Simiyu v Nyakongo & another (Criminal Appeal 34 of 2020)
[2023] KECA 66 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 66 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 34 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

FEBRUARY 3, 2023

BETWEEN

PETER JUMA SIMIYU ..... APPELLANT

AND

JOHN OMOLLO NYAKONGO ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

(An appeal from the ruling/order of the High Court of Kenya at Mombasa by Hon Lady Justice Njoki Mwangi delivered on 1st November 2019 criminal Revision No. 5 of 2019 Mombasa Original Mombasa CM Criminal Case No 1338 of 2016 as consolidated with Criminal Case No. 685 of 2015)

JUDGMENT

1. The appellant herein Peter Juma Simiyu lodged an appeal against the ruling and order of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) rendered on 1st November 2019 in which the Court reviewed and set aside the order of the Chief Magistrate's Court in Criminal Case No. 1338 of 2016 [as consolidated with Criminal Case No. 685 of 2015] that acquitted the appellant under section 202 of the *Criminal Procedure Code* (hereinafter CPC), and ordered a re-instatement of Mombasa CMCC No. 1338 of 2016 and arraignment of the appellant before the Mombasa CM Court on 14th November 2019, to answer the charge he faced previously in the lower Court. The appellant in his memorandum of appeal dated 14th September 2020 challenges the ruling on three main grounds namely that the High Court erred in finding that it had supervisory jurisdiction under section 362 and 364 of the *CPC* and article 165 (3), (6) & (7) of the *Constitution* to entertain the 1st respondent's application, to set aside the acquittal order made by the trial magistrate and to re-instate the criminal charges in CMCC No. 1338 of 2016.

2. The factual background to this appeal will give a clear perspective of the case. The 1st respondent had rented offices which occupied the whole of the third floor on Harbour House, along Moi Avenue Mombasa. He paid rent per quarter and had paid up to December 2015. On the 10th March 2015, the 1st respondent received a call from his sub-tenant and later on from the Caretaker that his offices had been broken into and that goods from therein were being carted away. The goods carted away from his office were valued at 7.9 million and cash 530, 000/-. Those carted away from the sub-tenant were worth 360, 000/-. He treated the matter as theft and reported it as such to Central Police Station, Mombasa. It later transpired that the appellant and his co- accused had been sent to levy distress for rent.

3. The appellant was charged before the Chief Magistrates' Court Mombasa in Criminal Case No. 1338 of 2016 with two counts of the offence of Breaking into a building and committing a felony contrary to section 306(a) of the *Penal Code*. In the first count he was accused of entering the 1st respondent's building and stealing properties worth the amounts as stated hereinabove. In the second count he was accused of entering the building belonging to Bakri International and stealing properties valued as stated herein above. On the 26th January 2017, the case against the appellant was consolidated with that of his co-accused who had been charged earlier in Criminal Case No. 685 of 2015. The charges in the consolidated cases were the same.

4. When on the 9th May 2016 the 1st respondent was called to the witness stand as the first prosecution witness in CMCC 685 of 2015, that case had not been consolidated with CMCC 1338 of 2016, the case against the appellant's co-accused, . In his testimony the 1st respondent stated that he was a tenant at the Harbour House offices where he paid rent quarterly. He denied that he owed any rent, or that he was ever served with any notice for distress for rent, or that the co-accused had any order from court to break into his premises. No other witness was present and so the case was adjourned.

5. On 26th January 2017, the case against the appellant was consolidated with that against his co-accused. It was then adjourned. The consolidated case did not proceed on 10th May and on 4th September 2017 as planned. On the 23rd October 2017, the prosecution made an application to withdraw the case under section 87(a) of the *Criminal Procedure Code*. On the same day, Hon E. Kagoni allowed the application in a ruling where he stated as follows:

> " I agree with the defence that under the circumstances section 87a *Criminal Procedure Code* (*sic*) will not be in the interest of both the absent complainant and the accused persons who have been diligently been attending Court. I proceed to acquit both accused persons under section 202 of the *Criminal Procedure Code*."

