



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL REVISION NO. 1 OF 2019

(From the original conviction and sentence in Criminal
Case no. 933 of 2011 of the Magistrates court at Tigania)

REPUBLIC.....APPLICANT

VERSUS

KALOKI KAILANYA.....RESPONDENT

JUDGMENT

[1] This Criminal Revision was commenced through a letter dated 31st December 2018 and signed by F. W. Njihia, Prosecution Counsel from the Office of the Director of Public Prosecution. Prosecution Counsel has requested this honorable court to call for and examine the record in Tigania Chief Magistrates court criminal case no. 933 of 2011 and revise/review the finding of the learned trial Magistrate Hon. P. M. Wechuli which was delivered on 19th October 2018.

[2] According to the Prosecution Counsel the respondent had been charged with theft of farm produce contrary to Section 8 (10) of the Stock and Farm Produce Act. The prosecution called 3 witnesses. However, they were unable to call more witnesses as the police file was unavailable in several occasions. The reason for non-availability of the police file was that the initial investigating officer was transferred and there was no proper handing over. Further, the OCS Nchiru Police Station was transferred and there was no proper command on how the file was to be presented and availed in court. Consequently, the court compelled the state to close its case without crucial evidence of the lands officer, the agricultural officer and the investigating officer. The application was unopposed.

[3] The High Court has supervisory jurisdiction over the subordinate court. See article 165(6) and (7) of the Constitution below:-

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

[4] Therefore, revision powers of the High court contained in Section 362 through to 366 of the Criminal Procedure Code (cap.75) must be seen within the lens of section 7 of the Sixth Schedule of the Constitution. Section 362 specifically provides 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”.

[5] What the High Court can do under its revision jurisdiction is stated under section 364 of the Criminal Procedure Code Cap 75, which states as follows:-

“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 section 354, 357 and 358,

and may enhance sentence;.

(b) in the case of any other order than an order of acquittal, alter or reverse the order

2. No order under this section shall be made to the prejudiced of an accused person unless he had had an opportunity of being heard either personally or through 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 arises 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.”

[6] It is clear from the above provisions of the Criminal Procedure Code that the High Court has wide powers in its revision jurisdiction. However there are also some limitations on those powers. In my view, Section 364(1)(b) of the Criminal Procedure Code, prohibits the court from converting an order of acquittal into a conviction through revision. Such order is better sought in an appeal where the accused will invariably fully participate in the proceedings and will enjoy the staple protections offered in criminal law. Needless to state that, even if under revision the court may issue orders it may issue in appeal, I should think that the revision procedure may not be as elaborate or provide all the staple protections in criminal law as an appeal would. In my view, the policy underpinning this position is the grave nature of conversion of an acquittal into a conviction and the effect such order has on the rights of the accused. I am content to cite Muriithi J in Wesley KiptuiRutto -vs- Republic [2017] eKLR that:

“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 –

“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.”

[7] See also DPP –vs- Gilbert M’Ringera Kiungu & Another [2018] eKLR, 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. 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.”

[8] In a ruling dated 19th October 2018, the trial court in Criminal Case 933 of 2011 acquitted the respondent under section 210 of the CPC. I am however aware that some posit that in such case, the prosecution may not necessarily be asking for conversion of the acquittal into a conviction but a review of the order which denied adjournment and inevitably forced closing of the prosecution case before crucial witnesses had testified. A review clearly sought on those grounds may be potent but as an acquittal was ordered. I still take the view that the relief sought herein should be sought and canvassed in an appeal where all parties will fully render themselves on the matter. In an appeal, a retrial may be ordered.

[9] Consequently, and for reasons I have stated, I decline to exercise my power of revision. Nonetheless, a court of law should always fashion appropriate orders in a proceedings such as this. I allow the prosecution 14 days to file an appeal on this matter. It is so ordered.

Dated at Nairobi this 12th day of October 2019

.....

F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Meru this 15th day of October 2019

.....

A. MABEYA

JUDGE