



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
HCCRREV/E016/2023

REPUBLIC..... APPLICANT

VERSUS

RICHARD KIPNGETICH CHIRCHIR..... RESPONDENT

RULING

1. The application before Court is for revision and is dated 26th July, 2023, supported by the affidavit in support of **Edwin Koech** dated 12th September, 2023.

Background

2. The Respondent herein was charged before Molo Law Courts in **Criminal Case No. E648 of 2023**. In Count 1 he was charged with the offence of forcible detainer contrary to **Section 91** as read with **Section 36** of the Penal Code and in Counts II, III and IV he was charged with various offences of forgery contrary to **Section 345** as read with **Section 349** of the Penal Code.

3. The Respondent pleaded not guilty to the charges on 14th March, 2023 and the matter was set down for hearing before Hon. D. Mosse SRM for 12th April, 2023.

4. On 12th April, 2023, the prosecution applied for an adjournment for the reason that the documents sought to be relied on by the prosecution witnesses were still with the document examiner in Nairobi hence the hearing couldn't proceed. The trial magistrate indulged the prosecution and the matter was adjourned to 10th May, 2023 and this date was marked as a last adjournment.
5. On 10th May, 2023 when the matter came up for hearing, the matter could not proceed as the documents to be relied upon by the prosecution witnesses were still with the document examiner, and the forensic report was not ready. Since the matter had a last adjournment, and noting the opposition raised by the defence for the adjournment, the prosecution sought to withdraw the matter under **Section 87 (a)** of the Criminal Procedure Code. The defence on the other hand prayed that the matter be withdrawn under **Section 202** of the Criminal Procedure Code.
6. The trial magistrate proceeded to acquit the respondent under the provisions of **Section 202** of the Criminal Procedure Code in total disregard of the established procedural law and substantive justice thus occasioning a grave injustice to the complainant.

Applicants Case

7. The Applicant is inviting this Court to examine the proceedings of the trial Court in Molo Criminal Case No. E648 of 2023 and look into the correctness, legality and propriety of the orders of the Honorable D. Mosse SRM dated 10th May, 2023.

8. The Applicant craves that, the said order be reviewed, that the order acquitting the Respondent be set-aside and substituted with an order reinstating the prosecution case and directing that a fresh hearing date be fixed before any other Magistrate in Molo other than Hon. D. Mosse SRM.
9. That, by virtue of **Article 165 (6)** of the Constitution, this Court has supervisory jurisdiction over Subordinate Courts and **Article 165 (7)** empowers the Court to call for proceedings before any Subordinate Court and make appropriate orders or directions to ensure fair administration of justice.
10. **Section 362** of the Criminal Procedure Code provides for the power of the High Court to call for records as;

"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."
11. That, **Section 364** of the Criminal Procedure Code on the other hand provides for the powers of the High Court on Revision as

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."***

12. That, while **Section 364 (1) (b)** provides as a general principle that a Court exercising revisionary powers cannot alter or review an acquittal, under **Section 382** of the Criminal Procedure Code the High Court can interfere with the orders of a Subordinate Court, including an acquittal, through the revisionary powers where the order has occasioned a failure of justice such as in the present case.

13. In the case of **Prosecutor -v- Stephen Lesinko (2018) eKLR**, Justice R. Nyakundi in his ruling, while outlining the revisionary powers of the High Court, stated that;

"the High Court is vested into wide revisionary powers to look into the orders, decisions, proceedings, sentences where any of the following circumstances manifest themselves.

a. Where the decision is grossly erroneous

b. Where there is no compliance with the provisions of the law.

c. Where the finding of fact affecting the decision as not based on the evidence or it is result of mis-reading or non-reading of evidence on record

d. Where the material evidence on the parties is not considered.

e. where the judicial discretion is exercised arbitrarily or perversely if the lower Court ignores facts and tries the accused of lesser offence."

