



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MAKHANDIA & ODEK, JJ. A)

CRIMINAL APPEAL NO. 83 OF 2017

BETWEEN

SAMUEL OTIENO OBUDO.....1ST APPELLANT

MARY GATHIGA KANYIHA.....2ND APPELLANT

KEITH MUSYOKI KISUNGUH.....3RD APPELLANT

ALLOYS NYAMBARAIGA TINEGA.....4TH APPELLANT

DAVID MULINGE KITHUA.....5TH APPELLANT

GEORGE OMONDI ARUM.....6TH APPELLANT

BENJAMIN NJATHI KAGUTU.....7TH APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (**G. W. Ngenye-Macharia, J.**) dated 2nd March, 2017 **in H. C. Cr. A. No. 179 of 2016**)

JUDGMENT OF THE COURT

The instant appeal is in respect of a ruling made on 2nd March 2017 in **Criminal Revision Case Number 179 of 2016** by the High Court sitting at Nairobi. The ruling was the culmination of a Criminal Revision application made before the court by the Office of the Director of Public Prosecutions, “*the respondent*”. In the application the respondent had requested the High Court to call for and examine the record of proceedings in the Chief Magistrate’s Court, **Criminal Case Number 1860 of 2015** which pitted the respondent against the appellants.

The appellants are public servants with their job designations being; Director of Finance and Accounting, Principal Finance Officer, Deputy Director, Internal Audit and Accountant III, respectively in the National Assembly. They were charged in the Chief Magistrate’s court with nine counts, to wit, conspiracy to commit felony contrary to Section 393 of the Penal Code, abuse of office contrary to Section 101 (1) as read with Section 102A of the Penal Code, and of making a document without authority contrary to Section 357 (a) of the Penal Code. The Parliamentary Service Commission (**PSC**) was the complainant. They all denied the charges against them during their arraignment in court on 10th November 2015. The trial was then set for 26th January 2016.

As is normally the practice, the appellants’ defence counsel applied to be furnished with the witness statements and documentary evidence that the prosecution intended to rely on in the prosecution of the case and which the respondent undertook to avail. On 26th January 2016, respective counsel for the appellants informed the court that they had not been supplied with the documentary evidence as a result of which the hearing was adjourned to 11th February 2016. On that date however, the appellants’ defence indicated that they had been informed that the documents were ready though they had not been furnished with the same. The case was subsequently fixed for hearing on 30th March 2016, 5th April 2016 and 8th April 2016. On 30th March 2016, the defence again informed the trial court that vide a letter dated 3rd February

2016, they had formally requested for certain documents, but there had been no response from the respondent. Specifically, they had requested for certified copies of the minutes of the full PSC meeting leading up to the advertisement in the Daily Nation newspaper on 11th February 2016; certified copies of the policy document(s) governing the proposed changes and resolutions for workplace restructuring at the PSC; certified copies of the full minute book and/or certified copies of the minutes of the PSC for the financial years 2012/13 and 2014/15 and lastly, certified copies of the full minute book and/or certified copies of the minutes of the PSC tender committee for the financial years 2012/13 and 2014/15.

In response, the prosecution through the investigating officer informed the court that he was not in possession of the requested documents and as a matter of fact, the prosecution did not intend to rely on them during trial. The officer agreed to supply some documents comprising some invoices and the matter was adjourned to 5th and 8th April 2016. On 5th April 2016, the defence indicated that they had been furnished with the said invoices. However, the requested documents from PSC had not been supplied.

The case was thereafter scheduled for hearing on 19th, 20th and 21st July 2016 with a mention date on 4th July 2016 to confirm compliance. On the mention date, the matter was slated for a further mention on 12th July 2016 for directions. On that day, the defence applied for summons to issue to the investigating officer to show cause why the requested documents should not be furnished. On 15th July 2016, it was indicated that there had been partial compliance although the investigating officer had informed them that the PSC had intimated that the unsupplied documents were privileged or classified. The claim for privilege was challenged on grounds that it was an afterthought and an attempt to conceal material facts. The defence insisted on full disclosure and stated that the minutes sought were crucial to the defence. The issue was reserved for trial by the court and the hearing was scheduled for 19th and 20th July 2016.

