REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL REVISION NO. 5 OF 2019

(**arising from Kakamega CMCRC No. 1785 of 2018**)

REPUBLIC

(DIRECTOR OF PUBLIC PROSECUTIONS).....APPLICANT

VERSUS

JUDITH ACHOLA MULALA.....RESPONDENT

JUDGMENT

1. The instant revision cause shall be determined simultaneously with the following other revisions causes:

(a) HCCRREV. No. 6 of 2019

Republic vs. Levin Magina Ndombi (arising from Kakamega CMCRC No. 2918 of 2018);

(b) HCCRREV. No. 7 of 2019

Republic vs. Alvin Acholi (arising from Kakamega CMCRC No. 282 of 2018);

(c) HCCRREV. No. 8 of 2019

Republic vs. Reuben Lunani Wahitsachi (arising from Kakamega CMCRC No. 2209 of 2018);

(d) HCCRREV. No. 9 of 2019

Republic vs. Patrick Mirikau Matsitsia (arising from Kakamega CMCRC No. 138 of 2018);

(e) HCCRREV. No. 10 of 2019

Republic vs. Roda Nanyama Kakai and another (arising from Kakamega CMCRC No. 2865 of 2017);

(f) HCCRREV. No. 11 of 2019

Republic vs. Edwin Mulozi (arising from Kakamega CMCRC No. 2240 of 2018); and

(g) HCCRREV. No. 12 of 2019

Republic vs. Nabil Mohamed (arising from Kakamega CMCRC No. 1935 of 2018).

2. The eight matters came up for hearing on 10th June 2019 before Hon. Malesi, Senior Resident Magistrate (SRM). The records reflect that the state prosecutor did not attend court on that day. When the court called out the matter it was established that there were no witnesses present. In all these cases the accused persons were recorded as being in attendance, some with their advocates, ready to proceed with the matters. Due to the absence of the state prosecutor and of witnesses, the court proceeded to dismiss the cases under section 202 of the Criminal Procedure Code, Cap 75, Laws of Kenya, and to acquit the accused persons, who are now the respondents in the cause before me.

3. The state was aggrieved, and applied to this court, through letters by the Senior Assistant Director of Public Prosecution, Regional Head Kakamega County, Patrick Magero Gumo, all dated 10th June 2019, for revision of the decision of the trial court on the basis that:

(a) The trial court had conducted the hearings in the absence of the prosecution;

(b) The trial court had failed to take notice of the fact that there was a shortage of prosecutors for the Kakamega law courts;

(c) The trial court had dismissed the matters under section 202 of the Criminal Procedure Code due to non-attendance of prosecution counsel who was then on maternity leave which had begun on 15th February 2019 and was due to end on June 2019;

(d) The trial court failed to adjourn the matter to a later date when the prosecution counsel would have been available;

(e) The trial court did not take into account the fact that in some of the matters witnesses had testified; and

(f) The trial misapprehended the purport of section 202 of the Criminal Procedure Code and misapplied the same to the circumstances that were before him.

4. I will now recite the events in each of the cases that were before the trial court:

(a) In HCCRREV No. 5 of 2019 (Kakamega CMCRC No. 1785 of 2018), the matter was part-heard as two witnesses had testified on 19th July 2017 and 15th November 2017. The matter was adjourned several times thereafter for a variety of reasons, caused by the state, the defence and the court. On 10th June 2019, the record reflects that there was no state prosecutor present and there were no witnesses. At the previous hearing on 31st January 2019 the matter had been adjourned at the instance of the state for lack of witnesses and the police file.

(b) In HCCRREV No. 6 of 2019 (Kakamega CMCRC No. 2918 of 2018), the matter was fresh in that no witnesses had yet testified although plea was taken on 26th November 2018. The matter was adjourned several times to facilitate the furnishing of the accused with state evidence and for lack of witnesses and the police file. On 10th June 2019, the state prosecutor was absent and it was recorded that although the matter had be called out there were no witnesses. At the previous hearing on 29th May 2015, the matter had been taken out as it was said that the prosecutor for that court was on leave and it was at that hearing that the matter was listed for 10th June 2019.

