REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome CJ & P; P. M. Mwilu DCJ & VP; Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. E001 OF 2025

–BETWEEN–

WADE COX.....1ST APPELLANT

GEORGE NATHAN ONYANGO.....2ND APPELLANT

NICHOLAS NGUMBI.....3RD APPELLANT

–AND–

GEORGE ODHIAMBO OKELLO.....RESPONDENT

(*Being an Appeal from the Judgment of the Court of Appeal at Nairobi (Kiage, Achode & Mativo, JJ. A) in Criminal Appeal No. E025 of 2022 delivered on 22nd November 2024)*

Representation:

Nicholas Ngumbi for the Appellants
(Nicholas Ngumbi Advocates)

Mr. Antony Achura for the Respondent
(Lugano & Achura Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This is a petition of appeal dated 3rd January 2025, filed on the same date under Article 163(4)(a) of the Constitution, Section 15A of the Supreme Court Act, Cap 9B, and Rules 38, 39, and 40 of the Supreme Court Rules, 2020. The appeal questions whether the High Court correctly exercised its supervisory jurisdiction under Article 165(6) and (7) of the Constitution and its revisionary power under Sections 362 and 364(1)(b) of the Criminal Procedure Code, CAP 75 of the Laws of Kenya (CPC), in failing to overturn the trial court's decision to acquit the respondent under Section 202 of the CPC. It also considers whether Sections 364(1)(b) and (4) of the CPC are inconsistent with Article 165(6) and (7) of the Constitution, to the extent that they prevent the High Court from overturning an acquittal when exercising its supervisory jurisdiction.

B. BACKGROUND

[2] The 1st appellant was the Global Coordinator General of the Christian Churches of God (CCG), an organization incorporated in Australia and affiliated with Christian Churches of God-Kenya, a society registered and operating in Kenya under the Societies Act, and the 2nd appellant was the Chairman of the Kenyan affiliate, at all material times. Between 2009 and 2011, the respondent served as Chairman of the Christian Churches of God-Kenya. During this period, the respondent allegedly misappropriated funds totaling Kshs. 10,000,000/= for his personal use. The diverted funds were intended to support education for orphans, deaf children, and initiatives to uplift the poor through various charity programs.

[3] Sometime in 2011, the 1st appellant discovered the alleged financial impropriety and travelled to Kenya to report the matter to the police. However, between 2011 and 2017, the police did not initiate any proceedings against the respondent. Dissatisfied with their inaction, the 1st and 2nd appellants sought permission to file private prosecution proceedings against the respondent.

Permission was granted on 26th July 2018, and the 3rd appellant was appointed as a private prosecutor.

C. LITIGATION HISTORY

i. Proceedings at the Magistrates' Court

[4] The 1st and 2nd appellants instituted private prosecution proceedings against the respondent through ***Private Prosecution Case No. 1 of 2019 (hereinafter PP.1/2019)*** before the Chief Magistrate's Court at Milimani Law Courts, Nairobi. The respondent was charged with six counts of stealing by agent, contrary to Section 283 (c) of the Penal Code, Cap 63 of the Laws of Kenya. The matter was scheduled for plea taking on 17th January 2019. However, despite having been duly served, the respondent failed to attend court, and the court issued a warrant of arrest, which was to be executed by officers from the Directorate of Criminal Investigations (DCI) based at Central Police Station.

[5] Despite the issuance of the warrant, the DCI at Central Police Station failed and/or neglected to execute the same. The 3rd appellant made several unsuccessful attempts to secure the respondent's arrest, but it was not until June 2020 that the 3rd appellant managed to trace the respondent to the Kisumu West Constituency Development Fund (CDF) offices. On 29th June 2020, with the assistance of officers from Kisumu Police Station, the 3rd appellant caused the respondent's arrest. Thereafter, he successfully applied for the respondent's transfer to Nairobi vide ***Miscellaneous Criminal Application No. 142 of 2020,*** for purposes of taking a plea in PP.1/2019.

[6] Meanwhile, in PP.1/2019, the matter was mentioned on 26th February 2019, 14th May 2019, 31st July 2019, and lastly on 24th October 2019 when the trial court (*Onkwani, PM*) dismissed it under Section 202 of the Criminal Procedure Code (CPC) for want of prosecution.

[7] Subsequently, on 8th July 2020, the 3rd appellant and the respondent appeared before the trial court (*Sinkiyian, SRM*) in PP.1/2019 for, among other

things, the reinstatement of the case and taking of plea. The 3rd appellant contended that the matter had been dismissed in error, as neither he nor the respondent had been served with summons or notified of the court date. He argued that the trial court had improperly invoked Section 202 of the CPC, given the absence of notice to the parties. In his view, the dismissal was procedurally flawed. He further submitted that the court retained jurisdiction under Section 363 of the CPC to correct errors apparent on the record and could, therefore, reconsider the dismissal. In the alternative, he requested that the matter be referred to the High Court for appropriate correction of the error.

