



**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: GICHERU, LAKHA & OLE KEIWUA, J.J.A.)**

**CRIMINAL APPEAL NO. 20 OF 1999**

**BETWEEN**

**JUSTINE GACHOKI NDEGWA ..... 1ST APPELLANT**

**PAUL NJOGU KIBERIA ..... 2ND APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

**(Appeal from a revision order of the High Court of Kenya at Nairobi (Hon. Mr. Justice H.P.G. Waweru) dated 25th September, 1998**

**in**

**High Court Criminal Revision No. 18 of 1997)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This is an appeal by the appellants against an Order which the superior court (Waweru, J.) purported to make on 25 September 1998 in revision setting aside the Order of acquittal of the Senior Resident Magistrate's Court at Kerugoya on 27 March 1997 .

The appellants with eleven others were, on 3 May 1996 charged before the said court with the offence of murder contrary to section 203 as read with **section 204** of the Penal Code in that on the night of 2 and 3 April 1996 at Kimunye Village in Kirinyaga District they jointly murdered one **STANLEY KIMOTHO**.

Between 3 May 1996 and 27 March 1997 the 13 accused persons appeared before the Court to be furnished with committal documents. But these were never produced to the Court or served upon the 13 accused persons. The learned Senior Resident Magistrate acquitted all the accused persons under **section 202** of the Criminal Procedure Code as the prosecutor could not proceed without the committal documents.

The Director of Public Prosecution, by a letter of 21 May 1997 applied to the superior court for that order to be revised. Eventually, on 25 September 1998 the superior court held that the lower court acted in exercise of jurisdiction that it did not have and the order in effect was a nullity in law. He, therefore, in the exercise of his revisional jurisdiction reversed the order of the lower court made on 27 **March 1997** .

The appellants have now appealed to this Court and Mr. Gathenji for the appellants contended, firstly, that the superior court had no jurisdiction to revise the Order of acquittal in the face of clear and express words of **section 364 (1)** of the Criminal Procedure Code, Cap. 75, which provides as follows:-

**"364. (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 than an order of acquittal, alter or reverse the order.*

Having carefully considered the provisions of **section 364(1)(b)**, we are satisfied that Mr. Gathenji's argument is well founded. We find no difficulty in view of the unambiguous words of the said section in accepting his submission.

It was also additionally contended that the superior court had no jurisdiction to make the revisional order in the instant case as it contravened section

**364(5) of the Code which states:- "364. (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".**

In our judgment, with respect, this is a clear bar and the learned judge erred in failing to give any effect to it. We heard Mr. Okumu for the respondent with interest but were not persuaded that in view of the above express statutory provisions the order made by the superior court can be upheld.

We are, therefore, compelled to allow the appeal on the ground that the superior court had no jurisdiction to make the order in revision which it did. Accordingly, the Order of the superior court given on **25 September 1998** is set aside.

**Dated and delivered at Nairobi this 2nd day of August, 2002.**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**M OLE KEIWUA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**