(c) In HCCRREV No. 7 of 2019 (Kakamega CMCRC No. 282 of 2018), the matter was part-heard, four witnesses had testified on 27th August 2018. It came up for hearing on two other occasions thereafter when it was adjourned because the trial court was not sitting and the accused sought time to engage counsel. On 10th June 2019, the prosecutor was absent and the court dismissed the matter on application of counsel for the accused. The previous hearing was on 4th February 2019 when the matter was adjourned to allow the accused to engage counsel. The record is silent on whether the state was ready with witnesses on that day.

(d) In HCCRREV No. 8 of 2019 (Kakamega CMCRC No. 2209 of 2018), the matter was fresh. Plea had been taken on 31st August 2018. The matter had come up for hearing on three occasions, including 10th June 2019. On the first occasion it was adjourned because the presiding court was not sitting, on the second occasion the prosecution did not have its witnesses and the prosecution file, and on the third occasion the prosecutor was not in court, neither were the witnesses present.

(e) In HCCRREV No. 9 of 2019 (Kakamega CMCRC No. 138 of 2018), the matter was fresh, for although plea was taken on 13th November 2018, no witness had testified as of 10th June 2019 when the case was dismissed. It had four hearing dates, including 10th June 2019. On 25th March 2019 the matter did not proceed because the prosecution did not have witnesses. On 16th May 2019, the prosecutor attached to the court was said to be on leave. On 27th May 2019, the state did not have witnesses. Come 10th June 2019, the state prosecutor was absent and there were no witnesses in court.

(f) HCCRREV No. 10 of 2019 (Kakamega CMCRC No. 2865 of 2017), the matter was fresh. Plea had been taken on **25th** September 2017. The matter came up for hearing on seven occasions. It was adjourned for a variety of reasons, which included the prosecution not having witnesses, the defence not being ready, some of the accused persons being absent and the parties attempting to reconcile the matter out of court. Eventually, it was dismissed on 10th June 2019 as state counsel was no present to prosecute it.

(g) HCCRREV No. 11 of 2019 (Kakamega CMCRC No. 2240 of 2018), the matter was fresh. Plea had been taken on 3rd September 2018. The matter came up for trial on four occasions. The first hearing was adjourned because the trial court was not siting. The second one did not take off because the state did not have witnesses. The third hearing failed because the state did not have witnesses. On 10th June 2019, neither the prosecutor nor its witnesses were in court.

(h) HCCRREV No. 12 of 2019 (Kakamega CMCRC No. 1935 of 2018), the matter was part-heard as two witnesses had testified on 26th November 2018. The matter was allocated six hearing dates thereafter, but the matter did not proceed on those dates for various reasons - court not sitting, prosecutor not available, lack of witnesses, among others. The trial on 28th February 2019 collapsed for lack of a prosecutor after the court had waited up to 11.40 AM. The court on its own motion adjourned the matter to 20th March 2019. Come 20th March 2019, the state did not have witnesses and was granted a last adjournment to 21st March 2019, on which day the state did not have witnesses and the matter was put off to 9th May 2019. On 9th May 2019 the court did not sit and the matter was

allocated 10th June 2019, when the case was dismissed because the prosecutor was absent.

5. Before I consider whether there is merit in the application by the state for revision of the orders made by the trial court to dismiss the eight matters, I should first of all remind myself of the jurisdiction of the High Court with regard to revision. The same is provided for under section 362 of the Criminal Procedure Code, Cap 75, Laws of Kenya, which states:

> *"Revision*
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> *362. Power of High Court to call for records*
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> *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."*

6. The scope of the remit of the High Court to revise decisions of trial courts has been discussed in a number of previous decisions. In *Republic vs. James Kiarie Mutungei* [2017] eKLR , for example, it was said:

> *"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, correctness of the order in question … In considering similar provisions under the Indian Criminal Procedure Code … the Supreme Court in the case of Sriraja Lakshmi Dyeing Works vs. Pangaswamy Chettair (1980) 4 SCC 259 said as follows:*
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> *'The conference of revisional jurisdiction is generally for the purpose of keeping tribunal subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa.'"*