[8] Counsel for the respondent opposed the 3rd appellant's application, contending that the warrant of arrest had lapsed in October 2019 following the dismissal of the matter for want of prosecution. He further submitted that only the High Court had the jurisdiction to set aside or vary the dismissal order issued on 24th October 2019.

[9] Upon hearing both parties, the trial court observed that it could not proceed with plea-taking, given that the matter had already been dismissed. Accordingly, the case was referred to the Chief Magistrate for a determination on whether it should be forwarded to the High Court for revision, as requested by the 3rd appellant. In the interim, the respondent was released on an unsecured personal bond of Kshs. 500,000/=.

[10] Thereafter, on 15th July 2020, the Chief Magistrate *(Hon. Andayi, as he then was*), considered the application and held that, as the dismissal was a judicial decision rather than an administrative act, he lacked the jurisdiction to reconsider or review the same.

ii. Proceedings at the High Court

[11] Dissatisfied with the trial court's decision, the appellants filed Criminal Revision No. 47 of 2020: ***Wade Cox & Others Vs George Odhiambo Okello***, seeking revision of the dismissal order issued on 24th October 2019. The appellants faulted the trial court for dismissing the case in the absence of

the accused person. In their view, Section 202 of the CPC required the attendance of an accused person in court before the court could proceed to dismiss a case for want of prosecution. Furthermore, the court, having issued a warrant of arrest against the accused, ought to have summoned the DCI, Central Police Station, to ensure that the warrant had been enforced. Be that as it may, the 3rd appellant had not been informed of the mention date of 24th October 2019, and that it was not in the interest of justice that a criminal case be dismissed at a preliminary stage before the accused person had been brought before the court to take a plea. As such, their rights as victims to participate in the criminal trial had been violated.

[12] In response, the respondent filed grounds of objection dated 6th October 2020, premised on the grounds that the appellants ought to have appealed the decision of the trial court as opposed to invoking the revisionary jurisdiction of the High Court. Be that as it may, PP No. 1/2019 was dismissed by the trial court for want of prosecution due to the numerous times that the complainants and the private prosecutor were absent from court when the matter was scheduled for mention.

[13] In a Ruling delivered on 16th December 2020, the High Court (*Kimaru, J as he then was*) noted that the 3rd appellant, as a private prosecutor, held a similar position to the Director of Public Prosecutions. To this extent, he had the onus of prosecuting the case with diligence, preparing witnesses and exhibits to be presented before the trial court, and this role included requesting for summons to be issued to witnesses, and moving the trial court to fix a hearing for the trial.

[14] In its observations, the court noted that although the appellants obtained leave on 26th July 2018 to initiate a private prosecution, the charges were not filed until six months later, on 17th January 2019. Rather than applying for summons to compel the respondent's appearance, the 3rd appellant immediately sought a warrant of arrest to be executed by the DCI at Central Police Station. Moreover, both the 3rd appellant and the respondent failed to

appear in court on multiple occasions, including the initial mention date of 26th February 2019, a date fixed in the presence of the 3rd appellant. As a result of this non-attendance and lack of progress, the trial court dismissed the matter for want of prosecution. In these circumstances, the court found that the appellants had failed in their duty to diligently pursue the prosecution and to follow up with the trial court to ensure the timely adjudication of the charges against the respondent.

[15] Concerning the dismissal of PP.1/2019 under Section 202 of the CPC, the court held that the private prosecutor did not offer a plausible reason for his failure to attend court for a cumulative period of one year and four months before he made the application to have the case reinstated to hearing. In any event, it became apparent that the appellants had already filed a civil suit against the respondent seeking the recovery of the sums allegedly stolen, and the suit was pending hearing and determination. As such, they were not left without any legal recourse.

[16] Finally, on whether the court had jurisdiction to grant the orders sought by the appellants, the court noted that the effect of the trial court issuing orders under Section 202 of the CPC was the acquittal of the respondent. As such, the court lacked jurisdiction to reverse an order of acquittal in an application for revision predicated under Section 362 and 364(1) (a) and (b) of the CPC. In the premises, the application for revision was dismissed.

iii. Proceedings at the Court of Appeal

[17] Undeterred, the appellants appealed vide ***Criminal Appeal No. E025 of 2022***, premised on 8 grounds of appeal, *inter alia,* that the learned Judges erred in fact and in law:

i. *By upholding the decision of the trial court, acquitting the respondent under Section 202 of the CPC;*

ii. *By holding that the High Court lacks the power to revise an acquittal under Section 364(1)(b) of the CPC, thereby abdicating its*

supervisory jurisdiction under Article 165(6) and (7) of the Constitution;

iii. *In proferring a narrow and pedantic construction to the High Court's supervisory jurisdiction under Article 165(6) and (7) of the Constitution;*

iv. *By unjustifiably punishing the 3rd appellant for the failure of the DCI to enforce the warrant of arrest issued against the respondent;*

v. *By overlooking the cardinal duty of the court in a criminal trial to notify parties of scheduled hearing and mention dates;*

vi. *By disregarding the rights of victims in a criminal trial;*

vii. *By failing to consider the material placed before the court, to wit, documented attempts at enforcing the warrant of arrest; and*

viii. *By failing to consider the evidence of service of summons upon the respondent.*

[18] The respondent on the other hand urged that the learned Judge properly found that he lacked jurisdiction since the subject of the revision brought before him was an acquittal order. Furthermore, the appellants' conduct, coupled with the fact that they had also lodged a civil suit against the respondent over the same claims, made their pursuit of criminal remedy a clear abuse of the court process.

