REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL REVISION NO. 10 OF 2017

BETWEEN

ABSALOM OMOLO ONGER …..APPLICANT

AND

REPUBLIC …….…….…. RESPONDENT

(Application for revision of the order of Hon.J.Ng'arng'ar, CM dated 20th December 2016 in Criminal Case (SO) No. 22 of 2014 at the Chief Magistrates Court at Kisumu)

RULING

1. The application before the court is an application for revision made under **sections 362** and **364** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. The applicant is aggrieved by the order of the trial magistrate under **section 200** of the ***Criminal Procedure Code*** directing that the matter to proceed from where it left after it had been heard by two magistrates**.**

2. The supervisory jurisdiction of the High Court in criminal cases is given statutory underpinning in **sections 362** to **366** of the ***Criminal Procedure Code***. **Section 362** specifically provides that:

> *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.*

3. The contours of the revision jurisdiction are set out in **section 364** which states:

> *364(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 section 354, 357 and 358, and may enhance sentence;*
> >
> > *(b) in the case of any other order 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 had had an opportunity of being heard either personally or through 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 arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

4. It is clear from the provisions I have cited that the High Court has wide powers to correct errors of law or procedure in subordinate courts. However, it has been pointed out in ***David Njogu Gachanja v Republic*** **NRB HC Misc. Criminal No. 604 of 2005 [2006]eKLR** that:

Revisional jurisdiction of this Court should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their day today proceedings. If every ruling of the Lower Court and which went against a party were to be subjected to the Revisional Jurisdiction of this Court, we would have opened flood gates and this Court will be inundated with such applications and the subordinate may find it practically impossible to proceed with any case to its logical conclusion.

5. The matter at hand concerns the discretion of the court under **section 200** of the ***Criminal Procedure Code*** which, at the material parts, provides as follows:

(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of the right.

(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may if it is of the opinion that the accused person was materially prejudiced thereby set aside the conviction and may order a new trial.

6. The general principle now established by our courts is that **section 200** of the ***Criminal Procedure Code*** should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. This was the position stated by the Court of Appeal in ***Joseph Kamau Gichuki v Republic*** **NRB CA Criminal Appeal No. 523 of 2010 [2013]eKLR** where it held that:

This Court has previously held that section 200 of the Criminal Procedure Code should be invoked sparingly and only in cases where the ends of justice will be defeated if a succeeding magistrate does not continue a trial commenced by his predecessor. Some of the considerations to be borne in mind before invoking section 200 include whether it is convenient to commence the trial de novo, how far the trial had proceeded, availability of witnesses who had already testified, possible loss of memory by the witnesses, the time that had lapsed since the commencement of the trial and the prejudice likely to be suffered by either the prosecution or the accused.

7. In the same case the Court of Appeal emphasised what it stated in a previous decision, ***Nyabuto & Another v Republic*** **[2009]KLR 409** that:

[S]ection 200 aforesaid is a provision of the law which is to be used very sparingly and only in cases where the exigencies of the circumstances, not only are likely but will defeat the ends of justice if a succeeding judge does not, or is not allowed to adopt and continue a criminal trial

started by a predecessor owing to the latter becoming unavailable to complete the trial.

8. The decisions I have cited demonstrate that the trial magistrate had discretion to make an order under **section 200** of the ***Criminal Procedure Code*** considering the various factors before it. The High Court, exercising revision jurisdiction, particularly on an interlocutory matter is reluctant to intervene in such cases. Furthermore, as the authorities show, the applicant may yet take the issue on appeal where the court will have the opportunity to review the entire record and decide whether the accused is prejudiced.

9. In the matter before the subordinate court, the accused was charged with the offence of defilement contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act*** in 2014. The matter proceeded a pace before two magistrates who were transferred during the proceedings. The applicant had been placed on his defence before the last magistrate, who heard the matter, was transferred. After considering the matter particularly, the length of time the case had taken, the nature of the case given that it involved a child and the stage at which the case had reached, the trial magistrate ordered the case to proceed.

10. As I understand, the applicant's case is that he will be prejudiced if the case does not start afresh since the previous magistrate declined to admit video evidence that was necessary for his defence I will only state that the said order is not before this court and an order for the case to start afresh would not cure the applicant's complaint.

11. Nevertheless, I find that the trial magistrate exercised discretion under the law and I see no reason to intervene. For the reasons I have stated, I decline to revise the decision of the trial court and dismiss the notice of motion dated 10th February 2017.

DATED and **DELIVERED** at **KISUMU** this **9th** day of **March** 2017.

D.S. MAJANJA

JUDGE

Mr Munuang'o instructed by Omondi, Abande and Company Advocates for the applicant.