On 19th July 2016, the defence reiterated their request for the documents which they followed up with a notice to produce pursuant to Section 69 of the Evidence Act and Articles 20 (3) (b), 25 (c), 35 and 50 of the Constitution. The respondent stated that it needed to serve the PSC as the custodian of the requested documents. The matter was again adjourned to 20th July 2016 to give time for the PSC to avail the documents but on the said date, the documents were not furnished. A further mention was slated for 29th August 2016 and the hearing fixed for three consecutive days; 6th, 7th and 8th September 2016. On 29th August 2016, the respondent indicated that the PSC was unable to release the documents as the matter remained under active consideration. The respondent reiterated that whatever it had served was what it intended to rely on during trial. The matter was fixed for mention the next day to confirm compliance by the PSC and for further directions. On that date, the defence counsel noted that out of the 27 documents requested, only 17 had been availed, duly signed and that some of the contents in the documents had been redacted.

It is on that premise that the appellants then filed an application dated 26th August 2016 seeking to strike out and dismiss the charges against them. The application was made pursuant to Articles 48 and 50 of the Constitution and Section 89 (5) of the Criminal Procedure Code. The appellants' main contention was that they would not be accorded a fair trial since the prosecution had failed to supply them with documents which they deemed absolutely necessary for their defence. The application was successful and accordingly, the trial court struck out and dismissed the charges levelled against the appellants. According to the trial court, the rights of the appellants to a fair hearing would have been infringed and compromised if the hearing was to proceed without availing the requested documents.

The matter did not end there though, as the respondent then moved to the High Court. By a letter dated 26th September 2016, the respondent requested the High Court to call for and examine the record of the above proceedings so as to satisfy and pronounce itself on the legality and or propriety of the findings and orders, as well as the regularity of those proceedings. The request was expressed to have been made under Articles 165 (3) (6) and (7) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code. The request was made on grounds that the Chief Magistrate acted without powers to interpret the Constitution in dismissing the charges, citing violation of the appellant's right to a fair trial, while the respondent had supplied all the witness statements and documentary exhibits intended to be relied on in the trial. Secondly, that the court was not fair and impartial by dismissing the charges because the complainant was not accorded an opportunity to be heard, in violation of Article 50(1) of the Constitution. Thirdly, that the court abused the legal process in allowing the application under Section 89(5) of the CPC, yet the charges in this case had been admitted during plea, and notice to produce under Section 69 of the Evidence Act served and hearing dates fixed severally. Fourthly, that the court acted against the public interest and that the orders of dismissal were unlawful, irregular and without justification. Fifthly, that the orders undermined the powers of the Director of Public Prosecutions to control criminal proceedings. Further, that the trial magistrate was not impartial since she demonstrated bias towards the innocence of the appellants even before hearing the prosecution evidence. Finally, that the dismissal of the charges did not advance the cause of justice.

In their response, the appellants maintained that they could not proceed with their defence without the requested documents which related to the procurement processes and decisions of the PSC. They reiterated that failure to disclose and avail the documents by the respondent was wilful, deliberate and a subversion of their right to a fair trial. They maintained that the actions of the respondent amounted to an abuse of the court process. The respondents also challenged the assertion of privacy and privilege as a justification for non-disclosure, for the reason that the documents requested did not touch on privacy of any individual. It was the respondent's submission that an order to dismiss a complaint or a charge can be made at any stage of the proceedings and not only before plea taking. Furthermore, the respondent did not contest the jurisdiction of the trial court when the application was prosecuted in the trial court. They also pointed out that the prosecution, specifically the complainant did not raise the issue of being denied an opportunity to be heard. They also maintained that the review was an attempt by the respondent to appeal the orders of the lower court using the wrong procedure. To the appellants, the trial magistrate acted within jurisdiction to entertain and determine the application.

In her ruling, **G. W. Ngenye –Macharia, J** held that the magistrate's court erred in dismissing the charges against the appellants on the basis that they would not be accorded a fair trial due to non-compliance by the respondent with the order to furnish the documents it intended to rely on during trial. The Judge ruled that the magistrate's court had acted *ultra vires* its jurisdiction. The court found that there had been partial compliance and remarked, *inter alia*, that the duty of disclosure is a continuing one throughout trial. Further, that the magistrate's court was at liberty to exercise its powers of seeking production of the evidence, such as through summoning the PSC to determine the question of non-disclosure before taking the drastic step of striking out the charges against the appellants. The Judge then proceeded to reinstate the charges against the appellants.

