



**Rai & 5 others v Republic (Criminal Revision E026 of 2024)
[2024] KEHC 11363 (KLR) (Crim) (30 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11363 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E026 OF 2024
LN MUTENDE, J
SEPTEMBER 30, 2024**

BETWEEN

**RANJEETA PANDEY RAI 1ST APPLICANT
SHAILESH KUMAR RAI 2ND APPLICANT
ISAAC IKUA KIHARA 3RD APPLICANT
CHRIS OYUNGE ONTITA 4TH APPLICANT
ISAAC IKUA KIHARA 5TH APPLICANT
ROSALIA BLOOMS LIMITED 6TH APPLICANT**

AND

REPUBLIC RESPONDENT

RULING

1. The applicants herein are indicted in Milimani Chief Magistrate’s Court Criminal Case No. E604 of 2023 with various counts. Cumulatively, a total of nine (9) Counts which are fraudulent in nature. They are alleged to have conspired to defraud M/S Heritage flowers cash of Ksh. 10,520,919,000/= the property of Heritage Flowers Ltd between September,2021 and August 2022.
2. The 1st applicant, a director of Heritage Flowers Ltd is alleged to have stolen Ksh. 368,416.71 which came into his possession by virtue of the said employment.
3. Two of the counts are in respect of Money Laundering where the 1st and 2nd applicant are stated to have engaged in transaction to conceal USD 88,495; USD 348,166.94; and, EURO 368,416.7, stated to have been stolen from M/S Heritage Flowers Limited, knowing the monies were proceeds of crime.



4. The 1st, 2nd, 3rd and 4th applicant are stated to have forged the minutes of operation meeting of the management team dated 17/9/2021 at Heritage flowers Officers TRV Parkwest Parklands 3rd avenue. Then, the 1st and 2nd applicants allegedly forged a loan agreement between the Rosalia Bloom Ltd as the lender and the 1st applicant as the borrower.
5. That the applicants further forged minutes of virtual meeting of board of directors of Rosalia Bloom Ltd dated 19/2/ 2022. And, a trust deed between Rosalia Blooms and Heritage Flowers Ltd as beneficiary dated 26/9/2021.
6. The applicants denied the charges. Subsequently, they filed a Notice of Preliminary Objection seeking striking out in limine the entire charges levelled against them under the provisions of Section 89 of the [Criminal Procedure Code](#) and Article 47 and 50 (1) of the [Constitution](#) .
7. Points of law raised were that the charges lacked legal foundation and were incurably defective for being instituted contrary to the law. Further that the charges could not be sustained and that the company had not lodged any complaint against the applicants. The applicants' case was that derivative suit ought to have been filed pursuant to Section 238 of the [Companies Act](#).
8. The trial court dismissed the application holding that the Prosecution's power to institute criminal proceedings under Article 157 of the [Constitution](#) cannot be interfered with and is not subject to any direction. That there was no proof that the charges were brought in abuse of court process and that no prejudice was demonstrated by the applicants.
9. That the respondent have the mandate of bringing evidence and the court cannot determine whether a prima facie case has been established. That the applicant is a company and is separate from its directors but this is limited by agency and that the company can only be criminally liable through an agent.
10. That Section 23 of the [Penal Code](#) has three fundamental requirements: That an agent must have executed an illegal act or omission; the actions were committed in the scope of employment; and, that the agent had express authority or instructions to execute the actions. That express instruction is not necessary and it is enough to illustrate that the actions are within the field of operation accredited to the individual in question.
11. That Section 193 of the [Criminal Procedure Code](#) authorizes concurrent litigation of civil and criminal proceedings from the same issues; and, that the applicant did not demonstrate substantive injustice that would result if proceedings continue or that there was malice in bringing them.
12. That the court held that the it was in public interest that complaints made to the police are investigated and perpetrators are prosecuted; and, he court also noted that it had jurisdiction to determine the charges.
13. Through an application dated 17th January,2021, the applicants seek an order setting aside the order by the trial court so as to allow the Preliminary Objection on the ground that the argument was based on the grounds that the trial court's decision flouted mandatory provisions of Section 238(2) of the [Companies Act](#), 2015 as the trial court was divested of the jurisdiction to entertain the charges that were preferred against them which are in the nature of derivative claims, which could only be pursued by the company.
14. That the court failed to consider the applicants' affidavit and authorities from the Court of Appeal filed by the applicants and which were binding on the subordinate court. The court also failed to consider material evidence before it.