7. In *Republic vs. John Wambua Munyao & 3 others* [2018] eKLR, Odunga J. stated:

> *"31. … 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 …*
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> *32. …*
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> *33. …*
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> *34. …*
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> *35. …*
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> *36. …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 an appeal under the guise of a revision …"*

8. Clearly, the High Court does have jurisdiction to revise decisions of trial courts that are brought or come to its attention. The powers that the court can exercise on revision are set out in section 364 of the Criminal Procedure Code, which states:

> *"364. Powers of High Court on revision*
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> *(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—*
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> *(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;*
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> *(b) in the case of any other order other than an order of acquittal, alter or reverse the order.*
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> *(c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.*
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> *(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."

9. Next I should consider how I should proceed after a decision or decisions available for revision have been brought before me. By virtue of section 365 of the Criminal Procedure Code, no party has a right to be heard at revision, although the court may choose to hear the parties if need be or at their request. The said law also provides that revision may be heard by a single judge. See section 366. The said provisions state as follows:

"365. Discretion of court as to hearing parties

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. Number of judges in revision

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."

10. The complaint by the state revolves around decisions made by the trial court with regard to non-attendance by state prosecutors. I should, therefore, need to look at what the law of procedure is on such matters. There are two sets of provisions on the consequences of non-attendance by parties. These are stated in sections 202 and 206 of the Criminal Procedure Code.

11. Section 202 of the Criminal Procedure Code states as follows:

"202. Non-appearance of complainant at hearing

If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit."

12. My understanding is that section 202 applies to the situation where the matter is coming for hearing for the first time. In that case where the complainant fails to appear or to attend at that hearing then the court will be at liberty to either acquit the accused person or adjourn the hearing to another date.

13. Section 206 on the other hand states as follows:

"206. Non-appearance of parties after adjournment

(1) If, at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which made the order of adjournment, the court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs.

(2) …

(3) …

(4) …"

14. Section 206 refers to non-appearance after adjournment, and should, therefore, be read together with section 205 of the Criminal Procedure Code, which provides for adjournments. The relevant part of section 205 states:

"205. Adjournment

(1) The court may, before or during the hearing of a case, adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may allow the accused person to go at large, or may commit him to prison, or may release him upon his entering into a recognizance with or without sureties conditioned for his appearance at the time and place to which the hearing or further hearing is adjourned:

Provided that no such adjournment shall be for more than thirty clear days, or, if the accused person has been committed to prison, for more than fifteen clear days, the day following that on which the adjournment is made being counted as the first day."

15. My understanding is that section 206 provides for what should happen after the matter is adjourned after the first hearing date, whether the case took off at that first hearing date or not. It would appear that there after consequences that follow non-appearance or non-attendance in court by the parties after the hearing is adjourned. For the accused person's non-appearance, the court may decide to proceed with the hearing, the non-attendance notwithstanding. The provision is silent on this, but given the permissive language of the provision, it would appear that the court can also adjourn the matter once more. The practice is that the court would adjourn the matter and issue a warrant for the arrest of the accused person. Rarely do trial courts proceed to hear a matter under section 206 in the absence of the accused person. For the complainant, the consequence is that the charge could be dismissed. Again, the provision is discretionary. The court also has the option of simply adjourning the matter to another date.

16. The two provisions talk about the non-appearance of the complainant and not of the state or state prosecutors or officers from the Office of the Director of Public Prosecutions. There is quite some controversy as to what 'complainant' means under these provisions, and in others where the word is used in the Criminal Procedure Code.

17. The Criminal Procedure Code does not define the word 'complainant.' The word that is defined in the interpretation part of the Criminal Procedure Code, section 2, is the word 'Complaint', to mean 'an allegation that some person known or unknown has committed or is guilty of an offence.' The word 'complainant' is, no doubt, to me, derived from the word complaint, and it would appear to me to mean the person who makes a complaint. The *Black's Law Dictionary*, tenth edition, defines a complaint to mean the initial pleading that starts an action in civil cases, and, in criminal cases, the formal charge accusing a person of an offence.