Aggrieved and dissatisfied with those orders, the appellants filed the present appeal. The 1st to 6th appellants filed identical grounds of appeal. In summary, they complained that the Honourable Judge erred in law and fact in finding; that the prosecution was under no duty to supply the appellants with any documents beyond what they intended to rely on despite the fact that the documents requested for and which had been heavily relied on in preferring charges against the appellants, had not been produced; failing to appreciate the appellants' right to fair hearing and the right to information as guaranteed under Article 35 and 50 of the Constitution respectively; for failing to appreciate that the documents sought by the defence were crucial to the framing of the charges against the appellants; for making a determination on the matter despite the fact that she conceded that under section 348 A of the Criminal Procedure Code, the respondent could only approach the High Court by way of an appeal and not revision; ignoring the mandatory provisions of section 362 of the Criminal Procedure Code which provides that no proceedings by way of revision shall be entertained at the instance of a party who could have appealed; for finding that a magistrate's court lacked jurisdiction to determine questions of fair trial in a matter before it and for arguing that such jurisdiction fell squarely on the High Court; finding that the magistrate's action of striking out the charges was drastic and unreasonable despite the fact that the respondent had been granted several adjournments to produce the documents but its position remained that the documents were classified and therefore could not be disclosed; for faulting the magistrate for failing to exercise alternative means of obtaining the requested documents despite the fact that the respondent had indicated that it was impossible to comply with the orders due to the issues of confidentiality raised by the PSC; for finding that a magistrate's court could have compelled a would-be witness at the trial to produce the documents without taking into account the hard-line position taken by the PSC that it was impossible to produce the documents; for holding that the magistrate should have balanced the right of the appellants to fair trial and the issues of public interest despite the provisions of Article 50 of the Constitution which upholds the right of an accused person to fair hearing; for making orders that violated the Constitution and the due proper administration of justice; and lastly, in the circumstances of this case, perverting justice.

As already intimated, the 7th appellant filed a separate memorandum of appeal. The 7th appellant faulted the Judge for finding that she had jurisdiction to entertain the revision before her in the absence of an appeal; for failing to find that the proceedings before her were a nullity in the absence of an appeal; for proceeding to make definitive finding on a revision request even after finding that the issues raised ought to have properly been canvassed through an appeal; for failing to find that the appellants were entitled to disclosure of the documents requested as part of their right to all documents needed to exculpate themselves; for finding that the striking out of charges was drastic and unreasonable despite the fact that the prosecution had been granted several adjournments to enable it produce the documents but had maintained that the documents were classified; for finding that the magistrate could have compelled a would be witness at the trial to produce the documents since the PSC employees had been listed as witnesses in the case.

In his written submissions, the 1st appellant contended that by a letter dated 10th March 2016, the appellants sought from the respondent, documents which were exculpatory to them and which were with the respondent but not disclosed. When the letter elicited no response, another one dated 31st March 2016 was sent to the investigating officer as a reminder. A formal notice to produce the documents was sent on 11th July 2016. The respondent did not honour the notice prompting the appellants to file the application seeking to have the charges against the appellants struck out and dismissed on the basis that the respondent had not supplied sufficient details of the evidence in its possession to enable them answer to the charges. That further, the respondent failed to honour a court order issued on 10th November 2015 directing them to avail the documents. The appellant alleged that the refusal by the respondent was deliberately aimed at incriminating him with a view to hounding him out of office.

Since he had been accused of illegally procuring toners and authorizing payments for them on behalf of the PSC, it was submitted that the 7th appellant's defence was that the procurement and subsequent payment for the toners had been duly authorized by the PSC and a resolution to procure the toners made in a full PSC meeting. The appellant also insisted that the minutes of that meeting had been made available to the respondent but had refused to avail them to him. This, the appellant believed was gross injustice since the documents that could exculpate him had been kept away by the respondent. On the issue whether the magistrate's court acted *ultra vires* its jurisdiction in striking out and dismissing the charges, it was submitted that the proceedings before the magistrate's court were not constitutional litigation as envisaged in section 8 of the Magistrates' Court Act. That the magistrate was nonetheless clothed with power to ensure all documents and statements were supplied to the accused or his counsel before trial to ensure no prejudice is visited upon the appellant during trial.