[19] In a Judgment delivered on 22nd November 2024, the appellate court (*Kiage, Achode & Mativo, JJ.A*) identified three issues for determination. *On whether the Court had jurisdiction to revise the respondent's acquittal*, the court held that whereas the appellants attempted to circumvent the precepts of Section 364(4) of the CPC by framing the issue as a constitutional petition and invoking Article 165(6) and (7) of the Constitution, the issue was centred on the High Court's revisionary jurisdiction under the CPC. Therefore, the High Court had no jurisdiction to reverse the respondent's acquittal. It mattered not that

the issue was framed as a constitutional petition since the appellants had a duty to invoke the proper forum.

[20] On *whether the superior court was right in finding that the 3rd appellant was not diligent*, the appellate court, upon detailing the chronology of events, affirmed the High Court's finding that the trial court was correct in dismissing the matter since the 3rd appellant was complacent in ensuring that the matter was prosecuted expeditiously.

[21] On *whether the superior court was correct in finding that the respondent could be acquitted under Section 202 of the CPC in his absence and on a mention date*, the appellate court noted that the respondent did not appear in the trial court at any time from the inception of the proceedings and therefore had not taken a plea. He was also not present in court on the date of the acquittal. He could therefore not be acquitted of that to which he had not pleaded. The court therefore found that the acquittal order made by the trial court and upheld by the superior court was improper. In any case, there was no proof on record that the appellants were served with summons to appear in court on that date.

[22] In reference to the revision, however, the court held that the learned Judge was right to decline the application for revision in view of the mandatory statutory limitation under Section 364(1) and (4) of the CPC. In their view, the court might have had greater latitude if the matter had come by way of appeal. Ultimately, the court found no merit in the appeal and dismissed it with no orders to cost.

iv. Proceedings at the Supreme Court

[23] Unrelenting, the appellants filed the instant appeal challenging the decision of the Court of Appeal on the following principal grounds, that the Learned Judges of Appeal erred in law:

i. *By holding that the mandatory provision of Section 364(1)(b) of the Criminal Procedure Code denied the High Court the jurisdiction to set aside the acquittal of the respondent;*

ii. *By misapprehending and failing to appreciate that Article 165(7) of the Constitution gives the High Court broad constitutional supervisory jurisdiction;*

iii. *By failing to recognize that failure to serve the summons on the appellants and subsequently dismissing their case, violated their right to a fair trial;*

iv. *With respect to the 1st and 2nd appellants, who were the victims, failing to find that the mandatory application of Section 364(1)(b) of the CPC violated their right to a fair trial as victims.*

v. *By failing to find that the 3rd appellant's efforts to effect the warrants of arrest amounted to prosecution, and as such, dismissal of the case for want of prosecution was improper in light of the documented attempts the appellants filed in court in showing the several attempts to arrest the respondent; and*

vi. *By failing to set aside the respondent's acquittal despite finding that the acquittal, being grounded on Section 202 of the CPC, was irregular.*

[24] Consequently, the appellants sought the following reliefs:

i. *The appeal be allowed.*

ii. *The judgment and order of the Court of Appeal at Nairobi (Kiage, Achode & Mativo, JJ.A) dated 22nd November 2024 in Criminal Appeal No. E025 of 2022 be set aside and in its place an order be made allowing Criminal Appeal No. E025 of 2022 as was prayed before the Court of Appeal at Nairobi.*

iii. Any other order or further orders as this Honourable Court may deem appropriate to grant in the circumstances of this case.

[25] In response, the respondent filed a replying affidavit sworn on 24th January 2025 by *George Odhiambo Okello*, wherein he urged that there is a ***Civil Case No. E189 of 2023*** in Milimani between the parties herein and that the appellants have not proved any irreparable damage or injustices they would suffer if the appeal is not allowed. Be that as it may, he argued that while Section 364 of the CPC gives High Court supervisory powers just like Article 165(6) and (7) of the Constitution, such supervisory powers do not extend to an order of acquittal.

D. PARTIES' RESPECTIVE SUBMISSIONS

i. The Appellants' case

[26] The appellants' submissions are dated 6th March 2025 and filed on 17th March 2025. The apellants consolidate their grounds of appeal into four thematic areas.

[27] On *whether this Court has jurisdiction to hear and determine the appeal*, the appellants cite the case of ***Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another*** [2012] KESC 9 (KLR) to submit that the revision application was premised on various articles of the Constitution, specifically calling upon the courts below to interpret the High Court supervisory jurisdiction under Article 165(6) and (7) of the Constitution. Accordingly, the appellants argue that the appeal meets the threshold under Article 163(4)(a) of the Constitution.

