REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL REVISION NO. 378 OF 2018

REPUBLIC.....APPLICANT

VERSUS

BRIAN MURIUNGI.....RESPONDENT

RULING ON REVISION

1. Before me is a Motion on notice dated 12th November, 2018 by the Director of Public Prosecution **(DPP)** against the respondent. The DPP was aggrieved by the decision of the Hon. Lucy Ambasi (C.M.) dated 12th September 2018 **In Meru Criminal Case No. 1512 of 2018 Republic Versus Brian Muriungi** acquitting the respondent.

2. The DPP seeks that the case be reinstated and be allowed to proceed for hearing. The Motion was opposed by the respondent through grounds of opposition dated 24th April, 2019.

3. The respondent who is a minor had been charged with the offence of House Breaking contrary to ***section 304 (1) and stealing contrary to section 279(b) of the Penal Code.*** He also faced an alternative charge of malicious damage to property contrary to ***section 339 (1) of the Penal Code***.

4. It was alleged that on 5th August, 2018 at Kathumbi Area in Imenti North Sub County within Meru County, the respondent broke and entered the building used as a dwelling house by **Moris Mutuma** and stole therein a mobile phone make Tecno P5, mountain bike, and a ball all valued at Kshs. 21,000/= the property of **Moris Mwiti Mutuma**. In the alternative charge, the respondent is alleged to have wilfully and unlawfully damaged six (6) window panes valued at Kshs. 10,000/= the property of the said **Moris Mwiti Mutuma.**

5. The respondent pleaded "not guilty" to the charge and the matter was set down for hearing on 12/09/2018. On 16th August, 2018, the respondent informed the trial court that he was a minor and a class 6 pupil at **Lirinda Primary School.** The court therefore appointed **Mr. Peter Kaimba, Advocate** to represent him and fixed the matter for mention on 22nd August, 2018 when the respondent appeared.

6. On 29th August, 2018, when the matter was listed for mention, the respondent was absent and a warrant for his arrest was issued. The matter once again came up for mention on 5th September, 2018 when the respondent was also absent. The warrant was extended to 5th October, 2018. The prosecution did not inform the court why the warrant had not been executed.

7. On 12th September, 2018, the date the matter had originally listed for hearing, the respondent showed up for hearing. However, the prosecution neither had the police file nor any witness. The prosecutor applied for adjournment which was opposed by the defence Counsel. The court upheld the objection and ordered that the prosecution does proceed with its case.

8. Having neither the police file nor any witness, the prosecution applied to withdraw the case under ***section 87(a) of the Criminal Procedure Code ("CPC").*** The application was objected to and the court upheld the objection. It held that the complainant was not in court and acquitted the respondent under ***section 202 of the CPC.***

9. The applicant contended that he was denied the exercise of his prosecutorial powers under ***section 87 (a) of the CPC;*** that the matter was not listed for hearing as it had only come up for the lifting of the warrant of arrest; that the complainant was not aware of the date and the prosecutor was throughout in court. That the order was in breach of ***section 9(2) of the Victim Protection Act.*** On these grounds, **Mr. Gitonga,** Learned Counsel for the DPP urged that the Motion be allowed.

10. 0n his part, **Mr. Kaimba,** Learned Counsel for the respondent opposed the Motion on the basis of the preliminary objection dated 24th April, 2019. He contended that on the basis of ***section 364(1) (b) of the CPC,*** this court lacks jurisdiction to hear the application. That DPP was contesting an acquittal through revision instead of appealing against the acquittal. The case of **DPP v. M'Ringera Kiungu and Another [2018] eKLR** was relied on in support of that contention. That to allow the application would be in breach of ***section 190 of the Children's***

Act. Counsel urged that the application be dismissed.

11. This courts jurisdiction on revision is set out in ***section 362 of the CPC.***

The section provides: -

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".***

12.. It is clear from the foregoing that the jurisdiction of this court in revision is somehow restricted. All the court has to do is to 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 such subordinate court'.***

13. The first issue this court has to determine is whether it has jurisdiction to determine this matter. If I understood Mr. Kaimba well, his contention was that because the respondent had been acquitted, the only available avenue for the applicant was to appeal. He relied on the case of **DPP v. M'Ringera Kiungu and Another (supra)** for that contention.

14. I do not think that submission is correct. If an acquittal is so irregular and illegal, nothing restrains this court from revising such an irregular order. In **R. v Edwin Otieno Ocholla & another [2018] eKLR**, the court revised an acquittal under ***section 202 of the CPC*** and ordered a retrial. In **DPP v. Benard Koech Kemboi [2017] eKLR,** the court reopened a case in which an accused had been acquitted under ***section 202 of the CPC.*** The case relied on by Mr. Kaimba is not applicable as the court in that case was dealing with an acquittal under ***section 210 of the CPC*** and not ***section 202*** like in this case.

15. The question which this court has to consider is the correctness, legality or propriety and/or the regularity of the order and proceedings impugned. It is clear from the record that as early as 6th August, 2018, the 12th September, 2018 had been earmarked by the trial court and set as the date for the hearing of the case against the respondent. He turned up on that day ready to proceed with the case against him. It is therefore imprudent for the applicant to argue that the case was not coming up for hearing on that day.

16. Since that day had clearly been set for trial, the prosecution was expected to have summoned its witnesses and ready to proceed with the case. The prosecution neither had the witness nor the police file. The court expected the prosecution to call its witness none of which it had. The prosecution then applied for an adjournment which was opposed. The trial court denied the adjournment sought.

