



REPUBLIC OF KENYA



**KENYA LAW**  
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**Cox & 2 others v Okello (Criminal Appeal E025 of 2022)  
[2024] KECA 1693 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1693 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL E025 OF 2022  
PO KIAGE, LA ACHODE & JM MATIVO, JJA  
NOVEMBER 22, 2024**

**BETWEEN**

**WADE COX ..... 1<sup>ST</sup> APPELLANT**

**GEORGE NATHAN ONYANGO ..... 2<sup>ND</sup> APPELLANT**

**NICHOLAS NGUMBI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**GEORGE ODHIAMBO OKELLO ..... RESPONDENT**

*(Being an appeal from Ruling and Order of the High Court at Nairobi  
(Kimaru J) dated 16th December 2020 in Criminal Revision No. 547 of 2020)*

**JUDGMENT**

1. This appeal arises from proceedings that commenced by way of private prosecution in the lower court. As a general rule prosecutorial powers are vested in the Office of the Director of Public Prosecutions (ODPP), established under Article 157 of *the Constitution*. The power provided in Article 157 (6) (a) to institute and undertake criminal proceedings against any person before any court, (other than a court martial), in respect of any offence alleged to have been committed, reposes in the ODPP.  
Private prosecution is therefore, the exception rather than the norm in our laws.
2. The constitutional basis for private prosecution can be traced to Article 157 (6) (b), where the ODPP is vested with power to take over and continue any criminal proceedings commenced in any court (other than court martial), that have been instituted or undertaken by another person or authority, with the permission of the person or authority.
3. The ODPP Act 2013 at Section 2(1) defines the prosecutor to include a private prosecutor and provides at Section 28 that any person can commence private prosecution upon providing thirty days notification to the ODPP, of the commencement of such proceedings.



4. Wade Cox and George Nathan Onyango, the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively, were the complainants in the lower court. They obtained leave of the court through their advocate/ private prosecutor Nicholas Ngumbi the 3<sup>rd</sup> appellant, to institute private prosecution against George Odhiambo Okello the respondent.
5. The respondent was charged with six counts of stealing by agent contrary to Sections 283 (b) and 283 (c) of the Penal Code. The particulars of the charge were that between 7<sup>th</sup> October 2008 and 16<sup>th</sup> June 2011 the respondent, being the Chairman of Churches of God Kenya, stole various sums of money by virtue of his capacity as the Chairman of the stated Churches.
6. The matter came up for mention several times and both the appellants and the respondent were absent. The trial court finally made an order dismissing the case under Section 202 of the Criminal Procedure Code for want of prosecution on 24<sup>th</sup> October 2019.
7. When the appellants finally resurfaced, they made an application to the superior court for revision of the trial Court's order, on grounds that: the court cannot dismiss a case under Section 202 of the Criminal Penal Code in the absence of the accused person: on the date of the dismissal the matter was listed for mention and not for hearing: the parties were not served with the notice to appear in court on the mention date: and, the court should have ensured that the arrest warrant that it issued against the respondent was enforced.
8. The application was opposed by the respondent on the premise that the applicant ought to have appealed against the decision of the trial court instead of seeking review. Further, that the suit was dismissed due to chronic absenteeism by the parties to the suit. Lastly, that the word 'hearing' is not defined in the Criminal Procedure Code and thus, it encompasses both mention and hearing dates.
9. Kimaru J (as he then was), considered the application before him and dismissed it in a judgment delivered on 16<sup>th</sup> December 2020, precipitating this appeal.
10. The grounds of the appeal are that the learned Judge erred in law and fact: by upholding the decision of the trial court acquitting the respondent under Section 202 of the Criminal Procedure Code (CPC); by holding that the High court lacks the power to revise an acquittal under Section 364(b) of the CPC, thereby abdicating his supervisory jurisdiction under Article 165 (6) and (7) of *the Constitution* to which he proffered a narrow and pedantic construction; by unjustifiably punishing the 3<sup>rd</sup> appellant for the failure of the Directorate of Criminal Investigations to enforce the warrant of arrest issued against the respondent; by overlooking the cardinal duty of the court in a criminal trial to notify parties of scheduled hearing and mention dates; by disregarding the rights of the victims in criminal trial; by failing to consider the material placed before the court, to wit, documented attempts to enforce the warrant of arrest; and, by failing to consider the evidence of service of summons upon the respondent.
11. The firm of Nicholas Ngumbi Advocates filed written submissions dated 24<sup>th</sup> November 2023 and 23<sup>rd</sup> January 2024 on behalf of the appellants. Counsel urges that the superior court failed to rule on whether the trial court complied with the express requirements of Section 202 of the CPC and instead, erred by considering the issue of summons to the respondent, which was dealt with by the trial court.
12. Counsel contends that the court proceeded on the erroneous assumption that the private prosecutor was aware of the court dates, yet the trial court did not inform him in open court that the mention date of 26<sup>th</sup> February 2019 had been fixed. It was their submissions that on 14<sup>th</sup> May 2019 the trial court directed summons to issue to the private prosecutor. The summons was extended on 31<sup>st</sup> July 2019 and on 24<sup>th</sup> October 2019, when the parties did not attend court the matter was dismissed for want of prosecution.