[28] On *whether the Court of Appeal erred in failing to hold that the High Court has jurisdiction to set aside an acquittal in criminal proceedings*, the appellants contend that Article 165(6) and (7) of the Constitution prevail over Section 364(1)(b) of the CPC. They fault the Court of Appeal for elevating Section 364(1)(b) of the CPC above Article 165(6) and (7) of the Constitution. In support of this position, the appellants rely on ***Muruatetu & Another Vs Republic; Katiba Institute & 5 Others (Amicus Curiae)***

[2017] KESC 2 (KLR), where the Court held that a mandatory statutory provision that purports to fetter the court's discretion is a violation of the right to a fair trial. The appellants further argue that Article 165(6) and (7) of the Constitution are self-executing and require no statutory operationalization. Additionally, they fault the Court of Appeal for holding that an appeal would have afforded the High Court greater latitude than a revision application.

[29] The appellants further argue that the Court of Appeal erred in disregarding binding authorities which affirmed that under Article 165(6) and (7) of the Constitution, the High Court has jurisdiction to set aside a criminal acquittal notwithstanding the limitations imposed by Section 364(1)(b) of the CPC. To buttress this position, they cite ***Director of Public Prosecutions Vs Perry Mansukh Kansagara & 8 Others*** [2020] KEHC 6532 (KLR) *(the Solai Dam Case)* and ***Prosecutor Vs Stephen Lesinko*** [2018] KEHC 6174 (KLR). The appellants, therefore, invite this Court to consider whether, within the constitutional framework governing revision applications, the High Court possesses the authority to set aside a criminal acquittal.

[30] On the question of *whether the decision of the Court of Appeal infringed upon their right to a fair trial*, the appellants submit that the appellate court failed to acknowledge that the trial court's failure to serve summons upon them amounted to a violation of their right to a fair trial. Moreover, they argue that the appellate court declined to set aside the respondent's acquittal, notwithstanding its finding that the acquittal was irregular. They fault the appellate court for elevating Section 364(1)(b) of the CPC above the constitutional provisions of Article 165(6) and (7), thereby curtailing the High Court's supervisory jurisdiction. They also argue that the 3rd appellant's efforts to execute the warrant of arrest amounted, in substance, to prosecutorial action.

[31] Regarding *whether the Court of Appeal failed to ensure the administration of justice as contemplated under Article 165 (7) of the Constitution*, the appellants contend that the court's refusal to set aside an irregular acquittal undermined the fair administration of justice. They reiterate

that by prioritizing Section 364(1)(b) of the CPC over the constitutional provisions of Article 165(6) and (7), the appellate court undermined their constitutional right to the just and proper administration of justice.

ii. The Respondent's case

[32] In opposing the appeal, the respondent filed submissions dated 17th March 2025, lodged on 21st March 2025, in which four issues were delineated for determination.

[33] On *whether a right of appeal lies before this Court under Article 163(4)(a) of the Constitution following the decision of the Court of Appeal*, the respondent submits that the revision of the trial court's decision is a procedure specifically governed by the CPC. Consequently, the appellants cannot validly reframe the dispute as a constitutional petition. Relying on ***Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another*** *(supra)*, the respondent argues that the present appeal fails to meet the constitutional threshold, as no issues of constitutional interpretation or application were canvassed before the superior courts below.

[34] On *whether the High Court possesses revisionary powers in instances where an accused person has been acquitted*, the respondent maintains that the High Court acted correctly in declining to set aside the acquittal. In its view, the High Court properly exercised its discretion under the provisions of Section 364 of the CPC, which, they argue, does not confer jurisdiction to overturn an acquittal.

[35] On *whether the revision application was a deliberate attempt to circumvent the legal bar against appeals by private prosecutors following an acquittal,* the respondent contends that the appellants, acting in the capacity of a private prosecutor, had no right of appeal. Thus, the revision application was brought solely to evade the statutory limitations imposed on private prosecutors, thereby undermining the legal framework governing criminal

appeals. In this regard, the respondent relies on the decision in ***Abdulmajid Vs Khitami & 2 Others*** [2022] KEHC 9908 (KLR).

[36] As to *whether the appeal constitutes an abuse of the court process,* the respondent argues that the appellants are improperly invoking the criminal justice system to compel him to repay monies allegedly misappropriated, despite the existence of a pending civil suit concerning the same subject matter.

[37] The respondent further asserts that the appellants were using the criminal proceedings to intimidate him into settling the civil dispute, an approach disapproved by this Court in ***Jirongo Vs Soy Developers Ltd & 9 Others*** [2021] KESC 32 (KLR). He also relies on ***Kuria & 3 Others Vs. Attorney General*** [2002] KEHC 1215 (KLR), a decision cited with approval in ***Republic Vs Attorney General & 4 Others Ex-Parte Kenneth Kariuki Githii*** [2014] KEHC 6188 (KLR), where it was held that courts must be vigilant in prohibiting criminal prosecutions instituted to advance ulterior motives unrelated to the fair administration of justice. Accordingly, the respondent urges this Court to dismiss the appeal, characterizing it as an attempt to settle a personal vendetta rather than a legitimate pursuit of justice. He argues that, given the existence of *Civil Case No. E189 of 2023* pending before the Milimani Law Courts, the appellants will not suffer any irreparable harm should the appeal be dismissed.

