



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Revision Case 16 of 2010**

**JOSEPH MWANIA NGOLYA.....ACCUSED**

**VERSUS**

**REPUBLIC.....PROSECUTOR**

**ORDER ON REVISION**

**Joseph Mania Ngolya** was charged before the Chief Magistrate’s Court, Machakos with two offences. One, Forcible Detainer Contrary to section 91 of the Penal Code. Two, malicious damaged to property contrary to section 339(1) of the Penal Code. He entered a plea of not guilty on both counts.

His trial commenced before **Hon. S.M. Mungai**, then Principal Magistrate on 7<sup>th</sup> July, 2008. The complainant and his son testified on that day as PW1 & PW2 respectively. On 5<sup>th</sup> November, 2008, the prosecution substituted the charges and an order was then made for the recalling of the witnesses aforesaid. PW1 was recalled on 4<sup>th</sup> December, 2008 but was stood over to 18<sup>th</sup> February, 2009. On 16<sup>th</sup> September, 2010 the prosecutor stated to the court that; “*the case is to start afresh.*” Exhibits were not in court then and the defence counsel was said to be indisposed. The case was accordingly adjourned with remarks that- “*it is a fresh matter now*” and was allocated to court number 3 for hearing on 29<sup>th</sup> October, 2010.

On 29<sup>th</sup> October, 2010 court number 3 did not sit as the presiding magistrate was away in Nairobi Law Courts for her part-heards. Since the orders dated 16<sup>th</sup> September, 2010 stated that the case was a fresh one, on 27<sup>th</sup> October, 2010, the case was allocated to court 6 for hearing on 29<sup>th</sup> October, 2010. On that date the accused and his counsel appeared and objected to the case commencing *denevo*. Hon. Too, DMII (Prof) in his ruling observed that there were orders for the matter to start afresh and that those orders had not been set aside. Accordingly, he was well seized of the mater. This holding triggered a letter to this court dated 2<sup>nd</sup> November, 2010 by Messrs Ngolya & Company Advocates who are on record for the accused. In the letter, the accused sought a revision of the order of court made on 16<sup>th</sup> September, 2010 to the effect that “*it is afresh matter now.*” To the accused this order was made without jurisdiction and without the in-put of the accused and or his counsel. There was no basis in law for such an order to be made since **Mr. Mungai, P.M** who was still stationed at Machakos Law Courts and had heard the previous witnesses could not proceed with the case to its logical conclusion.

I have carefully perused the record and I am satisfied that the order of 16<sup>th</sup> September, 2010 was made in error. The order for a case to commence *denevo* can only be made where the magistrate presiding over a case for one reason or another ceases to have jurisdiction either as a result of transfer, death or ceases to be a judicial officer. In those circumstances and with the approval or consent of the accused, the case may start *denovo*. It is not within the provence of the prosecutor to direct the court on how to preside over the case.

On the date in question and out of the blues, the prosecutor stated “*the case is to start afresh.*” It appears that the court went along with that proposal. There was no reason advanced by the prosecutor as to why he felt that the case should start *denovo*. Nor was the accused asked for his input. **Hon Mungai, P.M.** who had previously presided over the case was still stationed at Machakos Laws Courts. He had not lost jurisdiction to hear the case to its finality.

Under section 362, of the Criminal Procedure Code this court has jurisdiction to call for files from subordinate court in order to satisfy itself of the correctness, legality or propriety of the proceedings and orders made by of those courts. Clearly the court order of 16<sup>th</sup> September, 2010 was incorrect, illegal and irregular. Accordingly it is vacated. I would have directed that the case proceed for hearing and final determination before **Hon. Mungai**, SPM. However, I am aware that **Hon. Mungai** , SPM, has since been transferred to Nakuru Law Courts. I would in the premises direct that the case be placed before the Chief Magistrate, Machakos Law Courts on a date convenient to the parties so that she may allocate the same to another court of competent jurisdiction. The accused will then determine before the said court whether the case should proceed from where **Hon. Mungai** had left or it starts *denevo*. See Section 200 of the Criminal Procedure Code.

**DATED, SIGNED and DELIVERED** at **MACHAKOS** this 1st day of **SEPTEMBER, 2012**.

**ASIKE-MAKHANDIA**  
**JUDGE**