13. Counsel submitted that before a matter is dismissed under Section 202 of the CPC, the trial court is obligated to inquire whether the hearing notice was served on the parties. He relies on the superior court decision in *Director of Public Prosecution v Bernard Koech Kemboi* (2017) eKLR where it was held that before a substantive order of acquittal is made under Section 202 of the CPC there must be proof of service of the notice of hearing on the complainant.
14. Additionally, it is urged that the private prosecution of the respondent could only have started after the arrest of the respondent. Therefore, the evidence tendered by the private prosecutor showing the refusal by the police to enforce the warrant of arrest was a relevant factor and a reasonable justification to review the acquittal.
15. The appellants submit that the Judge erred by basing his ruling on Section 364 of the CPC, which was not invoked by the appellants. They assert that the application was brought under Article 165 (6) and (7) of *the Constitution*, under which, as stated in the High court decision, *Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others Criminal Revision No 4 of 2020* (2020) eKLR (Solai Dam Case), the court exercising its supervisory jurisdiction can set aside an acquittal of an accused person in a criminal trial.
16. The appellant asserts that the acquittal of the respondent before the private prosecutor was notified of the court date disregarded the rights of the victims of crime. Further that the acquittal of the respondent on a date that was not set for hearing the case, denied the victims of the crime the right to have their views heard before a substantive decision was made as the Supreme Court stated in *Joseph Lendrix Waswa v R* Petition No. 23 of 2019 (2019) eKLR.
17. In opposition, the firm of Lugano & Achura Advocates filed submissions dated 11<sup>th</sup> December 2023 on behalf of the respondent. Counsel urges that the learned Judge properly found that he lacked jurisdiction since the subject of the revision brought before him was an acquittal order. He relies on the *Owners of Motor Vessel "Lilians" vs Caltex Oil (Kenya) Limited* 1989, where it was held that jurisdiction is everything hence, once the High Court found that it lacked jurisdiction to determine the question of the correctness of the trial court's decision, it had to down its tools and not proceed any further.
18. It is also submitted that the appellants' conduct, considered together with the fact that they have also lodged a civil suit against the respondent over the same claims, makes their pursuit of a criminal remedy a clear abuse of the court process. He prays to be awarded costs for unnecessary legal processes the appellants have subjected him to.
19. The appellants filed a further affidavit in which they urge that in the supporting affidavit of the 3<sup>rd</sup> appellant dated 5<sup>th</sup> October 2020, he attached documentary evidence of the attempts he made to have the respondent arrested and prosecuted. That evidence is relevant in determining whether he was diligent or not, in prosecuting the case. Further, that Section 193 of the CPC permits concurrent prosecution of criminal and civil cases. Therefore, it is not an abuse of court process. Finally, he urges that the issue of costs was not dealt with at the High court and therefore, cannot be litigated before this court.
20. We have considered the record and grounds of appeal, the rival submissions and the law applicable. This being a first appeal, our mandate is as was laid down by this Court in *Isaac Ng'ang'a Kahiga and anor v Republic* [2006] eKLR thus:

“In the same way, a court hearing a first appeal (i.e. a first appellate court) also has duty imposed on it by law to carefully examine and analyze afresh the evidence on record and



come to its own conclusion on the same but always observing that the trial court had the advantage of seeing the witnesses and observing their demeanor and so the first appellate court would give allowance of the same.”

