



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL REVISION CASE NO. 3 OF 2017

REPUBLIC.....APPLICANT

VERSUS

MAWIA KIMANZI

FRANCIS KIMWELE

ISAAC MUTEMIRESPONDENTS

R U L I N G

1. By a letter dated 3rd March, 2017, **Hon. B. M. Kimtai, Senior Resident Magistrate, and Head of Station, Kyuso Magistrate's Court**, sought revision of an order made by **Hon. J. Aringo – Resident Magistrate Kyuso Law Courts in Criminal Case No. 10 of 2017**.

2. This is a matter where the three (3) Accused persons (Accused) were arraigned before Court to answer criminal charges which they denied. When the matter came up for hearing on the **1st February, 2017** the case was adjourned to enable the Accused get Prosecution Witnesses' Statements. On the **21st February, 2017** the Court dismissed the case under **Section 202** of the **Criminal Procedure Code** and acquitted the Accused. Subsequently, the Complainant went to Court and lodged a complaint that he was present in Court but the matter was not called out. It was on that basis that I have been asked to invoke my power of revision to ensure justice is done.

3. The Accused in the case were charged with the offence of **Assault Causing Actual Bodily Harm** contrary to **Section 251** of the **Penal Code**. Particulars of the offence were that on the **30th day of December, 2016** at around **1600 hours** in **Ngaai Sub-location in Kyuso Sub-county within Kitui County** jointly and unlawfully assaulted **Kimanzi Musyoki** thereby occasioning him actual bodily harm.

When the substance of the charge was read to the Accused they denied having committed the offence therefore the matter was set down for hearing on a specified date. When the matter came up for hearing on the **1st February, 2017** the Prosecuting Counsel **Mr. Mwangi** indicated that he was ready to proceed with three (3) witnesses. On the material date the case was adjourned at the instance of the Accused persons. One of them was unwell while the other two (2) had not been furnished with Prosecution witnesses' statements. The case was adjourned to **21st February, 2017**.

4. The Court has a discretion to grant an adjournment. (**See Section 205 of the Criminal Procedure Code**). An Accused person has the right of being accorded a fair hearing which includes the right to prepare for the defence and to be informed in advance of evidence to be tendered by the Prosecution. (**See Article 50(2)(c) and (j) of the Constitution, 2010**). In the premises the trial Court exercised its

discretion appropriately.

5. When the matter came up on the **21st February, 2017** Prosecution Counsel for the State, **Mr. Mwangi** had this to state:

“It’s for hearing. Am not able to proceed. Witnesses are absent after being bonded, they were bonded on 18th February, 2017 and signed the bond.”

The Accused respondent thus:

“Accused 1 – It is alright

Accused 2 – It is alright. Have got statements.”

There is no indication if the 3rd Accused who was present per the coram was given an opportunity to address the Court.

6. Following the information given to Court, the Court ordered thus:

“This court does not find proper issue summons (sic) to complainant after they have failed to attend court yet they have been properly bonded. The 2nd and 3rd Accused are in remand. It is true matter coming (sic) for hearing for second time but its also evident that the complainant was properly bonded together with witnesses and failed to attend court. His failure to attend court is not explained. This court can only construe his failure to mean disinterest. Consequently all the 3 Accused are acquitted under Section 202 of the CPC.”

7. **Section 202 of the Criminal Procedure Code** provides thus:

“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.”

8. That provision of law gives the Court the discretion to dismiss the case. The trial Magistrate is however expected to exercise due diligence and reach a sensible decision. The Court ought to act judicially.

9. In the instant case the learned State Counsel did not seek an adjournment. He did notify the Court of his inability to proceed with the matter and added that the witnesses were duly notified of the date for hearing. He had absolutely no reason to offer why they were not in Court. And after the case was dismissed they took no other step.

10. It is apparent that the learned trial Magistrate who was seized of the discretion to dismiss the case or adjourn it could have taken into consideration the fact that at the outset the case was adjourned at the instance of the defence. On that note he would have considered granting the Prosecution another opportunity of availing witnesses.

11. According to the content of the letter by the Head of Station, the Complainant went to Court on the **23rd February, 2017** and alleged that he was in Court but he did not hear the matter being called out. Such a Complaint should have been raised on the **21st February, 2017**.

12. From the foregoing it is apparent that the learned trial Magistrate failed to act diligently but he did not contravene the law. The order that he made was legal therefore not amenable to revision.

13. I may add that the charge herein being of assault causing actual bodily harm the aggrieved party may file a Civil Suit against the Accused.

14. In the result, I decline to revise the order of the Subordinate Court.

15. It is so ordered.

Dated, Signed and Delivered at Kitui this 4th day of May, 2017.

L. N. MUTENDE

JUDGE