



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CRIMINAL REVISION NO. 7 OF 2018**

**REPUBLIC .....APPLICANT**

**VERSUS**

**JACKSON MUTETHIA alias ALI .....1<sup>ST</sup> RESPONDENT**

**TITO NYARORI NYAKUNDI .....2<sup>ND</sup> RESPONDENT**

**RULING ON REVISION**

1. This is a ruling on an application for revision dated 12<sup>th</sup> March 2018 by the Director of Public Prosecutions under the revisionary power of this court. Jackson Mutethia alias Ali and Tito Nyarori Nyakundi, were charged with the offence of obtaining money by false pretenses contrary to Section 313 of the Penal Code.

2. Particulars were that between 29<sup>th</sup> September, 2014 and 15<sup>th</sup> October, 2014 at Kitengela Township in Isinya Sub County within Kajiado County, jointly with others not before court, with intent to defraud, obtained Kshs. 1,644,000 from Jefferson Mokuia by falsely pretending that they were in a position to supply him with Flax and Chia seeds.

3. The respondents pleaded not guilty, trial commenced and 3 witnesses had testified by 25<sup>th</sup> August, 2016 when PW3 closed his testimony. The matter was then adjourned on various occasions. On 9<sup>th</sup> March, 2017 when the matter came up before Hon. M. Chesang, RM, the two respondents were present but defence counsel and the prosecutor were absent. At 10.18 am according to the court record the trial court stated:

**“Matter is dismissed under Section 202 of the Criminal Procedure Code as the prosecution and counsel and complainant still absent in court as of now at 10.09 a.m. (sic). Accused are at liberty unless otherwise lawfully held. The decision for courts to start on time at 9.00 am was made at the bench bar meeting held on 5<sup>th</sup> March, 2018 in which prosecution was present”**

4. As it clearly emerges from the court record, the case against the respondents was dismissed because the prosecution and the complainant were absent. Defence Counsel was also not in court. This decision prompted the office of the Director of Public Prosecutions to file the present application for review of that decision. The application was filed on 12<sup>th</sup> March, 2018, 3 days after the impugned decision.

5. The applicant has faulted the trial court for dismissing the case despite a counsel having been detailed to attend to that court after attending another court given the absence of another prosecutor.

6. I have considered the application for revision and perused the trial court’s record. 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.

7. Similarly, 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.

8. 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.

9. These provisions must be read together with Article 50(1) which grants every person the right to fair hearing. It provides that “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 referred to in this Article includes the victim who has a right to have the case heard and a just decision made. This right is buttressed by 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.

10. The trial court’s record clearly shows that 3 witnesses had testified by the time the charge was dismissed. That being the case, the trial court was required to rule whether or not on the evidence on record, the prosecution had established a *prima facie* case against the respondents to require them to be put them on their defence. If not, then the trial court would then be entitled to acquit them under section 210 of the Criminal Procedure Code.

11. 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”.**

12. It would appear that this section is applicable where no evidence has been offered by the prosecution and not where the prosecution witnesses have testified. In that regard, the trial magistrate was plainly in error in dismissing the charge under this section being a part heard and without determining whether the respondents had a case to answer based on the evidence on record.

13. I note that the offence was committed in 2014, this court sought to know from the prosecution whether they were keen to proceed with the trial in the lower court and whether the respondents will be traced for purposes of trial. The Mr. Meroka assured the court that indeed witnesses are available and they will trace the respondents.

14. From what I have stated above, I am satisfied that the trial court was in error. It ought to have considered the evidence on record but not dismiss the charge after witnesses had testified. I do not also find the relevance of the complainant in court after he had testified.

15. Consequently, I find that the application is merited and is hereby allowed. The decision of the trial court made on 9<sup>th</sup> March 2018 dismissing the charge against the respondents is reviewed and set aside. For avoidance of doubt, the case against the respondents is reinstated to hearing and final determination. The trial court file be placed before the Chief Magistrate on 19<sup>th</sup> November 2019 for direction on further hearing.

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

**E C MWITA**

**JUDGE**