6. When he finally learned of it, the 1st respondent was dissatisfied with the order of the trial court and on 6th February 2018 filed Criminal Revision Application No. 5 of 2019 before the High Court at Mombasa. He sought that the impugned orders of the trial magistrate be revised and reviewed and that the High Court sets aside the order of dismissal of CMCC No. 685 of 2015 as consolidated with CMCC No. 1338 of 2016, and that the order be substituted with an order of reinstatement of the said criminal cases and an order directing that the trial proceeds before any other Magistrate other than Hon. Kagoni.

7. The High Court, after hearing the parties found that it had supervisory jurisdiction to entertain the application. It proceeded to grant the orders sought, re-instated the criminal case and ordered for hearing before a magistrate other than the one who made the order acquitting the accused. It is against the High Court's ruling that the appellant has appealed before us.

8. We heard the appeal on the 26th September 2022 where learned counsel Mr. Amadi was present for the appellant and relied on his filed submissions dated 29th June 2022 together with the case digest and list of authorities of even date. There was no representation for the 1st respondent, nor did he file any papers or submissions. Learned Prosecution Counsel Mr. Kennedy Kirui was present for the 2nd respondent. He relied on his written submissions dated 25th September 2022 which he also highlighted. He also relied on his filed list of authorities dated 25th September 2022.

9. This being a first appeal from the decision of the High Court in revision, it is our duty to re-evaluate and reexamine the evidence and make our own conclusion but we must bear in mind the fact that we have not had the opportunity of seeing and hearing the witnesses and give allowance for that. In *Mwangi v Republic* [2004] 2 KLR 28 at page 30 this Court stated:

> " In *Okeno v R* [1972] EA 32 at p. 36 the predecessor of this Court stated, inter alia:
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> > " an appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1975] EA 336). It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday* Post [1958] EA 424.'"

10. The issues for determination in this appeal are two and both parties are in agreement. The two issues are:

    1. Whether the 1st respondent had *locus standi* to institute the impugned proceedings in the High Court for review.

    2. Whether the High Court had the requisite jurisdiction to entertain the application and issue the orders it did.

11. The appellant's case is that sections 138 and 218 of the *CPC* stipulate that an order of acquittal such as the one made by the trial Court on the 23rd October 2017 in favour of the appellant serves as a bar to further information or complaint and that the High Court breached that condition as no cogent reason was tendered nor did it disclose the illegality or impropriety attributable to the trial Court, that warranted the exercise of revision to overturn the acquittal order. The case of *R v Jared Wakhule Tubei & another* (2013) eKLR was cited for proposition that exercise of revision under art. 165 (6) & (7) and Sections 362 and 364 of the *CPC* only covers incorrect, illegal, improper or irregular proceedings.

12. The appellant contended that the state is the complainant in criminal proceedings and that the 1st respondent not being a party to the case or without having been granted leave by the court to institute private prosecution lacked the requisite capacity to move the Court individually for an order in revision, as under the *CPC* as read together with article 157 (*sic*) of the *Constitution*, such motions are the preserve of the 2nd respondent.

13. In regard to the propriety of the review undertaken, it was the appellant's position that under section 364 (1) (b) & (5) of the *CPC* when an appeal lies from a finding sentence or order and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of a party who could have appealed. That the 2nd respondent appearing on behalf of the 1st respondent had all the time to

appeal the acquittal order but failed to do so. It was the appellant's case that by dint of section 364 (1) (b) & (5) of the *CPC* the 2nd respondent is estopped from lodging the subject application for revision and that at the same time the High Court's jurisdiction to hear and determine the same was equally ousted, citing the case of *Bichange vs. Republic* [2005] 2 KLR in support of that proposition.

14. Mr. Kirui for the 2nd respondent was in agreement that there were two issues for determination as suggested by the appellant. Learned Prosecution Counsel, agreed with the appellant that acquittals are out of bounds to the High Court when exercising the powers of revision under sections 362 to 367 of the *CPC*, and cited the case of *DPP vs. Perry Mansukh Kasangara & 8 others* [2020] eKLR in support thereof. Counsel urged that article 165 (6) & (7) of the *Constitution* provided for supervisory jurisdiction of the High Court. He cited the same case of *DPP vs. Perry*, *supra* for the proposition that revisionary jurisdiction and supervisory jurisdiction are distinct and that the former cannot be equated to the latter, neither was the supervisory jurisdiction operationalized by sections 362 to 367 of the *CPC*, neither is it limited by it. Further that under the supervisory jurisdiction the High Court can make any order or give any direction it considers appropriate to ensure the fair administration of justice; and that the 1st respondent had locus standi to make the application he made to the High Court.