14. That, the proceedings of the Trial Court vis-à-vis the Law, the Respondent was charged with the offence of forcible detainer in Count I and in Counts II, III and IV he is charged with the offence of forgery. The nature of the stated offences.
15. That inevitably it requires extensive documentary evidence including documentary expert reports to prove the charges.
16. That **Edwin Koech**, the investigator in the matter, indicates in his affidavit 12 September, 2023 that both the complainant and the Respondent possess title deeds, both in the names of the complainant, to the land which is the subject matter of the case. The Investigations revolved around Title Deeds, Sale Agreements, and relevant specimen's signatures among others which had to be subjected to forensic examination at the DCI Document Examiner's office which the investigating officer averred that inordinate delay was occasioned, as it is only one office serving the entire country.
17. That, the matter only came up for hearing on two occasions. The first was on 12th April, 2023. On this date, the prosecution was not ready to proceed with the case and sought for adjournment. The reasons given were that the documentary evidence that was to be used during the

trial had been taken to the DCI Headquarters at Nairobi for forensic analysis by the document examiner and therefore the complainant could not be availed in Court to testify without the said documents.

18. This was the first adjournment made by the prosecution in the matter. Cogent, reasonable, credible and understandable reasons were given for seeking adjournment which the Trial Court failed to consider considering the nature of the case. Without offering a detailed ruling, the trial magistrate marked it as a last adjournment and set the matter for bearing on 10th May, 2023. Though the discretion of whether to grant or not to grant an adjournment rests with the trial magistrate, the order for last adjournment in the instant case was not made judiciously and it did not consider the complainant as a victim in this case.
19. That, when the matter again came up for hearing on 10th May, 2023, the prosecution again applied for an adjournment. The reasons given for seeking the adjournment were that there were no witnesses in Court as the documents to be relied upon by the witnesses during the hearing had not been finalized by the document examiner. The application for adjournment was opposed by the Respondent who prayed that the matter be withdrawn under the provisions of **Section 202** of the Criminal Procedure Code.
20. That, since the matter had a last adjournment, the prosecutor was hard pressed to conclude the matter and he applied to have the matter withdrawn under **Section 87 (a)** of the Criminal Procedure Code which provides;

"In a trial before a Subordinate Court a public prosecutor may, with the consent of the Court or on

the instructions of the Director of Public Prosecutions, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal-

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts."

21. This was the second time the matter came up for hearing. The reasoning for the application for the case to be withdrawn under **Section 87 (a)** was to ensure that the complainant/victim in the matter is not barred from having his case reinstated and testifying once the documents to be relied upon during the trial had been finalized by the document examiner. Such would have been a judicious and just decision to be considered by the trial magistrate.

22. That, on the contrary, the trial magistrate decided in favor of the accused person and proceeded to wrongly acquit him under **Section 202** of the Criminal Procedure Code because there were no prosecution witnesses in Court. The Trial Court did not consider the valid reasons advanced by the prosecution which reasons were, again, reasonable in the circumstances.

23. That **Section 202** of the Criminal Procedure Code provides;

"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."

24. That for **Section 202** of the Criminal Procedure Code to be invoked, it is a prerequisite that the Trial Court is convinced that the complainant was informed or had notice of the time and place appointed for the hearing and, after having received such notice, willfully failed to attend the hearing of the case. Such information is usually confirmed through police bonds to attend Court issued by the investigating officer in a given case notifying a complainant of the date and venue where the hearing is scheduled to take place. The said notice can also be issued to the complainant through Court summons issued by the trial magistrate. Copies of signed bonds and/or summons often offer proof that a complainant was served and made aware of the venue, date and time of the hearing.

25. That, in the instant case, the trial magistrate failed to appreciate that there was no proof of whether the complainant was informed of the hearing date or not.

