary jurisdiction of this court under **Section 362** of the **Criminal Procedure Code**, and if so, whether the Applicant made a case for this court to intervene interlocutorily in the proceedings pending before the trial Magistrate's Court. **Section 362** of the **Criminal Procedure Code** provides that:

***“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 findings, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”***

In **Republic vs. James Kiarie Mutungei [2017] eKLR** Nyakundi J. held that:

***“The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety or correctness of the order in question. The scope of revision is therefore more restrictive in comparison with the appellate***

*jurisdiction which requires the High Court to rehear the case and evaluate the evidence in totality to come with a decision on the merits.”*

Odunga J. in Joseph Nduvi Mbuvi vs. Republic [2019] eKLR held as follows in respect to the High Court’s revisionary jurisdiction:

*“15. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue on appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person.”*

In the present application, the Applicant has invoked the court’s revisionary jurisdiction to challenge the decision of the trial Magistrate to place her on her defence. This court understood the Applicant to say that under no circumstances, either legally or factually, was the trial court entitled to reach the verdict that she had a case to answer. The Applicant put forward a case to effect that the trial court ignored the submission that she made on the No Case to Answer stage of the proceedings. In her view, the argument that she placed before the court was compelling and irresistible. The only verdict that the trial court could have reached in the circumstance was to acquit her under **Section 210** of the **Criminal Procedure Code**.

Is that the case? What the Applicant is seeking from this court in an opinion on whether, based on the evidence on record, the trial court was entitled to reach the verdict placing the Applicant on her defence. Can this court reach such determination without evaluating the merits of the prosecution’s case? This court does not think so. In James Nthuku Kithinji Vs. Republic [2020] eKLR the court held that:

*“While exercising its revisionary jurisdiction, this court is not required to delve into the merits or otherwise of the Prosecution’s case lest it is embarrassed should it be called upon to render a determination should an appeal be filed. The Applicant’s submissions requires this court to consider the merit of the prosecution’s case. The court cannot do that at this stage of the proceedings....it has been held by various courts that it is not mandatory or even advisable for a trial court to give detailed reasons while placing an accused on his defence because to do so may cause embarrassment to the court when making the final determination.”*

In Wesley Kiptoo Rotto & another vs. Republic [2017] eKLR, Muriithi J. held that:

*“21. Sitting with Chesoni J. (Festo Wandera Mukendo vs. Republic*

*[1976-80] IKLR 1626,1631 to the same effect said:*

*[W]e were once more draw attention to the advisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an Appellate Court to set aside an otherwise sound judgment. Where a submission of “no case” is rejected, the court should [say] no more than it is. It is otherwise where the submission is upheld when reasons should be given: for then it is an end to the case or the count or counts concerned.”*

In the present application, it was clear to this court that the trial Magistrate did not commit a judicial discretionary sin that would require this court to sanitize by invoking its revisionary jurisdiction under **Section 362** of the **Criminal Procedure Code**.

This court agrees with the learned Prosecutor that the Applicant jumped the gun by invoking this court’s jurisdiction yet no determination had been made by the trial regarding her guilt or otherwise. The finding made by the trial magistrate that the prosecution had established a *prima facie* case is not a final decision amenable to revision by this court. It may well be that in the final judgement the Applicant may be acquitted. If the Applicant is convinced about the strength of her case, she can exercise one of the options under **Section 211(1)** of the **Criminal Procedure Code**. She also has the option to present closing submission after the close of the defence case. This court holds that the Applicant has suffered no prejudice in regard to her right to fair trial by being placed on her defence by the trial court.

That being the case, the Applicant’s application lacks merit and is hereby dismissed. The trial court’s file shall be returned immediately to the Magistrate’s court so that the trial may be concluded. Of course, if the trial court reaches a verdict that is not to the Applicant’s’ liking, she has the constitutionally guaranteed right of appeal to this court.

It is so ordered.

DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2020.

HON. L. KIMARU

JUDGE