It was also contended that, by the magistrate's court finding that the trial could not proceed without the production of the documents since it would infringe on the 7th appellant's rights, the court was in no way making a declaration of the infringement of the appellant's rights as envisaged under Article 23 of the Constitution. In the 7th appellant's view, compliance with the principles of fair hearing binds all judicial entities and it would be absurd to suggest that a magistrate's hands are tied despite actions by the prosecution that would lead to a violation of rights. It was pointed out that the application in the magistrate's court sought to strike out the charges against the appellants for the reason that the prosecution had failed to produce crucial documents despite repeated court orders to do so. The appellant denied that the application had sought to litigate and determine the rights of the appellants as provided for in the Constitution. The appellant denied that the orders given by the magistrate amounted to a declaration of the appellants' rights and or constituted a relief under Article 22 of the Constitution.

The appellant further faulted the Judge for her remarks that the documents could still have been sought during the trial and that striking out the charges was drastic and premature. To the appellant, the respondent first insisted that they were not going to rely on the said documents but later claimed that the documents were privileged and classified and could not therefore be produced even during the trial. According to the appellant, the stance taken by PSC was not going to change, rendering the Judge's remarks erroneous. It was the appellant's further submission that having been accused of irregularly ordering toners and making payments for them without authority, the only defence available to the appellant in the circumstances was to show that the transactions were duly authorized in full PSC meetings. The custodian of the minutes according to the appellant was PSC who was the complainant in the case. In the circumstances, he argued that it would constitute an affront to the principles of justice for the appellant to proceed to full trial without critical documents to prove that the charges against him were trumped so as to hound him out of office. Article 50 (2) was cited for the submission that an accused person has the right to be informed in advance of the evidence that the prosecution intends to rely on during trial, and to have reasonable access to that evidence. An accused is further entitled to adequate time and facilities to prepare his defence.

To buttress his arguments on the important nature of the right to a fair trial, the appellant relied on the authorities of **George Taitimu v Chief Magistrates Court Kibera & 2 Others (2014) eKLR** and **Dennis Edmond Apaa & 2 Others v Ethics & Anti-Corruption Commission & Anor, Nairobi Petition No. 317 of 2012 (2012) eKLR**. The decisions of **Republic v Douglas Patrick Barasa & Another (2014) eKLR**

and **Ruth Achieng v Republic (2017) eKLR** were however cited for the proposition that the respondent should have approached the High Court by way of appeal as opposed to revision pursuant to section 364 of the Criminal Procedure Code. The appellant thus opined that the decision of the High Court was made without jurisdiction.

In his written submissions, the 4th appellant asserted that the respondent ought to have approached the High Court by way of appeal as opposed to a revision. His argument stemmed from a reading of sections 348A and 364 (5) of the Criminal Procedure Code (CPC). According to the appellant, the High Court having conceded that the respondent ought to have approached it by way of appeal, should have proceeded to reject the revision sought. The appellant further submitted that the magistrate was justified in striking out and dismissing the charges against the appellant in the light of the fact that he had made repeated pleas for the supply of documents, and in particular the minutes of the Committee on procurements. On account of several adjournments and notices to produce which were ignored, the appellant submitted that the magistrate's court was duty bound to uphold the rule of law by justly dismissing the charges to prevent an abuse of the court process. The remaining appellants made oral submissions.

In his oral highlights, **Mr. Ochieng Oduol** learned counsel for the 1st appellant reiterated most of what is captured in his written submissions. He maintained however, that the documents requested were critical to the appellant in preparation of his defence. Counsel was of the view that the State cannot impede a fair trial by denying the appellant documents that would have assisted in his defence. Counsel denied that this was a suitable case for revision and asserted that an appeal was the only route left to the respondent. The revision request was therefore in breach of section 348A of the CPC. He submitted also that the magistrate was right in making the orders to ensure fair trial and the High Court had erred in holding that the magistrate's court had no jurisdiction to enforce fair trial provisions. In counsel's view, there was a deliberate attempt to impede justice by the respondent.

