



REPUBLIC OF KENYA



**Republic v Patel & another (Criminal Miscellaneous Application
E076 of 2022) [2023] KEHC 1404 (KLR) (20 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1404 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL MISCELLANEOUS APPLICATION E076 OF 2022**

JN KAMAU, J

FEBRUARY 20, 2023

BETWEEN

REPUBLIC APPLICANT

AND

BRIJESH KIRITBHAI PATEL ALIAS BRIJESH PATEL 1ST RESPONDENT

VEENASWETI PATEL 2ND RESPONDENT

RULING

Introduction

1. On July 14, 2022, the Applicant filed an application for seeking orders for review of the orders of the Learned Magistrate, Hon T Odera (as she then was) that were issued on July 13, 2022 which it stated had far reaching and adverse ramifications on criminal proceedings.
2. It pointed out that the Learned Magistrate exercised her discretion wrongly by ordering the release of a National Identity Card, an Indian Passport Number and two (2) Kenyan Passports which it averred were forgeries and/or fraudulently obtained.
3. It urged this court to invoke its revision jurisdiction under article 165(6) and (7) of the *Constitution of Kenya* and section 362 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) and vary and set aside the said orders as they were premature, irregular and contrary to the Prosecution's right to fair trial and due process under article 25 (c) of the *Constitution of Kenya* so as to accord fair administration.
4. In opposition to the said application, on September 1, 2022, the Respondents filed Grounds of Opposition of even date to the effect that the application had been overtaken by events and served no purpose.
5. The Respondents did not file any Written Submissions. On the other hand, the Applicant's Written Submissions were dated and filed on August 4, 2022. This Ruling is therefore based on the said affidavit



evidence, Grounds of Opposition and the Applicant's Written Submissions which parties relied upon in their entirety.

Legal Analysis

6. The Applicant placed reliance on the cases of *Mbogo vs Shab* (1968) EA 93, *Anne Jerop vs DPP* [2014] eKLR amongst others where the common thread was that the appellate court has inherent jurisdiction to interfere with the decisions of courts where discretion has been exercised irregularly.
7. It submitted that the burden of proving every element of the offence against an accused person lies with the Prosecution as was held in the locus classicus in *Woolmington vs DPP* 1935 1 All ER . It was its argument that it would need to tender in evidence *viva voce* evidence as well as the documentary exhibits that were generated from immigration and citizenship allied government institutions.
8. It was apprehensive that the documents it was relying on to prove its case could be destroyed and/or defaced in view of the hefty fines, lengthy prison terms and subsequent deportation.
9. It also relied on the doctrine of *ex turpi causa non oritur causa* that was addressed in the case of *Scott vs Brown, Benning & McNab Company (3)* [1892] 2QB 724 at page 728 where it was held that no court should enforce an illegal contract or enforce obligations arising out of illegal contracts or transactions if the illegality is brought to its attention. It thus urged this court to review and set aside the orders as it had sought.
10. Save for averring that the application had been overtaken by events and served no purpose, the Respondents did not demonstrate how this was.
11. Going further, this court noted that the Respondents' Grounds of Opposition were filed by the firm of M/S Onsongo & Co Advocates. However, in the lower court, the Respondents were represented by the firm of M/S Emukule & Co Advocates. Unless there is a change of advocates, the advocates in a matter are deemed to be on record from the time the matter is filed until it is concluded on appeal.
12. It was therefore the considered view of this court that in the absence of a Notice of Change of Advocates by the firm of M/S Onsongo & Co Advocates, the said firm of advocates was not properly on record for the Respondents herein. As the said Grounds of Opposition were filed by a firm of advocates that was not properly on record, they were inconsequential and the application for Revision was technically unopposed.
13. Be that as it may, it was necessary for this court to consider the Applicant's application for Revision on merit. The fact that a matter is unopposed does not automatically mean that it ought to be allowed. The court has to be satisfied that such application is equally merited despite it not being unopposed.
14. Notably, section 362 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides that:-

“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.”



15. Further, the High Court's power of revision is set out in article 165 (6) and (7) of the [*Constitution of Kenya, 2010*](#). The same provides that:-
- "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."
16. Article 165(6) of the [*Constitution of Kenya, 2010*](#) states that:-
- "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."
17. This supervisory power by the High Court over courts and tribunals under it is invoked in place of hearing an appeal as a stop gap measure to ensure that irregularities that would be overturned on appeal at the conclusion of the case for denying a party a chance to fully present its case in the best way it knows how are cut short before the matter is concluded.
18. This court also considered the case of [*Hillary Eting'a Barasa vs Republic*](#) [2021] eKLR where it was held that revisional jurisdiction of the court can only be exercised to correct a mistake, illegality or impropriety in any finding, sentence or order recorded or passed by the lower court or any irregularity in the proceedings leading to the impugned finding, order or sentence.
19. After carefully analysing this matter, this court found and held that the application herein could not be said to have been overtaken by events as the criminal cases against the Respondents herein were ongoing. This court therefore had power and jurisdiction to interrogate whether or not the Learned Magistrate erred when she directed that the exhibits the Prosecution wanted to rely on to prove its case was justified and/or regular. It had the power to interfere with her said decision if it was satisfied that she did not exercise her discretion judiciously.
20. Section 107 of the [*Evidence Act*](#) Cap 80 (Laws of Kenya) states as follows:-
- "1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
21. Further, Section 108 of the [*Evidence Act*](#) provides that:-
- "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."