E. ISSUES FOR DETERMINATION

[38]. Having considered the respective parties' pleadings and submissions in the instant petition, this Court is of the considered view that the following issues crystallize for our determination:

i. *Whether this Court has jurisdiction to hear and determine the appeal and if so;*

ii. *Whether the High Court has jurisdiction to set aside an acquittal in criminal proceedings; and*

iii. *Whether the appellants' constitutional rights were infringed.*

F. ANALYSIS AND DETERMINATION

i. Whether this court has jurisdiction to hear and determine the appeal?

[39] The appellants contend that this Court is properly seized of jurisdiction under Article 163(4)(a) of the Constitution, which provides for appeals as of right in cases involving the interpretation or application of the Constitution. They argue that the primary issue for determination is whether their right to a fair trial was violated, and whether the High Court failed to comply with Article 165(7) of the Constitution by not properly exercising its supervisory jurisdiction over subordinate courts. Additionally, the appellants raise the question of whether Section 202 of the Criminal Procedure Code imposes a mandatory requirement for both the complainant and the accused person to be notified of the hearing date before a matter may be dismissed for want of prosecution.

[40] The respondent, on the other hand, takes a contrary position. He submits that this Court lacks jurisdiction to entertain the appeal, arguing that the proper forum for adjudicating the matter is as prescribed under the Criminal Procedure Code (CPC). He further contends that the appellants did not obtain leave from either the Court of Appeal or this Court prior to filing the appeal, and as such, the appeal is procedurally incompetent.

[41] Article 163(4)(a) of the Constitution provides as follows regarding the appellate jurisdiction of this Court:

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court –***
>
> > ***(a) As of right in any case involving the interpretation or application of this Constitution; ...."***

[42] This Court has, in numerous decisions, pronounced itself on its jurisdiction to determine appeals under Article 163(4)(a) of the Constitution. In the case of ***Lawrence Nduttu & 6000 Others Vs Kenya Breweries Ltd & Another,*** SC Petition No. 3 of 2012; [2012] eKLR, the Court stated as follows [paragraph 28];

> ***"The appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of article 163(4)(a)."***

[43] At the High Court, the appellants were categorical that their application was premised on both Article 165 (6) & (7) of the Constitution and Section 362 of the Criminal Procedure Act. The appellant's expressly stated in their criminal revision application as follows:

> ***"In this application for Criminal revision, we call upon this Honourable Court to exercise its constitutional supervisory jurisdiction under Article 165 (6) (7) of the Constitution of Kenya, 2010 and its statutory revisional jurisdiction under Section 362 of the Criminal Procedure Code."***

[44] In support of their position, the appellants relied on ***Director of Public Prosecutions Vs Perry Mansukh Kansagara & 8 Others*** [2020] KEHC 6532 (KLR) (herein also referred to as the ***Solai Dam Case***), where the High

Court (*Mwongo, J*), after analysing the distinct provisions of Article 165 of the Constitution and Section 364 of the Criminal Procedure Code, held that the revision application before it was quasi-constitutional in nature. The Court therein affirmed that, under its supervisory jurisdiction, it could intervene to reverse a finding of an acquittal.

[45] In the present case, and despite the revision application bearing significant resemblance to that in the ***Solai Dam Case***, the High Court did not adopt a similar approach. Instead, it confined itself strictly to the statutory parameters under Section 364 of the Criminal Procedure Code and determined that its revisionary powers were limited. In particular, it found that it lacked jurisdiction to reverse an order of acquittal through revision proceedings.

[46] The Court of Appeal similarly found that the application before the trial court was anchored solely on the revisionary powers conferred by Section 364 of the Criminal Procedure Code. It further observed that the appellants had framed their application as a constitutional petition in an attempt to circumvent the statutory limitations imposed by Section 364, when it held thus in par. 25:

> ***"The appellants framed their application as a constitutional petition but in essence, they were seeking revision of the order of the lower court acquitting the respondent. We are cognizant of the fact that whereas the Constitution is the framework, it is the statutes that give specific mandates in specific matters. It is evident that the appellants took this route to circumvent the limitations of Section 364, which is the section that empowers the High Court to exercise revisionary powers in criminal proceedings..."***

[47] For our part, we find that there is a compelling need to expressly delineate the constitutional contours of Article 165 of the Constitution, particularly as it relates to the High Court's supervisory jurisdiction. Specifically, where the provisions of Article 165 are pleaded alongside Section 364 of the Criminal

Procedure Code, the question arises as to whether the court may exercise a broader mandate to uphold the fair administration of justice, including the power to reverse an order of acquittal.