17. Was the denial of adjournment merited. In my view, the trial court was entitled to decline the adjournment. There was no reason that was advanced by the prosecution why it did not have its police file or why there were no witnesses in court. The court was not informed whether the witnesses had been bonded or not and if not, the reason for not having bonded them. It should be recalled that at no time had the hearing date of 12th September, 2018 been vacated. The prosecution was well aware of the hearing date.

18. It was contended that the matter was only coming up for the lifting of the warrant of arrest against the respondent. Nothing could be further from the truth. The warrant for the arrest of the respondent had been issued on 29th August, 2018. On 5th September, 2018, the record shows that although the respondent was present, the prosecution still asked for the warrant to be extended and the court acceded to that request. The prosecution did not even bother to tell the court why it needed the warrant extended, firstly as the respondent was present and secondly, whether the same had not been executed.

19. To my mind, the prosecution having failed to explain to court why it did not have the police file or any witness in court, the trial court cannot be said to have acted irregularly by declining to grant the adjournment. It is time the DPP is told firmly, clearly and unequivocally that, adjournment of cases is not a matter of course. Cases are brought to court to be prosecuted and not for window dressing. Courts are not there to bend at the whims of the DPP. Courts are there to hear cases and when the DPP fails to give good reason why a case should not proceed, the courts will act as per the law provided, force him to proceed or dismiss the charges and acquit the accused.

20. The next issue is whether the court was justified in acquitting the respondent rather than acceding to the withdrawal of the charge under ***section 87 (a) of the CPC.*** The prosecution having failed to secure the adjournment sought, it sought refuge under the said section.

21. The above section gives the DPP the liberty to withdraw charges against an accused at any stage of the proceedings before the defence is offered. The effect of such withdrawal is to allow the charge to continue hanging over the head of an accused person like the sword of Damocles which can fall on him at any time. An accused in such a case may be re-arrested and charged at any time. Indeed, during the dark days in the history of this country, accused persons used to be pounced on immediately they left court.

22. To my mind, while the DPP is perfectly free to use his powers under the said section, it does not give him carte blanche licence to abuse those powers. When exercising his powers which are donated by the Constitution, including the powers under ***section 87 (a)*** aforesaid, he shall not be at the direction or control of any person or authority. He is therefore at liberty to decide who to charge with what offence and when and how to exercise that power.

23. However, when exercising those powers, there is a caveat in ***Article 157 (11) of the Constitution;*** that he shall have regard to the public interest, the interests of the administration of justice and the need to ***prevent and avoid abuse of the legal process.***

24. The trial court heard that the respondent was a minor and that no good reason had been advanced why the DPP wanted to withdraw the charges under that section. From the record, it is clear that the reason to withdraw the charge was because the DPP had not put his house in order. While he knew from 6th August, 2018 that the 12th September, 2018 was the hearing date, he turned up in court unprepared. Was the

court to sit back and assist the DPP?

25. What is the public interest in the administration of justice? I believe that public interest demands that cases be determined expeditiously and justice not be delayed ***(Article 159 (2) (b) & Art. 50 (e) of the Constitution),*** that in cases against children, a child's best interest is paramount and their cases should be determined without delay ***(Art 53 (2) and section 186 (c) of the Children's Act).*** That the interests of accused persons should always be weighed against those of victims **(*section 9 of the Victim Protection Act).***

26. Having the foregoing in mind, the question arises as to whether the intention to withdraw the case against the respondent under ***section 87 (a) of the CPC*** was in public interest. Firstly, it meant that the respondent who was a minor (class six pupil) and had presented himself for the hearing of his case would not have had his case determined expeditiously, its determination would have been delayed. Secondly, it was not in the best interest of the child.

27. Further and more important, it would have been an abuse of the court process. ***Section 87 (a) of the CPC*** is meant to assist the DPP to put his house in order when he realizes that there may have been a mis-step either on his part or the investigations. It is not meant to be a challenge or a cure to a lawful court order that requires him to proceed with a prosecution. He presents accused in court to be prosecuted not to attend court eternally. Adjournment of a case is not a matter of right. It must be earned by advancing good reasons, even on the first hearing date.

28. In this case, the court having held that there was no good reason to give an adjournment, in applying to withdraw the charge under ***section 87 (a)*** was but an attempt to abuse the legal process contrary to ***Art. 157(11) of the Constitution.*** The prosecution had been aware of the hearing date from the 6th August, 2018 but failed to bond its witnesses or even call for the police file on the hearing date. There could be no better abuse of court process than that.

29. In my considered view, the trial court was entitled to hold that the prosecution had no evidence to offer and acquit the respondent as it did. In this regard, there was nothing irregular with the way the court conducted the proceedings.

30. It was contended by the DPP that, the trial court breached the provisions of ***section 9(2) of the Victims Protection Act.*** That the complainant was not aware of the case. A simple answer to that is that, when the court fixed the hearing date in the presence of the prosecutor on 6th August, 2018, it was expected that the prosecutor, through the investigations officer was to inform the complainant of the date. It was not upon the court or the respondent to inform the victim of the date. The DPP cannot seek to blame the court for his own shortcoming.

31. In view of the foregoing, I think I have said enough to show that the application for revision has no merit and the same is dismissed.

DATED and DELIVERED at Meru this 13th day of June, 2019.

A. MABEYA

JUDGE