REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.106 OF 2019

REPUBLIC.....APPLICANT

VERSUS

NAHASHON MATHENGE WAHOME.....1ST RESPONDENT

CHARLES WANJAU KANYI.....2ND RESPONDENT

RULING

The Applicant, the Nairobi County Government, through the Republic was aggrieved by the decision of the trial court in **Nairobi Chief Magistrate's Court Criminal Case16891 of 2018 (City Court) Republic -vs- Nahashon Mathenge Wahome and Charles Wanjau Kanyi**. The decision made on 26th March 2019 terminated the criminal proceedings against the Respondents under **Section 210** of the **Criminal Procedure Code** after the Applicant had apparently failed to avail witnesses on the day the trial had been scheduled for hearing. The Applicant moved this court pursuant to the provisions of **Article 165(6)** & **(7)** of the **Constitution** and **Sections 362** & **364** of the **Criminal Procedure Code** seeking to have that decision revised by this court. The grounds in support of the application are stated on the face of the application. It is supported by the affidavit of Johnstone Muyuka, the County Prosecutor for Nairobi County Government. The application was opposed by the Respondents.

During the hearing of the application, this court heard oral rival submission made by Mr. Muyuka for the Applicant and Mr. Nyachio for the Respondents. Mr. Muyuka submitted that the Respondents were charged with trading without a valid licence. When the matter came up for hearing, the prosecution was ready to proceed with the matter. They were given time allocation. However, at the appointed time, the Applicant was unable to trace his witnesses because they were not within the court premises. He requested for time to call his witnesses. The request was declined. The case was dismissed under **Section 210** of the **Criminal Procedure Code**. The Applicant was of the view that the trial court had acted in bad faith in refusing to grant the prosecution an adjournment to call its witnesses. The Applicant questioned why the trial court applied double standard on the one hand granting adjournment to the defence and on the other hand declining to grant adjournment to the prosecution. He was of the view that the trial court was biased against the prosecution. He urged the court to revise and set aside the order of the trial court terminating the proceedings under **Section 210** of the **Criminal Procedure Code**.

Mr. Nyachio for the Respondents opposed the application. He submitted that the Respondents were acquitted under **Section 210** of the **Criminal Procedure Code**. The Applicant should have filed an appeal instead of craving for orders of revision from this court. He was of the firm view that the order sought by the Applicant cannot be availed to it in an application for revision. He urged the court to dismiss the application because the Applicant had wrongly invoked the jurisdiction of the court. He pointed out that the goods which had been detained by the Applicant pending trial were released to the Respondents after the lapse of fourteen days. He therefore urged the court to dismiss the application as it lacked merit.

This court has carefully considered the rival submission made by the parties to this application. There are two issues for determination. The first issue is whether the Applicant properly approached this court by filing an application for revision where the Respondents had been acquitted under **Section 210** of the **Criminal Procedure Code**. The second issue for determination, if the first issue is determined in the Applicant's favour, is whether there is merit in the Applicant's application. In regard to the first issue, this court agrees with the Respondents that the avenue that the Applicant should have approached this court is by way of appeal and not by filing an application for revision. **Section 364** of the **Criminal Procedure Code** sets out the power of the court when considering an application for revision. **Section 364(1)(b)** of the **Criminal Procedure Code**, prohibits the court from considering an application for revision where the order of acquittal is being sought to be altered or reversed. This is the position that was adopted by the court in **Wesley Kiptui Rutto -vs- Republic [2017] eKLR** where Muriithi J held thus:

> ***"There is power to revise (or review, as some case law has used the civil law terminology) all orders save an order for acquittal. See Section 364(4) of the Criminal Procedure Code and Bichanga –vs- Republic [2005] 2 KLR 4 where the Court of Appeal (Omollo, Okubasu & Waki JJA) held that –***
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> ***"The meaning of Section 364(4) of the Criminal Procedure Code 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."***

In **DPP –vs- Gilbert M'Ringera Kiungu & Another [2018] eKLR**, Gikonyo J held thus:

> ***"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. The Respondent will also be served and will participate fully in the appeal where his acquittal is being challenged. That is my view and position.***

Accordingly, I think the court is not obligated to revise an acquittal on revision. However, the Applicant may employ other avenues such as appeal to approach the court for orders."

It is clear from the foregoing that where an accused has been acquitted, and the prosecution is aggrieved, the only remedy available to it is to approach the court by way of appeal and not by way of seeking orders of revision. In the present application, it is evident that this court lacks jurisdiction to consider the merits of the prosecution's application in an application for revision.

That being the case, this court cannot give its comment in regard to the merits or otherwise of the Applicant's application. It will be otiose. It will be an exercise in futility. The Applicant's remedy lies in filing an appropriate appeal to this court.

The upshot of the above reasons is that the Applicant's application cannot be allowed. It lacks merit. It is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF JULY 2019

L. KIMARU

JUDGE