



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISUMU**  
**CRIMINAL REVISION NO. 45 OF 2017**

**BETWEEN**

CALVIN OTIENO ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

*(Application for revision of the order of Hon. D. Okundi, SPM dated 12<sup>th</sup> June 2017 in Criminal Case No. 1406 of 2014 at the Chief Magistrates Court at Maseno)*

**RULING**

1. The matter for consideration is an application for revision made under **sections 362 and 364** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***. In the letter filed on 20<sup>th</sup> June 2017, the applicant is aggrieved by the order of the trial magistrate refusing him to recall prosecution witnesses. He challenges the order on the grounds that the application infringes on his constitutional rights to a fair trial and that no prejudice will be suffered if the prosecution witnesses are recalled.

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 to permit the accused to recall all the prosecution witnesses for purposes of cross-examination. This discretion to recall witnesses is vested in the trial court and the fact that the trial magistrate declined the application does not, of itself, does not open the decision up for review otherwise the High Court would fall into the trap of micro-managing the trial process.

6. The application before the court was by the accused's counsel who applied to re-open the prosecution case after the accused had been put on his defence. In her ruling the trial magistrate considered the fact that the matter was an old one, that the accused had cross-examined all the prosecution witnesses at length, that the key witness was a child and it would not be in the best interests of the child to recall her and that given the lapse of time the other witnesses may be difficult to get. The trial magistrate also took into account the fact that the accused had, at all times, the opportunity to engage counsel of his choice but only engaged one at the defence stage. To my mind the trial magistrate exercised her discretion judiciously.

7. For the reasons I have stated, I decline to revise the decision of the trial court and dismiss the application.

**DATED and DELIVERED at KISUMU this 11<sup>th</sup> day of July 2017.**

**D. S. MAJANJA**

**JUDGE**