15. That the charges under Count 1 and 2 were unsound in law as ruled in *DPP v Attorney General* (2022) eKLR. That the applicants have been subjected to flawed charges which are devoid of legal and factual foundation.
16. It is argued by the applicants that averments of fact in the supporting affidavit filed at the trial court were uncontested and that the respondent only contested points of law. That this revision is also unopposed and that the respondent's submissions are inconsequential. The applicant refers to the case of *Gideon Sitelu Konchella v Julius Lekakeny Ole sunkuli 2 others* (2018) eKLR where the court held that a replying affidavit is a pleading and without it submissions have no basis.
17. That the institution of the charges was illegal. There was also a legal bar contemplated by the law and which prevented charges from being brought against them.
18. That the court erroneously relied on Section 23 of the Penal Code and the doctrine of agency without being satisfied that the company was an accused person in the case.
19. That this court has jurisdiction under Section 362 of the *Criminal Procedure Code* and Article 165 (6) and (7) of the *Constitution*, to correct the irregularity. The applicant further relies on *DPP v Kuldip Madan & Another* (2019) eKLR where the court held that revision can be invoked whenever the integrity of any proceedings is put into question and the High Court may disturb the decision in the best interest of justice.
20. Further, that they do not challenge the complainant's locus to bring the charges but have filed the application to challenge the sustainability of the charges as stated. Reliance was placed on the case of *Director of Public Prosecutions v Attorney General & 12 others* (2022) KECA. 317(KLR).
21. That the court also failed to distinguish the company as a separate entity from its directors as the directors cannot be held liable for the acts of the company.
22. That the complaint raised by Punjani Riyaz was in respect of the 2nd applicant's appointment as a director by the 1st applicant and the complainant's inability to access books and accounts. According to the applicant, the main dispute resulted from the sale of flowers by the company which was within local markets and the existence of another company running a competing business parallel with Heritage Flowers Ltd contrary to the Articles of Association.
23. That these are civil law concepts incapable of criminal litigation. That the crux of the complaint is within a derivative suit, the case involves breach of statutory duties, breach of trust and the duty to avoid conflict of interests owed. In this respect the applicant relies on the case of *Ghelani Metals Ltd & 3 Others v Elesh Gjelani Natwarlal & another* (2017) eKLR.
24. It is urged that although the offence of Stealing must be preceded by a complaint of a company against its officer; although the company is listed as the owner of the stolen amount, there was no complaint brought by the company. As held in *Edward Ndande v National Police Service Ltd & 5 Others* (2023) eKLR, the court can intervene where Institution and continuance of proceedings against the accused amounts to abuse of court process and if quashing would secure ends of justice. Where there exist a legal bar against institution and continuance of the suit for example for want of sanction or where the legal evidence adduced manifestly fails to prove the charge.
25. That Section 268 of the *Companies Act* operates as a legal bar. That the criminal trial is unsustainable and the court has assisted the complainant to circumvent the legal requirement under Section 239(1) of the *Companies Act*.



26. The respondent filed rival submissions where it is argued that private citizens are not restricted from filing complaints and that the court has power to consider relevant evidence collected by private citizens. That a victim has a right to be heard and to respond before decisions are made as per the provisions of the [Victim Protection Act](#). However, a private citizen cannot independently prosecute a criminal case.
27. That claims under Section 238(3) of the [Companies Act](#), 2015, by a member of the company brought by a member seeking relief on behalf of the company are limited to claims for breach of negligence and duty of trust. That the procedure for institution of such suits is incompatible with the [Criminal Procedure Code](#).
28. Revisional jurisdiction of the High Court that is enshrined in Section 362 and Section 364 of the [Criminal Procedure Code](#) (CPC) entitles the court to re-examine the record of the trial court where the court has exercised jurisdiction illegally or with material irregularity.
29. Section 362 of the CPC refers to the court's mandate to:
- “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..”
30. The court exercises superintendence over subordinate courts and tribunals to determine the legality and propriety of proceedings. In [Republic v James Kiarie Mutungei](#) (2017) eKLR, the court held that:
- “... function of the court under Section 362 of the [Criminal Procedure Code](#) as read with Section 364 is to enable the court to scrutinize and examine the correctness of facts of a subordinate court or tribunal so as to make a finding on legality or propriety. Legality means lawfulness, strict adherence to law, correctness and propriety ordinarily having the same meaning... The interference under Section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous, to justness appropriateness (sic) and suitability to trial...”
31. Procedurally, the court can be moved by a party but it also has discretion to issue orders on its own accord without any request by parties involved. Section 364. (1) of the CPC which provides that:
- 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 other than an order of acquittal, alter or reverse the order.
32. Therefore, the absence of a replying affidavit or grounds of opposition does not affect the courts discretion. The applicant has to prove its case, and, the court retains discretion to issue relevant orders where illegalities or procedural breaches are noted.