15. We noted that the 1st respondent brought his notice of motion application before the High Court and cited Constitution Articles 50 (1), which deals with fair trial; 22, which deals with enforcement of the Bill of Rights; 47 (1), which deals with fair administrative action; 159 (1) & (2), which deals with the principles that should guide the courts while exercising judicial authority; and, 165 (3) (6) & (7), which deals with the constitutional supervisory jurisdiction of the High Court; and sections 362; 364; 100; and 202 of the *CPC*; and sections 3; 4; 5; 7 and 9 of the *Fair Administration Act*, 2015. The appellant's co-accused was already deceased by the time the application was heard.

16. The High Court considered the application, the affidavit sworn by the 1st respondent in support thereof, the replying affidavit sworn for the appellant in substitution of the initial replying affidavit by his co-accused who died in December 2018 before the application was heard, and submissions by counsel. In regard to its jurisdiction to entertain the 1st respondent's application and order a re-instatement of the Mombasa CMCC No. 685 of 2015 and 1338 of 2016 following an acquittal under section 202 of the *CPC*, the High Court considered the provisions of article 165 (6) (7) of the *Constitution* and section 364 (1) of the *CPC.* The learned High Court Judge stated as follows:

> " In the case of *Reuben Nyamai Bichange vs Republic* [2005] eKLR when making reference to the provisions of Section 364 (4) of the *CPC*, the Court of Appeal stated thus:
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> > " The meaning of this Section is in plain language. When an accused is acquitted, the provisions in respect of revision cannot be used to turn an acquittal into a conviction."

Mr. Akanga submitted that the applicant should have appealed. I think not. The inclusion of the supervisory jurisdiction of the High Court in the provisions of article 165 (6) and (7) gives this court wide powers to make orders on revision. Under the said provisions, the High Court can make any order or give any direction it considers appropriate to ensure fair administration of justice, depending on the circumstances of the case... as long as the High Court in so doing does not turn an order of acquittal into a conviction."

17. The High Court found that it had supervisory jurisdiction under article 165 (6) & (7) of the *Constitution* and section 364 (1) of the *CPC* to review and rescind the lower court's ruling and acquittal order dated 23rd October 2017. The High Court further found that the learned trial magistrate could not have acquitted the appellant under section 202 of the *CPC* when the application made by the

prosecution was for withdrawal of the case under section 87 (a) of the *CPC*, and also after he was informed that the Police file had not been traced and that no witnesses had been bonded to attend court on that day. The High Court found that this was more so in the absence of evidence that the 1st respondent and other witnesses had been bonded for the hearing on the respective day and had failed to attend court. The High Court found that under the supervisory power provided under article 165 (6) & (7) it had wide powers and could make any order or give any direction it considers appropriate to ensure fair administration of justice. It proceeded to grant the orders sought, re-instated the criminal case and ordered for hearing before a magistrate other than the one who made the order acquitting the accused.

18. Before we deal with the issues that arise in this appeal, let us first consider whether the jurisdiction of the High Court donated under section 362 to 367 of the *CPC*, can be equated to the jurisdiction prescribed under Article 165 (6) & (7) of the *Constitution*.

19. Mativo, J. (as he then was) in the persuasive authority in the case of *Rana Auto Selections Ltd & 2 others v Kenya Revenue Authority & another* (Judicial Review Application 9 of 2020) [2021] KEHC 323 (KLR) had this to say about the purpose and application of supervisory jurisdiction of the High Court:

> "Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs. This power of superintendence is conferred by article 165 (6) of the *Constitution*. As was pointed out by Harries, C.J. in *Dalmia Jain Airways Ltd. v Sukumar Mukherjee* 1953 SC 58, this power is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there is grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under article 165 (6) of the *Constitution* to interfere."

20. We have delved into the objective or purpose of the supervisory power of the High Court, as well as on the issue when it can be invoked or applied. We now make reference to the persuasive judgment delivered by the *Indian Apex Court in the case of Krishnan and Another v Krishnaveni and ano* {1997} 4 SCC 241.