Respondent's Case and Submissions

26. The Respondent opposes the Applicant's application dated 26th July 2023 together with the submissions filed thereon. The application is incurably defective, incompetent, frivolous and an abuse of the Court process. It is premised on a clear misapprehension of the law governing the revisionary jurisdiction of this Honourable Court.
27. The Respondent isolates the following issues for determination;
- a) *Whether the application dated 26-07-2023 is competent or;*
 - b) *Whether the same is an abuse of the Court process*
 - c) *Whether the trial Court properly exercised its jurisdiction.*
28. As to whether the application dated 26th July, 2023 is competent, it is submit that the Respondent was lawfully acquitted by the Trial Court on 10th May 2023 pursuant to **Section 202** of the Criminal Procedure Code (CPC). The prosecution did not prefer an appeal against the acquittal under **Section 348A** CPC. Instead, they improperly seek to invoke the revisionary jurisdiction of this Honourable Court to set aside a lawful acquittal.
29. That, **Section 364(1)(b) CPC** expressly provides that:
- “in the case of any other order other than an order of acquittal, alter or reverse the order.”***
30. That, this means that acquittals are outside the scope of revision. The Court of Appeal in **Reuben Nyamai Bichange v Republic [2005] 2 KLR 4** emphatically stated:
- “The meaning of this section is plain. Where an accused person has been acquitted, the provisions in respect of***

revision cannot be used to turn an acquittal into a conviction. ... In view of the provisions of section 364(4) of the Criminal Procedure Code, ... [the High Court] had no power and was not entitled to convert that acquittal into a conviction.” (Empasis added)

31. That, this position was reiterated in **DPP v Gilbert M’Ringera Kiungu & Another [2018] eKLR**, where the High Court affirmed that acquittals cannot be interfered with through revision.

32. That, further, in **Republic v Martha Wambui [2018] eKLR (Nyeri HCCR 216/2018)**, the Court was explicit:

“An order to reopen the case for the prosecution would be tantamount to a reversal of the order of acquittal as it would put the accused person in the position before the acquittal. An acquittal is given very special treatment as is seen at s. 364(4) wherein the Court is prohibited in no uncertain terms from tampering with an acquittal on revision.”

33. That, the Applicant’s motion is incompetent, frivolous and contrary to express statutory provisions and settled judicial authority.

34. That, the Applicant seeks to improperly use revision as a backdoor appeal. The Supreme Court recently clarified in **Cox & 2 Others v Okello, Petition E001 of 2025 [2025] KESC 54 (KLR)** that:

“As such, the Court lacked jurisdiction to reverse an order of acquittal in an application for revision predicated under Section 362 and 364(1)(a) and (b) of the CPC.”

35. That, this demonstrates that the Applicant is attempting to circumvent the proper appellate process, contrary to law. The correct remedy was to file an appeal under **Section 348A** CPC, which they elected not to pursue. The present motion thus amounts to an abuse of process.

36. That, the acquittal under **Section 202** CPC was legally sound. On 10th May 2023, despite the prosecution being indulged earlier, no witness was availed to even lay the foundation of the case.

37. That, nothing prevented the prosecution from presenting its first witness (PW1) to testify and mark the relevant documents for identification pending the That, the learned magistrate, faced with the absence of witnesses, acted within jurisdiction under **Section 202** CPC.

38. The High Court in **DPP v Perry Mansukh Kansagara & 8 Others** [2020] eKLR confirmed that:

“That what is sought to be revised is an acquittal order under Section 210 of the Criminal Procedure Code. ... Sec 364 (1) clearly stipulates that the Court in exercise of its revisional powers, may: ... (b) in the case of any other order other than an order of acquittal, alter or reverse the order.”

39. That, the Trial Court’s decision was lawful and cannot be impeached through revision.

40. That, the Applicant argues that section 202 CPC could not be invoked because there was no proof that the complainant had notice of the hearing date. With respect, this argument is misconceived.

41. That, in criminal prosecutions, the “complainant” is the Republic — that is, the State acting through the Director of Public Prosecutions — not the individual victim of an alleged crime.