33. Revision as a process does not delve into the merit of the impugned decision. Similarly, unlike an appellate court where parties challenge the decision made the revision court cannot replace or alter findings of a trial court with its own findings, this power is vested on the appeal court.
34. In *Republic v Samuel Gathuo Kamau* (2016) eKLR, HPG Waweru J. held that:
- “Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on 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 conviction, sentence, acquittal (section 347, 348 and 348A of the Criminal Procedure Code). 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 Section 362 and 364 of the Criminal Procedure Code.”
35. In the instant application, the court has been invited to intervene as the trial court had been asked to invoke the provisions of Section 89(5) of the *Criminal Procedure Code* that provide thus:
- “Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order.”
36. The respondent filed grounds of opposition and urged that Section 89 does not give the court power to evaluate the evidence supporting the charges but the court only interrogates whether the charges disclose an offence.
37. The provisions of law is in respect of making of complaints. A magistrate can only decline to admit a charge where it is fatally defective such that it cannot be amended. The charges refer to 9 counts of various offences under the *Penal Code* and the *Money Laundering Act*.
38. The applicants have argued that the charges are incurably defective however, the particulars of each offence in the impugned charge sheet are elaborate and unambiguous. The crime alleged to have been committed and the elements of each offence has been disclosed in a way that the accused were able to answer to the charges.
39. The applicants faulted the court for failing to interrogate the evidence and the merit of the complaint brought by Punjani Riyaz. In their view, the claims form a civil dispute. Under Section 89 of the CPC, the court’s duty is limited to confirm that the charge sheet discloses an offence. Where evidence does not disclose the offence or where the threshold is not met the court has the mandate to dismiss the charges at the end of the trial. The decision to reject the charge is discretionary.
40. However, where an offence is disclosed, the trial must proceed on merit. The trial magistrate position was that it could not determine whether the prosecution had a prima facie case and that the matter had to proceed in public interest.
41. In *Kipoki Oreu Tasur v Inspector General of Police & 5 Others* (2014) eKLR Mumbi Ngugi J.(As she then was) stated that:
- “The criminal justice system is a critical pillar of our society. It is underpinned by the *Constitution*, and its proper functioning is at the core of the rule of law and administration of justice. It is imperative, in order to strengthen the rule of law and good order in society, that it be allowed to function as it should, with no interference from any quarter, or restraint



from the superior Courts, except in the clearest of circumstances in which violation of the fundamental rights of individuals facing trial is demonstrated.”

