



**Republic v Mugambi & 2 others (Criminal Revision E0383 of 2023)
[2024] KEHC 4194 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL REVISION E0383 OF 2023
SM MOHOCHI, J
APRIL 24, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

HILLARY MUGAMBI 1ST RESPONDENT

MOSES KIRUI 2ND RESPONDENT

MARGARET GICHUKI 3RD RESPONDENT

RULING

1. The Applicant, moved Court under article 165 (6) and (7) of the *Constitution* and sections 362, 364 and 365 of the *Criminal Procedure Code* by a letter dated 28th November, 2023, seeking revision in respect of the Ruling and order of the learned Principal Magistrate Hon. K. Kibellion of 28th November, 2023 in Nakuru CMCR No. E3936 of 2022 in which he acquitted the Respondents under section 202 of the *Criminal Procedure Code*.
2. The application is premised on the grounds that Ruling was irregular and unlawful contrary to the express provisions of section 202 of the *Criminal Procedure Code*, that there was no evidence of service of the hearing notice on the complainant, the Ruling offends the complainant’s right of fair hearing under article 50 (1) of the *Constitution* and that the Learned magistrate acted contrary to article 50(1) of the *Constitution* and Section 202 of the *Criminal Procedure Code* and thus failed to exercise his discretion judiciously.
3. The Court had on the 5th December 2023 called for the entire file in Nakuru CMCR No. E3936 of 2022 for the purpose of satisfying itself as to the correctness, legality or propriety of any finding.
4. From the Record, the Respondents were charged under the *Energy Act* No. 1 of 2019 on 9th December, 2022 to which they all pleaded not guilty to all the 3 counts preferred.



5. The matter came up for hearing on 29th May, 2023 but the prosecution sought an adjournment due to unavailability of witnesses in Court and further that there had been a notice the Court was not sitting. The matter again came up for hearing on 7th August 2023 and again the prosecution was not ready to proceed on the grounds that there was a government analyst report that was yet to be received. The Court granted a final adjournment .
6. On 28th November, 2023 the 2nd and 3rd accused did not appear and warrants of arrest subsequently issued with the cash bail being forfeited. A mention date for the 9th of January, 2024 was issued. Later in the day at 10.30am, all the accused persons were present and the prosecution sought an adjournment on the grounds that the police file was not in Court or alternatively that the matter be withdrawn under section 87A of the *Criminal Procedure Code*. Defence counsel argued that section 202 was applicable in the circumstances to which the Court agreed, proceeded to acquit the Respondents and ordered that the cash bail be refunded.

Issue for determination

7. The issue for determination is whether the Applicant has established a case for revision based on the provisions of Article 165 (6) of the *Constitution* and under section 362 of the *Criminal Procedure Code*.

The Law

8. The High Court power of revision is set out in Article 165 which provides:
 - “(6) he High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but 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 of justice.”
9. Section 362 of the *Criminal Procedure Code*, empowers the High Court to call 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.
10. Section 364(1) of the *Criminal Procedure Code* provides: -
 - “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 his 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 section 354, 357 and 358, and may enhance sentence;
 - (b) In the case of any other order other than an order of acquittal alter or reverse the order.
 - (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.”



11. In the case of *Prosecutor v Stephen Lesinko* [2018] eKLR Nyakundi J outlined the principles to guide the Court when examining the issues pertaining to section 362 of the *Criminal Procedure Code* as follows: -
 1. the decision is grossly erroneous;
 2. Where there is no compliance with the provisions of the law;
 3. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;
 4. Where the material evidence on the parties is not considered; and
 5. Where the judicial discretion is exercised arbitrarily or perversely if the lower Court ignores facts and tries the accused of lesser offence.
12. The foregoing provisions bestow jurisdiction to this Court to exercise revisionary powers in respect of orders of the Subordinate Courts. This Court is therefore possessed of the requisite jurisdiction to hear and determine this application.
13. Section 87 of the *Criminal Procedure Code* provides that:

“ 87 Withdrawal from prosecution in trials before subordinate Courts

In a trial before a subordinate Court a public prosecutor may, with the consent of the Court or on the instructions of the Director of Public Prosecutions**, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal

 - a. if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;”
14. On the other hand, section 202 of the *Criminal Procedure Code* provides that:-

202 Non-appearance of complainant at hearing

“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.”
15. That the operative words here are, 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.



16. In the case of *Republic v Janet Ngusia Hochili & 2 others* [2009] eKLR the High Court in concurring with the Trial Court held that;

“Under section 202 a trial Court has discretion to acquit an accused person if the complainant fails to attend Court. The prosecution offered to withdraw the case under section 87 (a). Withdrawal of a case under section 87 (a) requires the consent of the Court. The trial magistrate in his ruling explained the provisions of section 87 (a), 202 and 206 (1) of the *Criminal Procedure Code* and opted to acquit the accused persons under section 202 thereof. I do find that the trial magistrate exercised his discretion improperly. Indeed, the magistrate noted in his ruling that the complainant had been bonded to attend Court.”

17. In this Particular instance the Prosecution had been allowed the last adjournment on the 7th August 2023 and that there were express directions by the Trial Court that the matter to proceed for hearing on the 28th November 2023 a day which the prosecution was quick to apply for warrants when the Respondents were called out and found to be unavailable and that later when the matter was called out at 10.30 am the Respondents were all available and the Applicant was once more not ready to proceed with the hearing.

18. Being guided by the *Janet Ngusia Hochili & 2 others* case the Court notes that, from the charge sheet the complainant was the Republic through the ODPP this in not a complainant that can invoke and enforce the fair hearing rights under article 50 (1) and that the ODPP is intricately intertwined with the Republic and cannot thus be heard to have been unaware of the case or that the republic required a further notice to be prepared even after the matter had been marked as the last adjournment.

19. The Applicants have not demonstrated how the impugned decision disallowing the adjournments sought or acquitting the Respondents under Section 202 of the *Criminal Procedure Code*, incorrect, illegal or without propriety or that the discretion was exercised improperly.

20. Ultimately, I find that the decision by the trial magistrate was correctness, legal and is not a candidate for review on grounds set out in Section 362 of the *Criminal Procedure Code*

21. The Applicants’ application is therefore without merit and is dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 24TH DAY OF APRIL 2024.

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MOHOCHI S.M.

JUDGE