21. Three main issues arise from the pleadings and submissions filed by the parties for our consideration. These are:
  - i. Whether the court had the jurisdiction to revise the respondent’s acquittal.
  - ii. Whether the superior court was right in finding that the 3<sup>rd</sup> appellant was not diligent, and
  - iii. Whether the superior court was correct in finding that the respondent can be acquitted under Section 202 of the CPC in his absence and on a mention date.
22. The first issue for determination is whether the superior court had the jurisdiction to revise the order of the trial court acquitting the respondent. We made short shrift of this issue. It is noted that being dissatisfied with the decision of the lower court, the appellants elected to escalate the matter to the superior court by way of revision and not an appeal. The only question that needs an answer is whether the superior court had jurisdiction to revise the decision of the lower court acquitting the respondent.
23. The appellants submit that the Judge erred by basing his ruling on Section 364 of the CPC, while the application was brought under Article 165 (6) and (7) of *the Constitution*. In opposition the respondent urges that the Judge properly found that he lacked jurisdiction since the subject of the revision brought before him was an acquittal order.
24. A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. (See: Samuel Kamau Macharia V KCB & 2 others. Civil application no. 2 of 2011).
25. The appellants framed their application as a constitutional petition but in essence, they were seeking revision of the order of the lower court acquitting the respondent. We are cognizant of the fact that whereas *the Constitution* is the framework, it is the statutes that give specific mandates in specific matters. It is evident that the appellants took this route to circumvent the limitations of Section 364, which is the section that empowers the High Court to exercise revisionary powers in criminal proceedings.
26. The relevant provisions of the law in this appeal are Section 364(1)(b) which provides that:

“In the case of a proceeding in a subordinate court the record for which has been called for, or which has been reported for orders, or which otherwise comes to its knowledge, the High court may-

  - (a) .....
  - (b) In the case of any other order other than an order for acquittal, alter or reverse the order.”

And 364 (4) that:

“Nothing in this section shall be deemed to authorize the High court to convert a finding of acquittal into one of conviction.”



27. The foregoing being the stipulation of the law in mandatory terms, the learned Judge could not arrogate to himself jurisdiction exceeding that which is conferred by law. We therefore find no basis to fault the Judge for so finding.
28. The second issue is whether the superior court was right to find that the 3<sup>rd</sup> appellant was not diligent. The appellants fault the learned Judge for not considering the affidavit sworn by the 3<sup>rd</sup> appellant which illustrated the efforts made in tracing and finally arresting the respondent. In rebuttal the respondent argues that the appellants displayed lack of initiative and drive in getting their matter adjudicated and concluded timeously.
29. The superior court in finding that the appellants were not diligent held that:

