



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL REVISION NO. 300 OF 2017

DUNCAN MAWIRA MWITIAPPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. By a letter dated 9th November, 2017 **Douglas Mugambi Mwirichia (“the Applicant”)** complained that he was the complainant in the ***Nkubu Criminal Case No. 943 of 2016 Republic vs. Mawira Mwiti (“the said trial”)***. That he was dissatisfied with the way the said trial was conducted. That the prosecution had closed its case on 12th October, 2017 without adducing material evidence which he had supplied the police with.

2. That when the matter was reserved for ruling on a case to answer, he wrote a letter dated 22nd October, 2017 to the trial court complaining that the prosecution had failed to tender material evidence and call a crucial witness. He asked the court to arrest the judgment, mention the matter and issue summons for the attendance of the said witness whom the prosecution had left out.

3. Despite as aforesaid, the trial court proceeded and delivered its judgment on 30th October, 2017 whereby it found that the prosecution had not established any prima facie case against the accused and acquitted him. The applicant therefore applied that this court do recall and review the said judgment.

4. **DUNCAN MAWIRA MWITI** was charged on 28th July, 2016 with three counts as follows:-

a) threatening breach of the peace contrary to ***section 95 (1) (b) of the Penal Code;***

b) malicious damage to property contrary to ***section 339 (1) of the Penal Code;*** and

c) using insulting language in a manner likely to cause a breach of the peace contrary to ***section 95 (1) (a) of the Penal Code.*** He pleaded not guilty to the charges and the hearing was then fixed for 22nd May, 2017.

5. The record of the trial court shows that when the matter came up for hearing, the prosecution called two witnesses, the applicant and the investigating officer. These two testified on 22nd May, 2017 and 12th October, 2017, respectively. There were no other witnesses that were said to be available or any exhibits produced. The prosecution then closed its case on 12th October, 2017

6. On the basis of the forgoing, the trial court ruled that the Prosecution had not established a prima facie case as required by law. It acquitted the accused under ***Section 210 of the Criminal Procedure Code.***

7. The jurisdiction of this court to review a decision of a subordinate court is to be found in ***Section 362 of the Criminal Procedure Code*** which provides: -

8. On receipt of the said letter /complaints by the applicant, this court called for and perused the entire record of the trial court. What it confirmed is what I have set above.

“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.”

9. Under ***Article 157 of the Constitution***, the Director of Public Prosecutions has the discretion to institute and undertake criminal

proceedings against any person in respect of any offence alleged to have been committed. He is not to be under the direction of anyone. In the present case, the applicant was represented by the prosecutor who availed two witnesses before the trial court but it was not sufficient to prove the applicant's case. He closed his case before presenting the exhibit the applicant alleges he surrendered to the police or call the crucial witness who had made a statement to the police.

10. From his letter, the applicant was dissatisfied by the conduct of the prosecution and not the trial court. He contends that the prosecution failed to call a crucial witness and or tender a material exhibit in their possession.

11. In the criminal justice system, each institution and party has a role to play. The court cannot instruct either the prosecution or defence how to conduct their case. A trial court is not an active participant in a criminal trial. It remains impartial throughout in order to be able to arrive at an impartial decision. In this regard, I am of the opinion that the trial Magistrate did not err for she made a decision based on what she was provided with. The trial court could not have directed the prosecutor on how to conduct its case. Even if the court knew the existence of the said material evidence and crucial witness, the trial court had no jurisdiction to compel the prosecution to avail theirs. That would have compromised its impartiality. The trial court acted within the law.

12. In this regard, I am not satisfied that the applicant's application satisfy the requirements of *section 362 of the Criminal Procedure Code* to warrant a review of the proceedings impugned. The applicant has the option of raising his complaint with the Director of Public Prosecutions directly for that office to deal with the matter from within. That may be a lesson to prosecutors who make poor judgment or half heartedly prosecute cases on behalf of the public.

13. I direct that the Deputy Registrar of this court do place this Ruling before the DPP for his information and action.

14. Accordingly, the review is hereby declined.

DATED and DELIVERED at Meru this 4th day of July, 2018.

A. MABEYA

JUDGE