42. As such whether the provisions of Section 238 of the *Companies Act*, 2015, were satisfied and whether the company filed any complaint prior to the charges as is an issue that can be determined in the course of trial, an appeal would be preferred in event the final judgement is contrary to the law .
43. The charges are clear that the company was the main complainant and owner of the money. Other than the question of the company being defrauded as particularized in the charges, which actions are stated to have been taken by the accused in their capacity as servants, directors and agents of the company; there is the question of processing criminal proceeds to disguise their illegal origin such as operations, if proved should be interrogated and those involved brought to book. These actions amount to offences under the Penal Code which could be tried before a magistrate.
44. Sections 238-241 of the *Companies Act* are the relevant provisions on actions brought by and on behalf of the company. Section 238 particularly provides that:
- 1) In this Part, "derivative claim" means proceedings by a member of a company—
 - a. in respect of a cause of action vested in the company; and
 - b. seeking relief on behalf of the company.
 - (2) A derivative claim may be brought only—
 - c. under this Part; or
 - d. in accordance with an order of the Court in proceedings for protection of members against unfair prejudice brought under this Act.
 - (3) A derivative claim under this Part may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
45. On the other hand, Section 193 of the *Criminal Procedure Code* provides for concurrent criminal and civil proceedings. It enacts thus:
- “Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”
46. In *Republic v Inspector General of the National Police Service & another Ex parte Beatrice Hilda Omunia; Peter Nganga Chege & 2 others (Interested Parties)* (2019) eKLR, Mativo J. (As he then was) had this to say:
- “ 30. Even though it is not for this court to consider the defense of the accused persons, which is basically a function of the trial court, the core issue raised by the ex parte applicant is that the dispute is purely civil. Section 193A of the Criminal Procedure Code permits parallel civil and criminal proceedings, hence, even if there was a civil suit in court, the existence of a parallel civil case is not bar to criminal proceedings. [14] The offence being investigated is known



to the law, hence, the cited provision. The conduct under investigation can attract a criminal sanction if proved.”

47. Therefore, the applicants or members of the company still have a right to file civil proceedings on the same facts or relevant facts.
48. In this case facts as gleaned may call for a civil claim. But, there is also the element of a criminal aspect which take a different character which is not limited to the private interest of parties but calls for prosecution to conclusion by the Director of Public Prosecutions on behalf of the State under Article 157 (6) of the [Constitution](#) .
49. This power is described as a Constitutional mandate which is exclusive to the DPP and which is independent and not subject to control, direction or influence. A court of law can only interfere with the prosecution’s case in a manner that is permitted by the [Constitution](#) . (See *Michael Monari & Another v Commissioner of Police & 3 Others*, Misc. Application No. 68 of 2011)
50. Ordinarily, prosecutions are preceded by a complaint. Section 2 of the CPC defines a ‘complaint’ as an allegation that some person known or unknown has committed or is guilty of an offence. The CPC does not specify the person who can bring such complaint.
51. An ‘offence’ is defined under the [Office of the Director of Public Prosecutions Act](#) to mean: an act, attempt or omission punishable by law.
52. Therefore where the DPP is persuaded that investigations prove an offence, the respondent has the right to bring such charges and in public interest the matter be determined without technicalities.
53. Also, the fact that another dispute resolution mechanism exists or that civil or commercial proceedings would be more preferable is not a ground to challenge criminal proceedings under Article 157 of the [Constitution](#) .
54. The application has not met the threshold as there is no proof that the respondent acted in abuse of court process or its the prosecutorial power. Further, as correctly held by the trial court no prejudice would result of the matter is heard on merit. None can exist at this stage considering that the applicants have already answered to the charges and proceeded with the case which is at an advanced stage.
55. Further, the decision of the court could not determine the legality or constitutionality of the charges and prosecution’s action.
56. The applicant moved court under Article 47 and 50 of the [Constitution](#) . Section 8 of [Magistrate Court’s Act](#) provides as follows:
 - (1) 1) Subject to Article 165(3) (b) of the [Constitution](#) and the pecuniary limitations set out in section 7(1), a magistrate’s court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights (2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the [Constitution](#) .
57. It is notable that the application was brought late in time after the charges had been admitted and parties allowed to take plea. An objection under Section 89 should be raised at the preliminary stages since the purpose is to interrogate the formal charge before it is admitted and trial commences.
58. In [Director of Public Prosecutions v Samuel Obudo Otieno & 6 others](#) (2017) eKLR, the court held that the charges had been admitted, the Respondent had taken plea and the matter set down for hearing



severally. It was therefore, improper for the trial court to go back and cite a provision that ceases to have application once the charges are accepted

59. In this case, the matter is part heard , a prosecution witness has testified and has been cross examined and further documents adduced and interrogated by the defence. The issues in the revision are pending determination at the trial court. Moreover, the applicants had already subjected themselves to the court's jurisdiction.
60. The upshot of the matter is that the application for revision is unmeritorious. Accordingly, it is dismissed.
61. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 30TH DAY OF SEPTEMBER, 2024.

L. N. MUTENDE

JUDGE