The submissions of **Mr. Wena**, learned counsel for the 2nd, 3rd, 5th and 6th appellants; **Mr. Moriasi** for the 4th appellant and **Ms. Wanjiku Nyaga** for the 7th appellant mirrored the submissions made by Mr. Ochieng Oduol. They wholly reiterated and associated themselves with those submissions. However, Mr. Wena submitted further that Section 364 of CPC was categorical that only an appeal and not revision lay from the ruling of the learned magistrate. He maintained that this was a specific provision of law for resolution of a dispute. Accordingly, it was submission that where a specific provision of law provides for redress, it ought to be invoked. Further, that the judge had no jurisdiction to invoke Article 159 of the Constitution or inherent jurisdiction to go round the said provision.

In response, **Mr. Wang'ele**, learned Senior Principal Prosecution Counsel for the respondent supported the findings of the High Court. According to the respondent, the issue before the magistrate's court was a constitutional issue relating to fair trial. That pursuant to the Magistrates Court Act, the magistrate's courts powers to deal with matters constitutional were limited and the right to a fair trial was not one of those rights that the magistrate's court could interrogate. That the only court with jurisdiction to determine such issue was the High Court.

Further, in counsels' view, section 89 (5) of the CPC applied in respect of a situation where a charge did not disclose an offence unlike in this case. In the circumstances, counsel urged that there was no basis to strike out and dismiss the charges and the magistrate therefore acted without jurisdiction. She noted that there had been partial compliance with the disclosure of the documents or the notice to produce. Counsel reiterated that the minutes sought by the appellants could not be availed without infringing on the rights of others. On revision and whether the respondent should have approached the High Court by way of an appeal only, counsel maintained that section 384 of CPC should be read together with the supervisory jurisdiction of the High Court under the Constitution.

In our view, the broad issue for determination in this appeal are whether the learned magistrate acted without jurisdiction in striking out and dismissing the charges and in setting aside the decision of the learned magistrate.

As submitted by the appellants, the prosecution took the position that some of the documents sought were privileged and classified and could not therefore be produced or availed to the appellants. Though the respondent, at some point, claimed that the documents could not be produced since it would compromise the rights and interests of other individuals and or would undermine the security of Parliament as an institution, it was not demonstrated how disclosure of the documents relating to a procurement process would amount to security threat. The court did not delve into the specific reason the respondent might have harboured for failing to avail the documents. At some point in the trial court, the respondent intimated to court that the investigating officer would appear before it and give reasons why the documents sought by the prosecution could not be availed but that was never to be.

In **Thomas Patrick Gilbert Cholmondeley v Republic (2008) eKLR**, this Court stated as follows,

“... there is a duty on the part of prosecuting authorities to disclose to an accused person the evidence which they intend to bring before the court in support of their charge. That duty also includes disclosing to an accused person evidence which the prosecution has in their possession but which they do not intend to use during the trial. Such evidence may, if adduced, weaken the prosecution's case and strengthen that of the defence; whatever may be its nature, the prosecution is still obliged to disclose it to the defence. The duty continues during the pre-trial period and during the trial itself, so that if any new information is obtained during the trial, it must be disclosed.”

The appellants demonstrated the importance of the minutes of the meeting of the PSC which they stated duly sanctioned the procurement of the toners they were accused of irregularly procuring. Not only were those minutes crucial and central to their defence, the appellants had a legal right to access them. Those minutes formed the particulars of the charges facing the appellants and stood to impede their right to a fair trial.

The respondent has contended that the application before the trial court related to the constitutional right to a fair trial as envisaged under Article 50. The respondent's position was that under section 8 of the Magistrates' Court Act, a magistrate's court had jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. That jurisdiction is however limited to the rights guaranteed in Article 25 (a) and (b) of the Constitution as stated in section 8 (2) of the Act, that is to say, fundamental rights and freedoms that may not be limited, being freedom from torture and cruel, inhuman or degrading

treatment or punishment and freedom from slavery or servitude. In our view, the provision does not bar a magistrate's court from determining issues concerning a fair trial that may arise before it in the course of the proceedings. The right to fair trial is one of the rights that cannot be derogated from.