[48] This line of argument has been consistently advanced by the appellants from the trial court upwards. While we are cognizant that the ***Solai Dam Case*** (which addressed similar issues) may still be pending before the Court of Appeal, we observe that the constitutional and statutory questions presented in the instant appeal traverse the same trajectory. Moreover, the dismissal of a case by way of acquittal, whether with or without notice to the parties, implicates fundamental constitutional rights, particularly the right to a fair trial under Article 50 of the Constitution.

[49] In view of the above, we are satisfied that the issues raised fall within the ambit of Article 163(4)(a) of the Constitution and, consequently, this Court has jurisdiction to hear and determine the appeal as filed.

ii. Whether the High Court has jurisdiction to set aside an acquittal in criminal proceedings

[50] Article 165 (6) and (7) of the Constitution grants the High Court supervisory jurisdiction over subordinate courts. Article 165 (6) & (7) are clear in this respect as they 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 of justice".***

[51] Section 364 of the Criminal Procedure Code is read together with Sections 365 and 366. Section 365 provides for the direction as to the hearing of parties in revision proceedings, while Section 366 provides for the requisite number of judges in revision proceeding. The substantive section of the powers of the High Court in revision is Section 364. Section 364 (1) specifically provides:

> ***"(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 <u>other than an order of acquittal,</u> alter or reverse the order…."*** [Emphasis ours].

[52] The main argument by the appellants in this respect is that the mandatory nature of Section 364 (1) of the CPC limits the scope of the constitutional supervisory jurisdiction of the High Court under Article 165 (6) & (7). The appellants argue that the CPC is inferior and cannot be applied to restrict the constitutional supervisory jurisdiction of the High Court. In the ***Solai Dam Case,*** the court, distinguishing the supervisory and revisionary powers of the High Court rendered itself as follows:

> ***"There is a clear basis to hold that if the High Court calls up the proceedings of a subordinate court under its constitutional Supervisory Jurisdiction, it is empowered to go beyond what the Court in its statutory Revisional Jurisdiction can do under the CPC…. In stark contrast, statutory Revisional Jurisdiction is intended only to be a check on the correctness, legality or propriety of a lower court's finding sentence or orders and regularity of its proceedings…."***

[53] In ***Prosecutor Vs Stephen Lesinko*** [2018] eKLR, the High Court applied its supervisory jurisdiction under Article 165 (6) & (7) to set aside an order dismissing a charge of defilement under section 202 of the Criminal Procedure Code. The court in its determination, held as follows:

> ***"....As regards the orders on acquittal references made to section 348A and section 364 of the Criminal Procedure Code. The general legal principle under our code is that the court in exercising powers under revision cannot convert an acquittal to that of conviction.***
>
> ***It is also provided under the same code in section 380 that the court can interfere with any orders of a subordinate court including acquittal where there is gross error of law and is necessary to alter, review, vary or set aside in the interest of justice.***
>
> ***I have reviewed various aspects of the applicant's application. By the nature of the order dismissing the proceedings midstream the applicant's invocation of supervisory and or revisionary jurisdiction to me is an appropriate avenue to seek redress over the trial magistrates order..."***

[54] The supervisory power of the High Court is broad in perspective. The same is exercised by way of appeal or revision. There is, however, a clear distinction between the courts' supervisory jurisdiction as exercised on appeal and in revision proceedings. We find persuasion in the decision of the High Court in ***Republic Vs Samuel Gathuo Kamau*** [2016] KEHC 2680 (KLR), which held as follows:

> ***"Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. It does not include any perceived power to***

make a decision on behalf of a subordinate court which that court ought to make. In the case of appeals the supervisory power is exercised in respect to convictions, sentences, acquittals (Sections 347, 348 and 348A of the Criminal Procedure Code, Cap 75). As for revision, the supervisory jurisdiction is exercised in respect to findings, sentences, orders and regularity of any proceedings. See Article 165 (7) of the Constitution and sections 362 and 364 of Cap 75....."

[55] The power of the High Court in an appeal is set out in Section 354 (3) of the Criminal Procedure Code which provides as follows:

"(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

(a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

(bb) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal

charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as High Court may think fit;

(c) <u>in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate</u> court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit;

(d) in an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper". [Emphasis added].

[56] The supervisory power of the High Court in revision is, however, limited in its scope. The limitations are set out in Section 364 (1), which limits its powers to reverse an order of acquittal. The provision of section 365 (5) also

limits the High Court's powers in revision proceedings in instances where a party ought to have appealed against the said decision. Section 364 (5) specifically provides as follows:

> ***"(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".***

[57] The argument that bears in both the ***Solai Dam Case*** (supra) and the ***Lesinko Case*** (supra) is anchored on the constitutional mandate set out in Article 165 (7), which grants the High Court jurisdiction *to make any order or give any direction it considers appropriate to ensure the fair administration of justice*. Both decisions reason that this mandate grants the High Court a wider perspective in revision proceedings where the provisions of Article 165 (6) & (7) have been cited.