“The private prosecutor was therefore the one who was required to follow up the status of the case. It was apparent that the private prosecutor failed to check the status of the case until when he appeared before the court on 8<sup>th</sup> July 2020 after the accused person’s arrest on 29<sup>th</sup> June 2020 in pursuant (sic) to a belated execution of the warrant of arrest which had earlier been issued by the court. If the Private Prosecutor was diligent, he would have perused the court’s file and realised that the warrant of arrest that he was seeking to have enforced had expired with the dismissal of the case on 24<sup>th</sup> October 2019, about eight months earlier.”
30. From the 3<sup>rd</sup> appellant’s affidavit deposed on 5<sup>th</sup> August 2020 and filed in the superior court, we note the steps the 3<sup>rd</sup> appellant took to trace and have the respondent arrested. From the record however, we also note that the respondent was charged on 17<sup>th</sup> January 2019 but was not in court to take plea. The 3<sup>rd</sup> appellant was present and he told the court that they had duly served the respondent with the notice to appear in court. He thus prayed for an arrest warrant to be issued against the respondent. The Court issued the warrant of arrest and fixed the matter for mention on 26<sup>th</sup> February 2019.
31. When the matter came up for mention on 26<sup>th</sup> February 2019 the warrant of arrest had not been effected and the respondent was therefore, not in court. More importantly, the 3<sup>rd</sup> appellant who was in court when the date was given, was also absent. The court gave a further mention date of 14<sup>th</sup> May 2019, on which date the parties were still absent. This time the court ordered that summons be issued to the private prosecutor and scheduled the matter for mention on 31<sup>st</sup> July 2019. On this mention date the court was not sitting and the matter was fixed for mention on 24<sup>th</sup> October 2019. Again, the parties were not in court and the matter was dismissed under Section 202 of the CPC for want of prosecution.
32. From this chronicle of events we find that first, the 3<sup>rd</sup> appellant is an advocate and was present in court when the initial date of mention was given. It was incumbent upon him to know what order the court had given, or to peruse the court record in the registry to know the next court date. Secondly, it was also incumbent upon the appellants to come to court to report their progress in looking for the respondent and their intention to continue to prosecute their case.
33. The warrant of arrest was issued on 19<sup>th</sup> January 2019 at the behest of the 3<sup>rd</sup> appellant. However, the 3<sup>rd</sup> appellant failed to check the status of the case until when he appeared before the court on 8<sup>th</sup> July 2020. That was a year and a half later. In the premise the lower court was right to dismiss the case as the appellants had lost interest in it and we find no reason to fault the superior court’s finding that the appellants were not diligent in following up their case. This ground therefore, fails.
34. Turning to the third issue, the appellants urge that the acquittal of the respondent was contrary to Section 202 of the CPC as the respondent was not present in court. Further, that he was acquitted on a date that was set for mention and not the hearing. The respondent on his part contends that the



acquittal was proper as provided under the said section and that in the Criminal procedure Code there is no difference between the hearing and mention dates.

35. Section 202 of the CPC provides that:

“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.”

36. The superior court pronounced itself on the fact that the suit was dismissed in the absence of the respondent therein and on a mention date thus:

“The applicants would have had a case if it was established to the satisfaction of this court that the respondent had been served with the summons to appear before the court to answer the charges and had failed to appear. The applicants would have relied on section 202 of the Criminal Procedure Code if they established that they were present in court or were prevented from being present in court on account of a reasonable or justifiable excuse. In the present case, it was abundantly clear that the private prosecutor did not offer a reasonable excuse for his failure to attend court for a cumulative period of one year and four months before he made the application to have the case reinstated to hearing.”

37. For Section 202 to be deployed, first, the accused person must appear in obedience to the summons, at the time and place appointed in the summons for the hearing of the case, or be brought before the court under arrest. Secondly, it must be shown that the complainant, having had notice of the time and place appointed for the hearing of the charge, has not appeared. Only then can the court acquit the accused person.

38. We note that the respondent in this appeal did not appear in the trial court at any time from the inception of the proceedings and therefore, he had not taken plea. He was also not present in court on the date of the acquittal. He could therefore, not be acquitted of that to which he had not yet pleaded. We therefore find that the acquittal order made by the trial court and upheld by the superior court was improper. In any case, there is no proof on record that the appellants were served with the summons to appear in court on that date.

39. In reference to the revision however, the learned Judge was right to decline the application for revision in view of the mandatory statutory limitation prescribed under Section 364 (1) and (4) of the CPC. The court might have had greater latitude if the matter had come by way of appeal. The appellants assert that they approached the court on the basis of *the Constitution* and not the CPC. It is trite that where a party has an appropriate forum before which to seek redress, it is incumbent upon them to raise their concerns before the said forum as opposed to invoking the constitutional jurisdiction of the court at the outset

40. Ultimately, we find no merit in this appeal and dismiss it with no orders to cost.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