The Court extensively interpreted the relevant provisions of the Indian Criminal Procedure Code, [which are quite similar to our own *CPC*, Sections 362 to 364] on the revisionary power of the High Court, and made the following observations:

> "It is seen that exercise of the revisional power by the High Court ..... is to call for the records of any inferior Criminal Court and to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court and to pass appropriate orders. .....

Section 397 gives powers to the High Court to call for the records as also suo motu power under Section 401 to exercise the revisional power on the grounds mentioned therein, i.e., to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court, and to dispose of the revision in the manner indicated under Section 401 of the Code. The revisional power of the High Court merely conserves the power of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that its subordinates Courts do not exceed the jurisdiction or abuse the power vested in them under the Code or to prevent abuse of the process of the inferior Criminal Courts or to prevent miscarriage of justice.

The object of section 483 and the purpose behind conferring the revisional power under section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to meet out justice. .....The power of the High Court, therefore, is very wide. However, High Court must exercise such power sparingly and cautiously .....However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior Criminal Court in its juridical process or illegality of sentence or order." (Emphasis added)

21. We now turn to consider the provisions relating to the High Court's revisionary jurisdiction under the *CPC*. Section 362 of the *Criminal Procedure Code* provides as follows:

> " 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."

22. Section 364 of the *CPC* provides for powers of the 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..."

23. Undoubtedly the High Court's power of revision under the provisions of sections 362 and 364 of the *CPC*, and indeed under the entire spectrum of sections 362 to 367 of the *CPC*, are limited to finding, sentence or order recorded or passed by a subordinate court, other than an order of acquittal. The provisions are clear that the High Court in exercise of the power of revision, may call for the record which has been reported for orders, or which otherwise comes to its knowledge. The High Court's attention could be drawn through any medium including social media. That means that in the exercise of the power of revision, the High Court could also act suo muto It is therefore safe to say that no formal mode of approaching the Court or of drawing the Court's attention is required or is necessary

before the revision process can be invoked. The power of revision is limited to examination of 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.

24. Turning now to the supervisory powers of the High Court as provided under the *Constitution*: The powers granted to the High Court under article 165(7) flow from, and have to be read in conjunction with the provisions of article 165(6). The two sub articles provide as follows:

> "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration."

25. It is worth noting that under article 165 (6) of the *Constitution* takes a completely different approach and confers a supervisory jurisdiction on the High Court, not only over subordinate courts but is exercised over any tribunal, person, body or authority exercising a judicial or quasi-judicial function,. The only rider is that the High Court cannot exercise the supervisory power over a superior court. This jurisdiction is also not limited to criminal proceedings only but covers proceedings of civil nature . Further it is not limited to the High Court 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, but in addition to the powers under the *CPC*, the *Constitution* has expanded the scope of the High Court's power to "make any order, or give any direction it considers appropriate to ensure the fair administration of justice". So that if the High Court in the exercise of its supervisory jurisdiction calls for a record and finds that there was a unfairness in the administration of justice by the subordinate court, body or tribunal the High Court may intervene even if there may be no other challenge to the proceedings, order or sentence, whichever is the case.

26. Mr. Kirui urged that the supervisory powers of the High Court under article 165 (6) & (7) were not operationalized by the *CPC*, sections 362 to 367. That is correct for the simple reason that Article 165 of the Constitution came into effect after the inauguration of the *Constitution* 2010, while the *CPC* had been in force for decades, in addition to the fact the constitutional provision in question prescribed for an expanded jurisdiction to the one under the *CPC*.

27. The *Constitution of Kenya* 2010 required Parliament to make laws to operationalize various of its provisions, for instance articles 50 (9) and 47 (3). Where *Constitution* required legislation be enacted, then that had to be done. As making of laws is a long process, the makers of the *Constitution* 2010 in their wisdom, in the Transitional and Consequential Provisions, under the Sixth Schedule, section 7(1) thereof made provision for construction of existing laws with the necessary alterations, adaptions, qualifications and exceptions necessary to bring all laws in force before the effective date into conformity with the *Constitution*.