[58] While we appreciate the broad scope of Article 165 of the Constitution, we find that the exercise of the High Court's supervisory jurisdiction must be grounded in the procedures prescribed by statute. The Criminal Procedure Code sets out, with clarity, the framework within which the High Court may exercise its appellate and revisionary jurisdiction. Given this statutory clarity, we are of the view that the notion of quasi-constitutional applications has no place in the context of revision proceedings under the CPC. Accordingly, we agree with the findings of both the High Court and the Court of Appeal that the provisions of Section 364(1) of the Criminal Procedure Code are couched in mandatory terms. The trial court judge could not, therefore, confer upon himself jurisdiction beyond that which is expressly provided by law.

[59] A subsidiary argument advanced in this respect was that, given the proceedings were instituted by a private prosecutor, the said prosecutor had no right of appeal and thus lacked recourse to challenge the dismissal of the case through appellate channels. Indeed, while a private prosecutor is granted permission to conduct a prosecution under Section 88 of the CPC, this does not

automatically grant him the right to appeal. Section 348 vests such right in the Director of Public Prosecution when it provides as follows:

> ***"348A. Right of appeal against acquittal, order of refusal or order of dismissal.***
>
> ***When an accused person has been acquitted on a trial held by a subordinate 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, the Director of Public Prosecutions may appeal to the High Court from the acquittal or order on a matter of law".***

[60] From the above provision, it is only the Director of Public Prosecutions who is allowed by law to appeal to the High Court against an order of acquittal, an order refusing to admit a charge, or an order dismissing a charge. No such similar right of appeal is conferred upon the private prosecutor. This reasoning emanates from the place of private prosecution and the recognition that the Director of Public Prosecution will always be in charge of public prosecution. In the House of Lords case of ***Gouriet Vs Union of Post Office Workers*** [1978] AC 435, the opportunity to institute private prosecution was described as a valuable constitutional safeguard against lassitude or bias on the part of prosecuting authorities. The significance of the opportunity to privately prosecute cases can therefore not be dismissed. On the other hand, in the case of ***Shah Vs Patel*** [1954] 21 EA CA 236 it was held that even in a private prosecution, the prosecutor in law is the Republic at the instance of the private prosecutor who maintains residual control over every criminal proceeding at any stage thereof. See also, ***Albert Gacheru Kiarie T/A Wamaitu Productions Vs James Maina Munene & 7 Others*** [2016] KEHC 7743 (KLR) and ***Kimani Vs Kahara*** [1983] KEHC 14 (KLR).

[61] In ***Gregory & Another Vs Republic thro' Nottingham & 2 Others*** [2004] KEHC 2646 (KLR) the court determined that while criminal

prosecutions may be commenced by a person other than the Attorney General (*now,* Director of Public Prosecutions), such occasions must be few and limited and even when they come to pass, the Attorney General's authority remains entirely uncompromised and he can at his own discretion, take over the case in question and either continue it or terminate it. The court also reflected on the public interest safeguards in the conduct of private prosecution and rendered itself as follows:

> ***"It is clear from the authorities considered in this Judgment that the conduct of criminal prosecutions is always a matter of public interest. Therefore, the Attorney-General who is responsible for the conduct of public prosecution in the name of the Republic, is under a duty to safeguard the public interest as he manages the prosecutorial process. It is equally clear from the submissions of counsel, and from the authorities referred to, that the private individual is not in general to be regarded as the custodian of the public interest. On this account , the private prosecutor must not set himself in competition with the Attorney-General, in the conduct of prosecutions. This principle underlies our holding that, where the Attorney-General terminates the conduct of criminal prosecution which he himself had initiated, it will not be open to the private prosecutor to informally revive the terminated proceedings. The private prosecutor will be required in such a case, to first make an application before the High Court challenging the exercise of the Attorney-General's discretion…."***

[62] The foregoing authorities clearly illustrate that the scope of private prosecutions is circumscribed. Such prosecutions are generally excluded in serious criminal matters and are typically permitted only where limited private

interests are at stake. Moreover, the exercise of private prosecution powers remains subject to the broader constitutional and statutory mandate of the Director of Public Prosecutions whose authority may only be questioned within the High Court's oversight jurisdiction under Article 165 of the Constitution. Additionally, in the interest of safeguarding the public interest, the Director of Public Prosecutions retains a continuing and overriding interest in all criminal proceedings, including those commenced privately.