18. Initiation of criminal proceedings under the Criminal Procedure Code is provided for under section 89 , which reads:

"89. Complaint and charge

(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

(2) A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

(3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the magistrate, and, in either case, shall be signed by the complainant and the magistrate.

(4) The magistrate, upon receiving a complaint, or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of subsection (5), draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless the charge is signed and presented by a police officer.

(5) Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."

19. My view of this is that the complainant, within the context of the Criminal Procedure Code, would be that person who initiates the complaint that is envisaged in section 89 of the Criminal Procedure Code. That complaint, or charge, is what initiates the criminal proceedings. Under the Kenya criminal justice system, criminal proceedings are initiated in court by the Director of Criminal Prosecutions, and it is that office that conducts the actual prosecutions. My understanding, therefore, is that the complainant is the prosecutor, who stands for the Republic or state in criminal proceedings. Proceedings are started, continued and terminated at the behest of the state through the prosecutor. It is the state through the prosecutor that is the party to criminal proceedings, and the matter is styled as a dispute between the state and the accused person. Reference, therefore, to complainant in the Criminal Procedure Code must be reference to the prosecutor, the initiator of the criminal case.

20. The complaint envisaged in the Criminal Procedure Code is not that made by the victim of the crime with the police. The police may refer to the information they receive from a victim of a crime as a complaint, and to they may even refer to the victim to that extent as a complainant, but those words as used in the Criminal Procedure Code are not used in that context. They can only be construed in the narrow context of the information laid before a court by the person initiating the criminal matter formally in court, and to refer to that person. I have read and reread he provisions of the Criminal Procedure Code, and I am not persuaded that the word complainant refers to anything more than the person who initiates the cause in court through a complaint.

21. It would appear to me that section 202 of the Criminal Procedure Code does not apply to any of the cases that were before the trial court

on 10th June 2019. All of them had come before the court for the initial hearing and were adjourned, either after a hearing or upon collapse of the hearing. That would mean that the discretion allowed in section 202 of the Criminal Procedure Code did not apply to those cases, and it was, therefore, erroneous for the trial court to have purported to have had power to dismiss the cases under Section 202.

22. Does it, therefore, mean that the trial court ought not to have dismissed the cases? I do not think so. I believe the situation in all those cases fell under section 206 of the Criminal Procedure Code. Those matters came up for hearing after adjournment consequent upon a first hearing or adjourned hearing. The hearing dates had all been given by the court in the presence of the state. It cannot be argued that the state was unaware of the date, it would appear that the state chose to stay away, yet it was the initiator of the cases and the driver of the process. It should be the duty of the person who initiates a cause to drive it through, for when the driver is not available to set the vehicle in motion nothing moves. There are, no doubt, equivalent provisions in the civil process, when a civil matter comes up for hearing and the mover of it is not in court, the same would be liable for dismissal at the discretion of the court. See Order 12 Rules 1, 2, 3 and 4 and 17 Rule 3 of the Civil Procedure Rules.

23. The law gives the court discretion to dismiss suits for non-attendance by the prime movers. In the context of the matter before me, the prime mover was the state. The absence of the state prosecutor meant that there was no one to move the process forward, and the court had the option to dismiss the case, and it exercised that option. The only question then would be whether the court exercised that discretion or option reasonably or capriciously.

24. In the letters dated the 10th June 2019, the state lists five grounds that suggest that the trial court exercised its discretion in a manner that was not reasonable.

