



REPUBLIC OF KENYA



**Republic v Wakoli & another (Criminal Revision E013 of 2024)
[2024] KEHC 9401 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL REVISION E013 OF 2024
DKN MAGARE, J
JULY 31, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

JUSTUS NYONGESA WAKOLI 1ST RESPONDENT

MAJIMBO TINGA NGOMBO 2ND RESPONDENT

RULING

1. This is a ruling over a Notice of Motion application dated 4/3/2024 and filed under urgency by the Applicant seeking the trial court to admit the evidence of the late Edward Kamuchi Waithaka, now deceased.
2. The application is said to be brought under Section 362 of the *Criminal Procedure Code* and Section 33(h) of the *Evidence Act* and was premised on the ground that the evidence was crucial as the deceased was a star witness and his evidence was corroborated by other witnesses.
3. The Respondents opposed the application on the ground that there was no appeal and Section 33(h) of the *Evidence Act* did not apply.
4. Parties filed submissions. In the submissions dated 1/7/2024, the Applicant submitted that under *Criminal Procedure Code*, Section 2 defined complainant to be the Director of Public Prosecutions. Therefore, that the deceased herein was not the complainant, but the Director of Public Prosecutions was. They also cited the case of *Republic v Judith Achola Mulala* [2019] eKLR.
5. On their part, the Respondents submitted that there was no basis for revision. That there was no application for revision as only certificate of urgency was filed.



Analysis

6. The revisionary powers of this court are set out under the law. Under Section 362 of the [Criminal Procedure Code](#) it is provided as follows:

The High Court may call for 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.

7. Further, Section 367 of the [Criminal Procedure Code](#), on the other hand, provides as hereunder:

When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.

8. I note that the Respondents were charged with the offence of receiving a bribe contrary to Section 6(1) (b) as read with Section 18(1) of the [Bribery Act](#) of the [Penal Code](#).

“The particulars of the offence were that on 10/9/2019 at Gachatha Police Post in Nyeri County being employees of the National Police Service, attached to Gachatha Police Post requested for a financial advantage of Kshs. 30000 from Edward Kamoche Waithaka the proprietor of 240 Hotel with intent thereof that they would forego pursuing criminal charges against Joseph Wachira and consequently release the said Joseph Wachira from custody.”

9. The Respondent was charged on the second count with the offence of attempt to commit a corruption offence contrary to section 47A as read with Section 48(1) of the [Anti-Corruption and Economic Crimes Act](#) No. 3 of 2003.

10. The Applicant subsequently applied to the trial court to have the evidence of the complainant produced in court. The complainant was deceased. The court dismissed the application vide the ruling dated 3/4/2023 hence this review application.

11. In the High Court of Malaysia in *Public Prosecutor v Muhari bin Mohd Jani and Another* [1996] 4 LRC 728 at 734, 735 it was stated as doth:

“The powers of the High Court in revision are amply provided under section 325 of the [Criminal Procedure Code](#) subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”

12. I have to consider whether there is injustice in declining to admit the witness statement and evidence of the complainant who is deceased. The reasoning of the trial court was that such evidence did not fall under Section 33(h) of the [Evidence Act](#) which applied to res gestae as relates to offences of murder.



13. The Applicant's position is that the evidence is crucial as the witness was a key witness. In my evaluation, the learned magistrate properly acted within the purview of the law in dismissing the application by the prosecution.
14. A witness statement is not evidence for purposes of section 33(h) of the Evidence Act. The said section provides as follows: -
- “when the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.”
15. A witness statement was made, not as part of group of persons. It did not express feelings but statement of what transpired at the time of commission of the offence. No feelings but hard facts. There are equally no number of persons and feelings or impressions.
16. In Kenneth Mwenda Mutugi v Republic [2019] eKLR, Limo R K, J stated as doth: -
- “27. In line with the above jurisprudence, it is clear that the prosecution in this case made no attempts to lay any basis why the maker of P3 form could not be availed and this court stem from bad practice where medical experts think a that all that is required to tender evidence of a colleague is familiarity with their handwriting. This practice and obviously flies in the face of legal requirements as stipulated under Section 33 that demands that basis for non-availability of the authors/makers of any opinion written or oral be laid before another expert familiar with the handwriting of the expert can be allowed to tender the evidence. It is on that basis that this court finds that the appellant's ground of appeal in that regard is well taken. The question posed however is whether the ground is sufficient to overturn the finding of guilt on the appellant. I will return to the issue shortly herebelow...”
17. The application, though well meaning, lacks merit. Whereas the relevant witness may refer to the witness statement, they cannot produce them as evidence. Consequently I find no basis in the application. It is declined. The lower court file be returned to the court to proceed with the case.

Determination

18. I therefore make the following orders: -
- a. The witness may refer to the statement recorded but cannot produce the same in evidence. Otherwise, the application to review the decision made in Nyeri CMCRC No. 1 of 2022 is declined.
 - b. The lower court file be returned to the court to proceed with the case.
 - c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 31ST DAY OF JULY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Mwakio for State



Mr. Wahome Gikonyo for the 1st Respondent and holding brief for Mr. Njuguna Kimani for the 2nd Respondent.

Court Assistant – Jerusha