28. There were also many other provisions of the *Constitution* which, in order to operationalize them required legislative interventions, even though the *Constitution* did not expressly require legislation be enacted. That is where article 165 (3) & (6) fall. The *High Court (Organization and Administration) Act* No 27, 2015, under section 5 of the said Act gives the statutory operational basis for the Court's

exercise of supervisory jurisdiction, and specifically makes reference to it. The section provides as follows:

> " 5. The Court shall exercise —
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> a. the jurisdiction conferred to it by article 165(3) and (6) of the *Constitution*; and
>
> b. any other jurisdiction, original or appellate, conferred to it by an Act of Parliament".

29. The *High Court Rules* made under the same Act, under rule 20(2) thereof spells out the scope of the supervisory power of the High Court, capturing the provision of article 165 (3) & (6) of the *Constitution* and stipulates as follows:

> " 20(2) Despite paragraph (1), the supervisory jurisdiction of the Court over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function as contemplated under article 165(6) of the *Constitution* is not limited, and in particular the Court may—
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> (a) call for the record of any proceeding before any subordinate court, body or authority exercising a judicial or quasi-judicial function; and
>
> (b) make an order or give any direction it considers appropriate to ensure the fair administration of justice."

30. From this analysis it is clear that revisionary jurisdiction under sections 362 to 367 of the *CPC* concerns a narrow scope of review over criminal proceedings. The constitutional supervisory jurisdiction confers on the High Court an extremely broad-based authority with which to call up proceedings of both civil and criminal matters from all subordinate courts, tribunals and authorities, and is not limited on who or how the jurisdiction of the High Court can be invoked. The revisionary jurisdiction under the *CPC* is clearly distinct in terms of scope from the supervisory jurisdiction of the High Court provided under the *Constitution*. We must however make it clear that when the High Court exercises its revisionary power under sections 364 to 367 of the *CPC*, it is enforcing a supervisory role over the subordinate courts in criminal proceedings, the only difference being that its jurisdiction is limited to the conditions set under Sections 362 and 364 of the *CPC*.

31. Having dealt with the nature and scope of the revisionary and the supervisory jurisdiction of the High Court under the *CPC* and the *Constitution*, we now turn to the issues for determination in this appeal. The first issue is whether the 1st respondent had locus standi to bring the application. The appellant's argument is that the 1st respondent was not a party in the criminal proceedings and therefore could not bring the application unless he obtained the leave of the Court to do so. That only the 2nd respondent had the locus standi to do so. The 2nd respondent did not agree with that argument. Counsel urged that since the 1st respondent was seeking to enforce articles 50 (1), 22, 47 (1), 159 (1) (2) and 165 (3) (6) (7) of the *Constitution*, by dint of article 22 of the *Constitution*, every person has a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied,

violated or infringed, or is threatened. Counsel relied on the case of *DPP v Perry*, *supra* where Mwongo J. held:

> "No limitation of timeframe or nature of the case are imposed on the High Court's (Supervisory) jurisdiction; the authority may be exercised at any time; and given there are no limits as to who should invoke the power, presumably it may be invoked at the instance of either the Court or upon being moved by a party(Emphasis added)"

32. We must first answer the question who the 1st respondent was in the case. From our reading of the CM's court proceedings and the summary we have given herein of the case, it is clear that the 1st respondent was the complainant who reported the matter to the police for investigation, and that his report was the basis for the arrest and arraignment of the appellant before the CM's court. He was not just a complainant, but was a victim of the acts he reported to the police, which are particularized in the charges brought against the appellant. He claimed to have lost the properties contained in the particulars of the first count against the appellant, and to that extent was a victim having been directly affected by the acts of the appellant complained of.

33. The 1st respondent invoked articles 22 and 50 (1) of the *Constitution* which provide as follows:

> "22. Enforcement of Bill of Rights
>
> 1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
>
> 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
>
> a. a person acting on behalf of another person who cannot act in their own name;
>
> b. a person acting as a member of, or in the interest of, a group or class of persons;
>
> c. a person acting in the public interest; or
>
> d. an association acting in the interest of one or more of its members."
>
> 50. Fair hearing
>
> (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

34. These two provisions are enabling provisions for anyone who feels aggrieved to institute proceedings in court or in the appropriate body to have the same resolved. Quite apart from that the *Constitution* recognizes victims of offences and under Article 50 (9) provided thus:

> "Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences."