25. The first ground is that the trial court conducted proceedings in the absence of the prosecution. I am not clear in my mind about what is meant by this for no proceedings were conducted or could be conducted in the absence of the state for the matters were all at prosecution stage and could not possibly proceed in the absence of the prosecutor. In any event the law does not allow the trial court to proceed even with a defence case in the absence of the state. Perhaps, it means that the court ought not to have convened in the absence of the state. There is no law that requires that a court handling criminal matters should only convene in the presence of a prosecutor. The court should convene at any time of its convenience during official hours and it is the duty of the prosecutor to be in attendance to prosecute their cases. The court does not operate at the convenience of the state prosecutor. Like any party, the state prosecutor should be in court as and when the court convenes or sits. The fact that a state prosecutor is absent or late or unavailable does not stop a court of law from holding its sittings. The state prosecutor should never contemplate that because they are absent the court cannot proceed with its business. That is a fallacy which has no foundation in law. A state prosecutor who chooses to absent themselves from court sittings risks the attendant consequences that are clearly laid out in sections 202 and 206 of the Criminal Procedure Code. It would appear that that is what happened in this case. The court convened, the state chose to stay away and the hammer came down as stipulated in sections 202 and 206.

26. The other argument is that the trial court ought to have taken into account that in some of the matters witnesses had testified. Indeed, there are two matters where witnesses had testified. In one, two witnesses had given evidence, while in the other four witnesses had testified. While I agree that the fact that some witnesses had testified is a factor that the court could take into consideration in exercise of discretion under section 206, it should be noted that as framed section 206 does not bar the court from exercising discretion to discontinue the criminal matter even then. 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.

27. The other argument is that the court failed to take notice that there was a shortage of prosecutors at Kakamega Law Courts. Criminal cases do not belong to the court. They are initiated by the prosecutors, and it is their duty to prosecute them to the end. Prosecutors are not judicial staff. It should, therefore, not be the responsibility of the trial court to know, leave alone take notice, that there is a shortage of prosecutors. Once the state initiates its cases in court it should be its responsibility to ensure that they have prosecutors to conduct their prosecutions. Whether they have a shortage of staff or not is not a matter for the court. It should be the responsibility of the state department responsible for prosecutions to ensure that any shortages are addressed. Where any gaps exist in any of the regions across the country, that should be a matter for the prosecution agency to address. The issue of the court taking notice of any such gaps should not arise.

28. The above ground is closely related to the submission that the court dismissed the cases when the prosecutor attached to the court was on maternity leave. A state prosecutor is merely attached to a court at the discretion of the prosecuting agency, that is never done at the discretion of the court. Such a prosecutor is not a member of judicial staff. Whether that prosecutor is on maternity leave or not is not a matter of concern to the court. What the court expects is that when it convenes to transact criminal business, the prosecution agency would avail prosecutors to handle the cases it has brought to court. The court does not organise the affairs of the prosecution office, matters of prosecution staff going on maternity should be of no concern whatsoever to the court, whether they are brought to the attention of court or not. Court operations cannot, surely, be paralysed because a prosecutor has gone on maternity leave. In any event, going on maternity leave does not just happen suddenly; there is always adequate time which should allow for planning beforehand. What emerges here is that no such planning beforehand was done, yet it was common knowledge to the persons managing the prosecution office that at some definite point or other the officer in question would be proceeding on maternity leave.

29. There is also the complaint that the court failed to adjourn the matters to the next available date when the prosecution counsel would be available. In the first place the prosecution office did not send counsel to indicate to the court when the prosecution counsel would be next ready to prosecute these matters. Secondly, the dates for hearing had been fixed in open court in the presence of state prosecutors. It was up to the prosecution office to ensure that come the appointed day there would be prosecutors to handle the matters. It was imprudent to simply stay away and hope that the court will simply adjourn the matter. Other than the state there are other players in the criminal justice system, and there are constitutional imperatives to be taken into account with respect to these situations.

30. Overall, it has not been demonstrated that the trial court made any error of law in acting the way it did. The only anomaly is that it proceeded under section 202 instead of section 206 of the Criminal Procedure Code. Either way, the orders it made were within its discretion

under section 206. What comes out very clearly from these proceedings is that the prosecution filed to prepare itself for the proceeding on maternity leave of its staff hence creating a mess at the courts.

31. 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. It is so ordered. This order shall apply all the revision causes mentioned in paragraph 1 of this judgment.

DELIVERED DATED AND SIGNED AT KAKAMEGA THIS 15TH DAY OF NOVEMBER, 2019

W. MUSYOKA

JUDGE