



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION NO. 8 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DUKE NYANGAU PAUL .....RESPONDENT**

**RULING ON REVISION**

1. This is a ruling on an application for revision dated 12<sup>th</sup> March, 2019. The applicant sought to have the orders of the trial court made on 9<sup>th</sup> March, 2018 dismissing the prosecution's case for failure of the prosecution to attend court reviewed and set aside.
2. Duke Nyangau Paul, the respondent, was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code. Particulars were that on the 6<sup>th</sup> day of June, 2019 at Isinya Township, Isinya Sub-County within Kajiado County he unlawfully assaulted Daniel Musiya thereby occasioning him actual bodily harm.
3. The accused pleaded not guilty and as at 9<sup>th</sup> March, 2018 when the charge was dismissed, the prosecution had led 4 witnesses and closed its case. When the matter was placed before Hon. Chesang, RM on 9<sup>th</sup> March, 2018 for defence hearing, the recorded shows that the respondent was absent and so was the prosecutor. The court then went on to dismiss the matter under Section 202 of the Criminal Procedure Code for absence of complainant, prosecuting counsel and accused prompting the present application.
4. Revisionary jurisdiction of this court is granted by both the Constitution and the Criminal Procedure Code Cap 75. Article 165(6) provides that 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. Sections 362 and 364 of the Criminal Procedure Code provide for various aspects of review.
5. Section 362 provides that the High Court has power to 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. On the other hand, section 364 (1) provides that 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 sections 354, 357 and 358, and may enhance the sentence; (b) in the case of any other order other than an order of acquittal, ***alter or reverse the order.***
7. Article 50(1) grants every person the right to fair hearing. It provides that (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Every person here includes the victim who has a right to have the case heard and a decision made. This is buttressed with Article 48 of the Constitution which guarantees everyone the right of access to justice. There can be no right of access to justice if the case is not determined in a fair and just manner.
8. Obviously and without saying more, the trial court's record shows that the trial Magistrate fell into error. The prosecution had closed its case. On 9<sup>th</sup> February 2018, the court ruled that the respondent had a case to answer and fixed the matter for defence hearing for 9<sup>th</sup> March, 2018. That day was therefore for defence hearing and not the prosecution's case. There was no need for the presence of the complainant.
9. Section 202 of the Criminal Procedure Code provides:

***“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”.*

10. This section did not therefore apply where the matter was for the defence and not the prosecution. The court could not acquit a person it has ruled has a case to answer and before he defends himself. Furthermore, the respondent was absent and the trial court should have dealt with the issue of his absence rather than dismiss the case in his absence.

11. It is clear, therefore, that the trial magistrate fell into error in dismissing the charge against the respondent in his absence yet it was the day for defence hearing. That action occasioned injustice to the complainant's case.

12. That being the case, I find that the application has merit and is allowed. The decision of the trial court made on 9<sup>th</sup> March 2018 dismissing the charge against the respondent is hereby reviewed and set aside. The charge against the respondent is reinstated to hearing until final determination. The trial court's file be placed before the Chief Magistrate on 19<sup>th</sup> November 2019 for direction on the defence hearing

13. Orders accordingly.

**Dated Signed and Delivered at Kajiado this 8<sup>th</sup> Day of November 2019**

**E C MWITA**

**JUDGE**