Case Number:	Criminal Case E003 of 2020
Date Delivered:	15 Dec 2020
Case Class:	Criminal
Court:	High Court at Migori
Case Action:	Ruling
Judge:	Roseline Pauline Vunoro Wendoh
Citation:	Republic v Kevin Omollo Mulela [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	-
County:	Migori
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. E003 OF 2020

REPUBLIC ..... PROSECUTOR

-VERSUS-

KEVIN OMOLLO MULELA.....RESPONDENT

RULING

The Notice of motion dated 25/11/2020 was filed by **Benard Owuor** Counsel for the State. He sought orders of revision under Section 362 and 364 of the Criminal Procedure Code. The orders sought are as follows;

1) The court do set aside the orders made by the subordinate court in CRC. 168/2020 (Republic vs Kevin Omollo Mulela) discharging the accused person contrary Section 202 of the Criminal Procedure Code;

2) That the accused person in Cr. No 168 of 2020 be held at G.K Prison or be remanded and arraigned in court over the same offences;

3) That this court do call for the court record in CR. 168 of 2020 to peruse and grant orders that the case be reinstated and the witness be granted an opportunity to testify.

The background of this case is that the respondent **Kevin Omollo Mulela,** together with another, were charged with the offence of Burglary Contrary Section 304 (2) and stealing contrary to Section 279 (b) of the Penal Code. The respondent's co-accused pleaded guilty and was placed on probation on 8/5/2020.

On 23/11/2020 when the matter came up for hearing, the prosecution informed the court that the witnesses had been bonded but were not present and asked for an adjournment to another date. The court declined to grant the application for adjournment and instead acquitted the respondent under Section 202 of the Criminal Procedure Code. That order provoked the current application.

Mr. Owuor submitted that though the witnesses were not present when the case was called out, the court acted *suo motto* to terminate the case under Section 202 Criminal Procedure Code; that shortly thereafter, the witnesses showed up and were ready to proceed and that it is because the witness had not known where the court was sitting and by the time they found court, the matter had been dismissed. Counsel also urged that though the matter had come up for hearing several times, the respondent who was held at G. K. Prison was never produced in court though the witnesses used to attend court. Counsel urged that the court to consider justice for the complainants who were keen on testifying in the case; that the respondent will not be prejudiced in any way because he will be given an opportunity to cross examined the witnesses and also give his defence. Counsel further submitted that the complainant suffered great loss and it is only fair that the case be heard and determined on merit.

The Respondent opposed the application for reasons that he had been in prison for long; that the matter had come up for hearing four times and the complainants never attended court and that it was dismissed on the fifth time; that he used to attend court and that if the complainant had been coming to court, they should have known which court the case was being heard.

The power of the High Court to call for and examine the record of the subordinate court is provided for under Section 362 of the Criminal Procedure Code. The court may call for and examine the record of any proceedings before the subordinate court within its jurisdiction for the purposes of satisfying itself as to the correctness, legality or propriety of any findings, sentence or order, reviewed or passed by the said subordinate court.

Although it is not mandatory to hear the parties at this juncture, yet under Section 364 (2) of the Criminal Procedure Code, the court cannot make an order to the prejudice of the accused without hearing them. The section reads as follows

"**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 ii was required to pass under the written law creating the offence concerned."

The respondent having been acquitted by the trial court, it is only proper that he should be given a hearing before any other order can be made that may be to his prejudice. That is why the court directed that the notice of motion seeking revision be served on the respondent for hearing inter partes.

Under Section 364 Criminal Procedure Code, it is not this court's jurisdiction to convert on acquittal into a conviction. In this case, the dismissal of the case was done midstream and hence this court is clothed with jurisdiction to intervene if necessary.

I have had a chance to peruse the record of the proceedings in the subordinate court. This case was first fixed for hearing on 9/6/2020, but it seems the respondent was not produced. It was put off to 14/7/2020, again on that date, the respondent was not produced in court. It was further deferred to 24/8/ 2020 but again he was not produced. It was put off to 28/9/2020. He was not produced. The first time the respondent was produced in court was on 23/11/2020. Unfortunately, on the other dates when the matter came up for hearing, save for 28/9/2020, when the court indicated that one witness was present, it was never recorded whether witnesses attended or not. I do agree with the prosecution that due to Covid 19 Pandemic, there is a time that the prisons were not producing the accused persons in court for fear of infections. It is therefore untrue for the respondent to allege that he had come to court four times there before and his case was not heard.

The magistrate is aware of the challenges that the courts at this station face i.e shortage of court rooms, so that subordinate courts sit in open court whenever a court room is available. Courts have no specific court rooms for use and it all depends on which court room is available at any given time. On 23/11/2020, when the prosecution applied for an adjournment, the trial court without first allowing the respondent to respond to the application or giving reasons for denying the prosecution the adjournment, went ahead to dismiss the case under Section 202 Criminal Procedure code.

The record does not show at what time the decision to dismiss the case was made. It would have been prudent and is expected, that the court bearing in mind the challenge of shortage of court rooms, would give the prosecution sometime to wait for their witnesses or check outside whether they had come later or were lost in the court precincts. It seems the court did not do that.

This was the first time that the accused had been produced in court and the prosecution had not caused any delay in hearing the matter. The delay was solely attributable to the Covid 19 Pandemic. In making such a decision, the court had to take into account the seriousness of the case; the loss suffered by the complainant, the number of adjournments, whether the accused had been attending court and whether the witnesses had failed to attend therefore before. In this case, I find that the subordinate court's decision to dismiss the suit under Section 202 Criminal Procedure Code, suo motto, was hasty, arbitrary and unfair to the complainants. The court must always in all circumstances try to balance the rights of both the witnesses and especially the complainant, and the accused.

In the end, I allow the application and I make the following orders: -

1. **It is only fair and in the interests of justice that the court's order made on 23/11/2020 in CRC 168 of 2020 (Republic =vs= Kevin Omollo Mulela) be revised and the order of acquittal under Section 202 Criminal Procedure Code be and is hereby set aside;**

2. The case be and is hereby reinstated and will be heard on merit till it is determined;

3. The case will be placed before any other magistrate at Migori CM's Court other than Hon. Areri Principal Magistrate on

16/11/2020.

4. The matter be given a priority hearing.

5. The matter be mentioned before the Chief Magistrate Court for allocation to another magistrate.

Dated, Signed and Delivered at Migori this 15th day of December, 2020

R. WENDOH

JUDGE

Ruling delivered in open court and in the presence of: -

Ms. Tanui State Counsel

Ms. Nyauke & Josephine Court Assistant

Kevin Omollo Mulela – the Respodent