35. The Legislature enacted the *Victim Protection Act* [VPA] 2014, to give effect to article 50 (9). Section 2 of the *VPA* defines a victim as 'any natural person who suffers injury, loss or damage as a consequence of an offence'. The objects and purpose of the *VPA* as stipulated under section 3 is to recognize and give effect to the rights of victims of crime. Section 4 sets out the general principles that guide the Court in dealing with a question of the rights and welfare of a victim. Section 4(2)(b) provides:

> "(2) Subject to subsection (1), a court, administrative authority or person performing functions under this Act shall ensure that—
>
> (a) ... ;
>
> (b) Every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken;"[emphasis added]

36. Section 9 (d) of the *VPA* encapsulates and repeats the content and effect of Article 50(1) in the following terms:

> "(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;

37. Section 9 of the *VPA* is instructive because it provides for the victim's rights during the trial process. A Court is under obligation to ensure that 'every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken.

38. The Supreme Court of Kenya in *Joseph Lendrix Waswa v Republic* [2020] eKLR, determined the right of a victim to participate in a criminal trial and held:

> " Although the adversarial criminal trial process is a contest between the State, represented by the DPP, and the accused, usually represented by defence counsel and the traditional role of victims in a trial is often perceived to be that of a witness of the prosecution, it is without doubt, that flowing from both the *Constitution* and the *VPA* and in particular section 9(2)(a) of the *VPA,* that a victim too, has the right to participate in criminal proceedings.
>
> 52. The participation of victims in criminal trial proceedings, though a novel trend in our laws, is in accord with international developments that have embraced the place of victims in the trial process."

39. We believe that as a victim the 1st respondent could approach the High Court in revision if aggrieved by the order made by the subordinate court, to seek reprieve, by virtue of article 22 and 50 (1) of the *Constitution* and section 9 (2) of the *VPA.* On the issue of *locus standi* of the 1st respondent to bring the application, based on our discussions and findings above, the answer is that the 1st respondent had locus standi to approach the court and make the application as he did. Contrary to the submission by counsel for the appellant, the right to approach the High Court under the revision or supervisory jurisdiction is not the preserve of the DPP.

40. The second issue for determination is whether the High Court had the requisite jurisdiction to entertain the application and issue the orders it did. The appellant's submission was that the jurisdiction of the High Court under article 165 (6) & (7) and section 362 & 364 of the *CPC* is limited to calling for the record 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, citing *Rep. v Jared Wakhulle Tubei & another* [2013] eKLR. Further that the jurisdiction of the High Court to entertain the application was ousted for the reason the DPP, which had a right to appeal failed to do so as provided under Section 364 (1) (b) & (5) of the *CPC*, and therefore was estopped from bringing the instant application.

41. The state on its part urged that the High Court had jurisdiction to entertain the application, and that the supervisory jurisdiction of the High Court under article 165 (6) & (7) was unlimited by and distinct to the revisionary jurisdiction under section 3642 to 367 of the *CPC*, citing *Republic vs. Perry Mansukh Kasangara & 8 others*, *supra*.

42. The starting point is to state that contrary to submissions by the appellant's counsel, Gikonyo, J. in *Rep. vs. Jared Wekhule Tubei*, *supra* does not aid the appellant's case. The learned Judge stated very clearly as follows:

> " Quite contrary to the submissions by learned counsel Mr. Ombito, I wish to point out that, the exercise of supervisory power of the High Court, particularly under Article 165 (6) & (7) of the *Constitution* and sections 362-364 of the C*riminal Procedure Code* is so wide, and is not limited to situations where there is an error on the face of the record, or new issues having emerged, It covers incorrect, illegal, improper or irregular proceedings, order or finding of the trial.

