



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Odiala (Criminal Revision E016 of 2023)  
[2023] KEHC 973 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 973 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL REVISION E016 OF 2023  
RE ABURILI, J  
FEBRUARY 21, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**KEVIN OWINO ODIALA ..... ACCUSED**

*(Emanating from the judgment by magistrate Hon Christine Irene  
Agutu, SRM, in Ukwala PM's Court Criminal Case No E141 of 2021)*

**RULING**

1. Section 362 of the [Criminal Procedure Code](#) vests the High Court with powers to call and examine the record of any criminal proceedings before any subordinate court for the purposes 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 the proceedings in the case in the subordinate court.
2. Under section 363 (1) of the [Criminal Procedure Code](#), a subordinate court of the first class also empowered to call and examine the record of any criminal proceedings of a court of lower class than it which is established within its local limits of jurisdiction for the same purposes as given by the provisions of section 362 of the said [code](#).
3. Pursuant to section 362(2) of the [Criminal Procedure Code](#), if the subordinate court acting under the provisions of the section 363(1) finds that the proceedings of the lower court than it, are illegal, improper or that they are irregular then it is obligatory for that court of first class to forward the record with its remarks therein to the High Court.
4. The Principal Magistrate, Ukwala Law Courts has examined the record from the court sitting as Senior Resident Magistrate for the purposes of having the orders made by the Senior Resident Magistrate on December 14, 2022 revised by this court on account that although there is judgment written, read and pronounced by the trial magistrate hon Christine Irene Agutu, SRM, in Ukwala PM's Court Criminal



- Case No E141 of 2021 and the said judgment convicting the accused person for the offence of grievous harm contrary to section 234 of the *Penal Code* as charged, there is no evidence that the accused person was ever given the opportunity to proffer his defence.
5. The trial court record shows that the case was heard and five prosecution witnesses testified and closed on October 24, 2022 upon which the magistrate reserved the matter for ruling on case to answer for 2/11/2022. On the latter date, she delivered the ruling finding that the accused had a case to answer and placed him on his defence. The accused person then stated that he wished to tender sworn evidence and had no witness to call. The court then fixed the case for defence hearing on December 14, 2022. On the latter date, a duly written judgment was read and pronounced in open court with the accused said to be present together with court assistant and the prosecutor was said to be online. Accused was then remanded in custody at Siaya GK prisons awaiting presentence report on December 28, 2022. Nothing transpired on the latter date and no resentence report was filed. The head of station was on leave. In the intervening period, the trial magistrate has since been interdicted and from the record, it appears that the file was stumbled upon from the trial magistrate's chambers while she was away on interdiction hence the discovery that the accused person was convicted before defence case was heard as he had offered to tender evidence.
  6. An accused person enjoys constitutionally guaranteed rights, which rights relate to fair trial. These rights include, under article 50(2) (k) of the *Constitution*, the right to adduce and challenge the prosecution evidence tendered against him.
  7. The Principal Magistrate, hon Lyna Sarapai forwarded the trial court file to this court for review pursuant to section 363 of the Criminal procedure Code. She also ordered that the accused be produced before this court's Deputy Registrar on 22/2/2023 for further orders.
  8. The order by the Ukwala Principal Magistrate's Court in forwarding the record of the Senior Resident Magistrate to the High Court is quite in order and is in accordance with the provisions of section 363 (2) of the *Criminal Procedure Code* as read together with the provisions of section 363(1) of the said code.
  9. I am aware that the heads of station are attending a budgeting meeting away from stations and since Ukwala Law Courts is presently being served by only one Magistrate who is the Head of Station, Siaya Law Courts is providing judicial support in criminal matters through hon B Limo, SRM.
  10. Having examined the proceedings which took place on December 14, 2022 before the Senior Resident Magistrate hon CI Agutu where she read a duly handwritten and signed judgment convicting the accused for the offence of grievous harm contrary to section 234 of the *Penal Code* without first hearing his defence which he had offered and which was due for hearing on that particular day, I find that there was a grievous error in law on the part of the trial magistrate in convicting an accused person on a date when his defence was to be taken and before giving him the opportunity to defend himself. Such action deprived the accused person his right to fair trial as guaranteed under article 50(2) (k) of the *Constitution*. This was not a mere procedure error. I find that the proceedings were irregularly and improperly conducted.
  11. Consequently, I hereby revise the order made on December 14, 2022 by Hon CI Agutu, Senior Resident, Ukwala Law Courts convicting the accused person herein Kevin Owino Odiala before hearing his defence and set it aside. In its place, I hereby substitute the order of conviction with an order quashing and vacating and setting aside the entire judgment as pronounced on December 14, 2022 by hon CI Agutu, Senior Resident Magistrate and direct that the accused person shall be given the opportunity to tender his defence in the said case against him.



12. The file be forthwith placed before hon B Limo, SRM, Siaya Law Courts on February 22, 2023 to fix a date before Ukwala PM'S court for further orders or directions by any other presiding Magistrate other than hon CI Agutu, Senior Resident Magistrate.
13. This file is now closed.
14. I so order.

**Dated, Signed and Delivered at Siaya this 21<sup>st</sup> Day of February, 2023.**

**R.E. ABURILI**

**JUDGE**