In **George Taitimu v Chief Magistrates Court Kibera & 2 Others** (2014) eKLR, while grappling with a similar issue the High Court aptly stated;

“[T]he words of Article 50(2) (j) that guarantee the right “to be informed in advance” cannot be read restrictively to mean in advance of the trial. The duty imposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2) (c) guarantees the accused the right, “to have adequate facilities to prepare a defence.

[27] This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence The obligation to disclose was a continuing one and was to be updated when additional information was received.”

In the circumstances, we take the view that the magistrate had the jurisdiction to order the striking out and dismissal of the charges against the appellants. As observed by the learned Judge and noted in the above authority, the duty to avail documents was a continuing one and so it could have been enforced at any time during the trial. However, the respondent in this case had taken the position that the documents could not be produced due to alleged privilege attached to the requested documents, and or that such production would impact on the right of others not party to the proceedings or compromise the security of parliament. In light of the stand taken by the respondent, it would have served no purpose for the trial to proceed on that basis. The observation by the judge that the court was at liberty to exercise its powers of seeking production of evidence, summon PSC to determine the question of whether non-disclosure of the documents was gratuitous and a non-starter in the circumstances.

Further, and as correctly submitted by the 1st appellant, before the trial court was not really a constitutional litigation envisaged in section 8 of the Magistrate's Court Act. It was an application to have the charges struck out and dismissed for the reason that the respondent had refused to supply evidence in its possession that would have enabled him to adequately answer to the charges, it had also refused to comply with court orders, and that failure would have led to unfair trial of the appellants. The trial court was simply falling back to its powers to deal with situations when there is non-compliance with court orders by a party. It matters not the provisions of Section 89(5) of the CPC.

The appellants have urged before this Court that the respondent ought to have approached the High Court by way of appeal rather than by revision. The powers of revision granted to the High Court are not in dispute. Those powers are provided for in section 362 as read together with section 364 of the CPC. The High Court is granted jurisdiction to call up and examine the record of the subordinate court or tribunal for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and or as to the regularity of such proceedings. This jurisdiction flows from Article 165 (6) and (7) of the Constitution as well as section 364 of the CPC. The power is however, limited from a reading of section 364 of the CPC. The said section provides 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.

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. (Emphasis added)

The above guidelines which the High Court may exercise its revision powers from a reading of the above section are clear and require no explanation. But we emphasize that only a party who has no right of appeal that may seek revision. The position is buttressed by section 348A which provides;

“348A. (1) When an accused person has been acquitted on a trial held by a subordinate court or High Court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court or High Court, the Director of Public Prosecutions may appeal to the High Court or the Court of Appeal as the case may be, from the acquittal or order on a matter of fact and law.”

In **Peter Muturi Njuguna v Kenya Wildlife Service (2017) eKLR**, relying on the authorities of The Speaker of the **National Assembly v Karume (2008) 1 KLR 426** and **Kimani Wanyoike v Electoral Commission, Civil Appeal No. 213 of 1995 (UR)**, this Court observed that, where there is a specific procedure provided for redress of grievances, that procedure ought to be strictly followed. It therefore follows that where an appeal lies, like in the present case, and an applicant proceeds by way of revision, the court should not entertain such revision. The respondent in this case had a right to appeal the decision of the magistrate but chose instead to pursue a revision. In **Busia Criminal Case No. 112 of 2011, Republic v Gayati Deep Enterprises & 2 Others (UR)**, the High Court observed and correctly so in our view that:

“Those decisions are binding on this court. The decisions make the point that the word insistence in section 364(5) is not idle. Whilst a party who would have exercised its right of appeal cannot insist on proceeding by way of revision.”

We also note that the High Court agreed with the defence that the respondent ought to have appealed against the order but nonetheless proceeded to invoke the inherent jurisdiction of the High Court and Article 159 of the Constitution to entertain the application for revision. That was an error. A court cannot invoke inherent jurisdiction to circumvent the provisions of a statute. Nor can the provisions of the law be equated to a mere technicality so as to invite the application of Article 159 of the Constitution. In any event, we note from the proceedings that the respondent had intimated, when applying for the proceedings and ruling of the magistrate, that it desired to appeal as opposed to seeking revision. What caused change of tact or mind?

It is on this premise that we allow the appeal, set aside the ruling and order of the High Court dated 2nd March 2017. There shall be no order as to costs.

Dated and delivered at Nairobi this 24th day of May, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR