



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL REVISION NO. 94 OF 2016

REPUBLIC.....APPLICANT

VERSUS

CHRISTINE MBUKO.....1ST RESPONDENT

PAUL MAKAU MAINGI.....2ND RESPONDENT

JOSEPH MUTEMBWA MWISA..... 3RD RESPONDENT

RULING ON REVISION

The request for the revision herein is in a letter dated 7th December 2016 by George H. Murithi, the Principal Prosecution Counsel at Mavoko. The Applicant is seeking revision of an order dismissing the criminal case in Mavoko Criminal Case No 55 of 2015 under section 210 of the Criminal Procedure Code under the mistaken belief that the complainant and other witnesses had not testified. According to the said Principal Prosecution Counsel, when the matter came for hearing on 24th November 2016, there was a new investigating officer in the trial court who did not advise the prosecutor that the complainant and other witnesses had testified.

Further, that the said investigating officer on the contrary submitted that all witnesses had been bonded but none had come to court, whereupon the name of the complainant was called out severally, yet he had already testified and his presence not necessary. There was also an advocate in Court holding brief for the complainant who did not know the previous progress of the case. The court then proceeded to dismiss the case under section 210 of the Criminal Procedure Code on the basis that the complainant was not willing to testify.

I have considered the Applicant's application. The Respondents herein are the three Accused Persons in Mavoko Criminal Case No 55 of 2015, and they were charged with two counts of forcible detainer contrary to section 91 of the Penal Code, and a third count of resisting arrest contrary to section 254(a) of the Penal Code. A perusal of the proceedings reveal that the hearing proceeded on 18th August 2015, 31st August 2015, and 12th October 2015 before Hon. Mummasaba RM, and four prosecution witnesses gave evidence and were duly cross-examined. On 17th November 2015, Hon. Mummasaba RM disqualified herself from hearing the case for personal reasons, and directions were given on 12th October 2016 by Hon. L. Kassan SPM that the hearing proceeds from where it had reached.

When the hearing proceeded on 24th November 2016, the prosecution submitted that the witnesses, despite being bonded, had not come to Court, and that the investigating officer was unwell. Hon. L. Kassan SPM then ruled that the case be dismissed under section 210 of the Criminal Procedure Code, on

the ground that there was no evidence that had been offered.

Section 210 of the Criminal Procedure Code in this respect provides as follows:

“If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.”

There are two errors manifest in the ruling that was given on 24th November 2016 by Hon. Kassam SPM, the first being that the record of the proceedings in the trial Court showed that there was evidence that had been offered by four prosecution witnesses, contrary to the finding by the Honourable Magistrate. Secondly, the law under section 210 of the Criminal Procedure Code requires that submissions be made on a case to answer, and the magistrate then evaluates the strengths and /or weaknesses of the evidence tendered by the prosecution before making a finding of no case to answer, or case to answer as the case may be. There is no record of any such submissions made, or evaluation of the evidence tendered in the trial Court before the said ruling.

Section 362 of the Criminal Procedure Code which gives revisionary powers to this Court 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. Section 364 of the Criminal Procedure Code in addition provides for the powers of the High Court on revision as follows in this regard:

“(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 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.

(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.”

In the present revision, the orders sought herein do not prejudice the accused persons, as there was no

finding made by the trial Court as to their guilt or otherwise and the trial had not been completed. The requirement for the said accused persons to be given a hearing therefore does not apply.

Pursuant to the foregoing provisions of the law, I accordingly set aside the ruling and order dismissing the case in Mavoko Criminal Case No 55 of 2015 made on 24th November 2016 by Hon. Kassam SPM, and direct that the said case proceeds to hearing, and directions in this regard be taken before another magistrate other than Hon. Kassam SPM at Mavoko Law Courts.

This ruling and orders to be furnished to, Hon. Kassam SPM, the Senior Principal Magistrate at Mavoko Law Courts; the Applicant herein, George H. Murithi, the Principal Prosecution Counsel at Mavoko; and the defence counsel for the Accused Persons and the counsel watching brief for the complainant in Mavoko Criminal Case No 55 of 2015 without delay.

DATED AT MACHAKOS THIS 12TH DAY OF JANUARY 2017.

P. NYAMWEYA

JUDGE