[63] We note that in ***Abdulmajid Vs Khitami & 2 Others*** [2022] KEHC 9908 (KLR), the court made recommendations urging that private prosecutors ought to be granted a right to appeal when it stated as follows:

> ***"Furthermore, it is hereby recommended that a private prosecutor who has been given leave to prosecute under section 88 Criminal Procedure Code ought to be given a limited right of appeal. This will be necessary to avoid creating judicial dictatorship in the lower courts. In order to protect an accused who has been acquitted by the lower court, the victim or complainant who intends to appeal has to seek leave of the High Court before he appeals…."***

[64] We are of the considered view that it is time to re-examine the role and scope of private prosecutions in Kenya, particularly in relation to the right of a private prosecutor to institute an appeal. We, for that reason agree with the observations in ***Abdulmajid Vs Khitami*** (supra) and would signal the Kenya Law Reform Commission to consider undertaking a comprehensive review of the legal framework governing private prosecutions, with a view to addressing these gaps. That said, under the current legal framework, the appellants' only viable recourse would have been to request the Director of Public Prosecutions to exercise his constitutional mandate and institute an appeal in respect of the subject matter.

iii. Whether the appellant's rights were infringed

[65] The context of the proceedings before the magistrates' court in this case is rather peculiar. Although the court had granted the private prosecutor leave to initiate private prosecution, the prosecutor failed to diligently pursue the matter thereafter. It was only upon the subsequent arrest of the respondent that the private prosecutor re-engaged with the court process. By that time, however, the trial court had already dismissed the matter under Section 202 of the Criminal Procedure Code for want of prosecution. Notably, at the time of dismissal, neither the accused person nor the complainant was present in court, and the accused person had not yet taken plea.

[66] The provisions of Section 202 of the CPC provides as follows:

> ***"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".***

[67] The High Court, determining the question whether the provisions of Section 202 mandate notice to the parties addressed itself as follows:

> ***"On perusal of the trial court's proceedings, it was apparent the case was mentioned several times by the court but unfortunately, neither the Private prosecutor***

nor the accused persons were present in court. This was despite the fact that the Private prosecutor was present in court when the first mention date was fixed i.e. on 26th February 2019. Subsequently thereafter the matter was mentioned on 14th May 2019, 31st July 2019 and lastly on 24th October 2019 when the trial court dismissed the case under section 202 of Criminal Procedure Code for want of prosecution. In all these subsequent appearances, the Private prosecutor did not appear in court. This court did not discern a cogent reason for the Private prosecutor's failure to attend court. From the submission made, by the Private prosecutor, his explanation for failure to attend court was the mistaken expectation that it was the duty of the trial court to inform him when the case was listed for mention. This court's understanding of the situation is rather different; it was the Private prosecutor who was supposed to follow up with the court to ensure that the charges laid against the Respondents is diligently prosecuted....."

[68] At the Court of Appeal, the court took a contrary view as to the attendance of an accused person when it held:

"..... We note that the respondent in this appeal did not appear in the trial court at any time from the inception of the proceedings and therefore, he had not taken plea. He was also not present in court on the date of the acquittal. He could therefore, not be acquitted of that to which he had not yet pleaded. We therefore find that the acquittal order made by the trial court and upheld by the superior court was improper. In any case, there is no

proof on record that the appellants were served with the summons to appear in court on that date....”

[69] While we acknowledge that the private prosecutor failed to provide a reasonable explanation for his absence from court for a cumulative period of one year and four months, we note that Section 202 of the Criminal Procedure Code imposes a mandatory duty on the court to ensure that the complainant is notified of the time and place appointed for the hearing of the charge before dismissing the matter. The record of the magistrate's court does not indicate whether the complainant was duly served with notice of the hearing date prior to the dismissal.

[70] Nonetheless, we have weighed this procedural lapse against the duty incumbent upon the private prosecutor. The prosecutor failed to attend court on multiple occasions and bore the responsibility of acting diligently, including taking reasonable steps to stay informed of the status of the case. This obligation is underscored in ***Republic Vs Benedict Kolorwe Kaweto*** [2008] eKLR, where Lenaola J (as he then was) affirmed that no court should be held at ransom by the prosecution and that every magistrate is entitled to maintain order and decorum in court.

[71] What then are we to make of the fact that the accused person had not taken plea and was not present in court at the time of the dismissal? This must be considered in the context of the case. Warrants of arrest had been issued against the accused person when directions were first given. It was incumbent upon the private prosecutor to ensure there was demonstrable progress in executing the warrants during subsequent mention dates. This was not done.

[72] In light of the foregoing, we find that the appellants' rights under Article 50 of the Constitution were not infringed.

[73] Having made the above determination, we are satisfied that the Court of Appeal arrived at a proper and well-founded determination. Accordingly, the appeal is hereby dismissed.

[74] As of costs, noting the long history of this matter, and the issues involved and guided by this court's decision in ***Jasbir Signgh Rai & 3 Others Vs Tarlochan Singh Rai & 4 Others***, SC Petition No. 4 of 2012; [2014] EKLR, we deem it fair to order each party to bear their costs of this appeal.

[75] CONSEQUENTLY, and for the reasons aforesaid, we make the following orders:

(i) The Petition of Appeal dated 3rd January 2025 and filed on even date is hereby dismissed.

(ii) Each party shall bear its costs of the appeal.

(iii) We direct that the security for costs be refunded to the appellant.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **29th** day of **August, 2025**

.....

M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....	.....
P. M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT OF THE** **SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU **JUSTICE OF THE SUPREME COURT**	**I. LENAOLA** **JUSTICE OF THE SUPREME COURT**

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

REGISTRAR,

SUPREME COURT OF KENYA