42. That, the victim is only a witness in support of the State’s case. This principle was clarified in **Republic v Barasa & Another, Criminal Revision 21 of 2019 (2023)**, where the High Court, citing the Court of Appeal, held:

“The parties named in section 202 for example, are the complainant and the accused person. if the complainant is aware of the hearing date and is absent, without explanation, the Court may acquit the accused person, unless the Court sees some other good reason for adjourning the hearing. ‘complainant’ in this context has been interpreted to mean ‘the Republic’ in whose name all criminal prosecutions are brought and not the victim of the crime who is merely the chief witness on behalf of the Republic.”

43. That, in this case, the DPP was present in Court on 12th April 2023, when the matter was adjourned to 10th May 2023. The complainant — the Republic — therefore had full notice of the hearing date. The precondition under section 202 CPC was satisfied. It was not necessary for the investigating officer to bond the victim afresh to attend on 10th May when the Republic already had notice and the prosecution had failed to marshal its case.

44. That, the Applicant's reliance on the absence of a police bond to invalidate the acquittal is misplaced. The trial Court acted lawfully in acquitting the Respondent once the complainant (the Republic) failed to proceed despite notice.
45. That the Applicant alleges a miscarriage of justice. That claim is unsustainable. Justice is not served by punishing an accused person for the prosecution's failure to diligently prosecute its case. Once the acquittal was entered, the Respondent acquired the full protection of sections 215 and 218 CPC, which bar further proceedings on the same facts.
46. That. In **Republic v Martha Wambui** (supra), the High Court warned that interfering with an acquittal through revision would "put the accused person in the position before the acquittal," which is precisely the injustice **Article 50(2)(o)** of the Constitution guards against. In this regard, the Court held that;

"An order to reopen the case for the prosecution would be tantamount to a reversal of the order of acquittal as it would put the accused person in the position before the acquittal.

An acquittal is given very special treatment as is seen at s. 364(4) wherein the Court is prohibited in no uncertain terms from tampering with an acquittal on revision."

47. That, in light of the foregoing facts, authorities and submissions the Respondent prays that this Honourable Court finds and holds that;

- a) The application is incompetent as it offends Section 364(1)
(b) CPC.
- b) The application is frivolous, vexatious and an abuse of the Court, and;
- c) The acquittal under Section 202 CPC was lawful and properly entered.

48. The Respondent prays that the Applicant's application dated 26th July 2023 be dismissed with costs.

Analysis and Determination

49. The Power of High Court to call for records is provided for under **Section 362** of the Criminal Procedure Code.

"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".

50. **Section 364** of the Criminal Procedure Code provide for the Powers of High Court on revision as follows;

(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.

(c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate Court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the Court, the order of the subordinate Court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.

(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.

51. The Applicant is a state officer holding an important institution mandated with the exclusive prosecutorial powers, his diligence is a matter of public importance.
52. In this instance, it was the duty of the Applicant to showcase how and why this Court has jurisdiction to review an order of acquittal and the same is apparently lacking.
53. The stealth silence by the Applicant on the probity of the Court's jurisdiction in light of the opposition by the Respondent is telling.

54. I am inclined to find that 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.
55. Secondly, I cannot elevate the rights of the complainant above the rights of the accused. The Applicant confirmed the hearing date when the adjournment was marked as last and, on the schedule, hearing had a duty of commencing hearing including calling a witness.
56. The question of documents being subjected to forensic examination was no bar in commencing the hearing and this Court finds the Applicant to have been presumptuous of the Court and casual in approach in subsequently seeking withdrawal had all blame on the Applicant.
57. The Court echoes the Supreme Court position in **Cox & 2 Others v Okello, Petition E001 of 2025 [2025] KESC 54 (KLR)** that:

“As such, the Court lacked jurisdiction to reverse an order of acquittal in an application for revision predicated under Section 362 and 364(1)(a) and (b) of the CPC.”

58. I accordingly find that this Court lacks jurisdiction to review an order of Acquittal where no plausible reason for want of Appeal is tendered.
59. Accordingly dismiss the Application dated 26th July, 2023.

It is So Ordered

Dated, Signed and Delivered at Nakuru

On this day of 17th November 2025.

**S. Mohochi
JUDGE**