22. In addition, Section 109 of the *Evidence Act* stipulates that:-
- “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
23. It is evident that the provisions of the law require the Prosecution to prove its case beyond reasonable doubt unless the law provides that the burden of proof shall shift to the accused person.
24. This court looked at the grounds on the face of the application of the Applicants’ Notice of Motion application and filed on June 27, 2022 from which the orders of July 13, 2022 flowed and the averments in the 1st Respondent’s Affidavit that was sworn on even date and noted that the same were not sufficient ground for the order of release of the exhibits.
25. The assertion that the Respondents and their minor children required the said documents to access basic government services and/or government buildings or that the Respondents were not able to register their sim cards without their Identity Cards had no basis. There was nothing that was presented to the court to show that their sim cards had never been registered. As they were ordinarily resident in Kenya, there was a legitimate expectation that they ought to have registered their sim cards long ago and if they required to register the same, that did not warrant the release of their Identity Cards pending the hearing and determination of the case. Indeed, that was something that could have been done in minutes and the Identity Cards returned to the Prosecution for use as exhibits during trial.
26. This court took the firm view that the 1st Respondent ought to have taken a copy of his Identity Card for use while the case was on going. It is not uncommon for people to laminate copies of their Identity Cards for use in buildings and for other purposes.
27. The Prosecution’s case was based on the 2nd Applicant’s old Passport. An order for the depositing of the new Passport after renewal of her old Passport was likely to defeat the Prosecution’s case as the old Passport which it had contended had been obtained fraudulently was going to remain in the 2nd Applicant’s possession and out of its reach.
28. The fact that the 2nd Respondent’s Passport had expired and she had no other form of identification was immaterial for the reason that she did not require an expired Passport as her primary document for identification.
29. An order that would also have safeguarded the Prosecution’s interests would have been for the Learned Magistrate to have ordered that the 2nd Respondent return the old Passport after she had renewed it as the process of obtaining the old Passport was what was in contention and the basis of the Prosecutions’ case.
30. The relevance or otherwise of the minors’ Passport to the case was a matter of fact to be determined during trial. There was no indication that the minors required to travel out of the jurisdiction of Kenya.
31. This court found and held that in the event the said documents were found to have been forgeries and/or fraudulently obtained at the conclusion of the case, they would have been in use unlawfully and amount to having abetted illegal actions.
32. Once the Respondents were charged with knowingly presenting forged documents for purposes of obtaining passports contrary to Section 54(1)(g) as read with Section 54(2) of *Kenya Citizenship and Immigration Act, 2011*, knowingly presenting forged documents for purposes of obtaining a work permit contrary to Section 54(1)(g) as read with Section 54(2) of *Kenya Citizenship and Immigration*



Act, 2011, knowingly misleading an immigration officer for the purpose of obtaining a passport contrary to Section 53(1)(a) as read with Section 53(2) of Kenya Citizenship and Immigration Act, 2011 and being in possession of Kenyan Identity Card for the purpose of remaining in Kenya contrary to Section 54(1)(1) as read with Section 54(2) of Kenya Citizenship and Immigration Act, 2011, the Learned Magistrate ought not to have ordered the release of the said documents that the Prosecution was relying upon to prove its case.

33. Having found that the Learned Magistrate did not exercise her discretion judiciously, there was need to set aside and/or vacate the order of July 13, 2022 as it was premature for her to have ordered release of the documents it was going to tender in evidence.
34. The setting aside and/or varying the said order was in line with the provisions of Section 364(1)(b) and (2) of the Criminal Procedure Code that stipulate that:-
 - "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 his knowledge, the High Court may-
 - a.
 - b. In the case of any other order other than an order of acquittal alter or reverse the order (emphasis court).
 2. 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."
35. The Respondents were given an opportunity to be heard in this case but opted to use an advocate who was not properly on record. If there was a change of advocates, none was placed in the file herein by the time this court reserved its Ruling herein.

Disposition

36. For the foregoing reasons, the upshot of this court's decision was that the Applicants' application for Revision dated and filed on July 14, 2022 was merited and the same be and is hereby allowed.
37. It is hereby directed that the Respondents return to the court within seven (7) days from the date of this Ruling the following documents for onward transmission to the Prosecution:-
 1. Identity Card Number 32xxxx in the name of Brijesh Kiritbhai Patel
 2. Indian Passport Number K285xxxx in the name of Veenaswati Patel
 3. Kenyan Passport Number AK002xxxx in the name of Nikesh Patel (a minor)
 4. Kenyan Passport Number AK002xxxx in the name of Nikesh Patel (a minor).
38. It is hereby directed that the lower court files to wit Kisumu Criminal Case Kisumu E537 of 2021 Republic vs Veenaswati Brijesh and No E538 of 2021 Republic vs Brijesh Kiritbhai Patel alias Brijesh Patel be and are hereby returned to the Chief Magistrate's Court Kisumu and the same to be placed before the Chief Magistrate on March 8, 2023 for his further orders and/or directions in respect of the hearing of the said matters.
39. In view of the fact that the charges against the Respondents herein could infringe on their right to movement which is guaranteed in Article 39 (1), (2) and (3) of the Constitution of Kenya in the event



same were found not to have been proven, the Chief Magistrate be and is hereby directed to put in place measures to have the matters heard and determined expeditiously.

40. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF FEBRUARY 2023

J. KAMAU

JUDGE