43. We have noted that the learned Judge of the High Court analyzed and evaluated the proceedings before the CM's court, examined the exercise of jurisdiction by the trial Magistrate. She then observed:

> " This court has perused the proceedings that led to the acquittal of the 1st and 2nd respondents. On 23rd October, 2017, they attended court, The Prosecution Counsel was Ms. Fundi. She informed the court that she was waiting for the police file from DCI Urban. The Trial Magistrate, Hon. Kagoni placed the file aside.
>
> At 11:00 a.m., Ms. Fundi applied to withdraw the case under the provisions of section 87 (a) of the *Criminal Procedure Code* because the police file had not been availed. Mr. Sewe for the 1st respondent opposed the application for withdrawal of the case and stated that since the consolidation of the two cases, the prosecution had never been ready to proceed and had been granted several adjournments...
>
> Ms. Oyier for the 2nd respondent [appellant herein] associated herself with the submissions of Mr. Sewe.
>
> The Prosecutor ...said that the police file could not be traced and that is why witnesses had not been traced. She also stated that there was a complainant whose interest had to be considered.
>
> ... The Hon. Magistrate noted that the complainant was not in court, meaning he might as well have lost interest in the case. The said Magistrate agreed with the defence that under the circumstances, section 87 (a) of the *CPC* could not be in the interest of the absent complainant and the accused persons, who had diligently been attending court. He then proceeded to acquit both the 1st and 2nd respondents under the provisions of section 202 of the *CPC*."

44. After this analysis the learned Judge of the High Court then noted that the Prosecution had informed the trial court that the police file had not been traced and that therefore the witnesses had not been

traced. She concluded that Section 202 of the *CPC* could not be invoked unless the trial court was shown evidence that witnesses had been bonded and had failed to attend court. The High Court found that as no such evidence was placed before the trial court, there was no doubt that the witnesses were not bonded. She further analyzed the 1st respondent's assertion before her that he was never bonded.

45. We note that even though the 1st respondent had invoked several provisions of the law the learned High Court Judge did not make reference to any. For instance, article 47 of the *Constitution* and Sections 3; 4; 5; 7 and 9 of the *Fair Administration Act*, 2015. That aside she did consider section 202 of the *CPC* and article 165 (6) & (7). In that regard we noted that the appellant did not contest these facts surrounding the order of acquittal by the lower court, including the fact that none of the witnesses were bonded for court on 23rd October 2017, including the 1st respondent that made the application. These facts are proof that there was procedural unfairness, failure to take into account relevant considerations and unreasonableness on the part of the subordinate Court. which grounds are set out in section 7(2) of the *Fair Administrative Action Act*.

46. Furthermore, as the learned Judge of the High Court found, Section 202 of the *CPC* could not apply where there was no evidence that witnesses were bonded for the hearing of the case on the specific day the case was to be heard and where there was no evidence that they failed to show up for trial. Section 202 of the *CPC* applies where the accused person appears in obedience to summons and the complainant does not appear having had notice of the place and time of the hearing. The rider is that there must be evidence the complainant had notice of the place and time of the hearing. The High Court was right when it found that the requisite evidence that would justify invocation of section 202 of the *CPC* was lacking. We are satisfied that all these factors on the procedural unfairness, failure to consider relevant matters and justified the setting aside of the said orders.

47. We must mention one other factor. The application before the lower court was for withdrawal of the prosecution case under section 87 (a) of the *CPC*, and the basis for the application was that the prosecution had been given a final adjournment in the matter, and had neither their file nor witnesses. The learned trial magistrate declined to have the matter withdrawn under that section, opting suo motu to dismiss it under section 202 of the *CPC*. While a trial court may, in exercise of discretion decline a withdrawal of a case for good reason shown, to use the discretion to acquit when the condition requisites were missing was not just unprocedural, but illegal and smacked of impropriety.

48. The learned High Court Judge was right when she found that the High Court had supervisory jurisdiction under article 165 (6) & (7) and section 362 and 364 to make any order on revision and to give any direction it considered appropriate to ensure fair administration of justice. We go further and find that the decision reached by the learned Judge in this matter was justified for the reasons we have shown in this judgment.

49. The result of this appeal is that it lacks merit and is dismissed.

The orders of the High Court in its ruling of 1st November 2019 are affirmed with the rider that the date for arraignment of the appellant before the Chief Magistrate's Court Mombasa be within 30 days of the date of this judgment.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF FEBRUARY, 2023.

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

.....

P. NYAMWEYA

JUDGE OF APPEAL

.....

J. LESIIT

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR