



REPUBLIC OF KENYA



**Wangechi Wangare & Co Advocates v Republic (Criminal Revision
58 of 2022) [2023] KEHC 3629 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL REVISION 58 OF 2022
CM KARIUKI, J
APRIL 27, 2023**

BETWEEN

WANGECHI WANGARE & CO ADVOCATES APPLICANT

AND

REPUBLIC RESPONDENT

(In the matter of revision of the orders issued by the Hon. C Muhoro Senior Resident Magistrate in Nyahururu Criminal Case MCCR E140 of 2022 – Republic v Samuel Kwamanjan Akoli & Virginia Muthoni Gichohi on 7/9/2022)

RULING

1. The applicant, via notice of motion dated 9/9/2022, seeks orders.
 - a) That this Honourable Court be pleased to exercise its powers under section 362 of the Criminal Procedure Code and call for Nyahururu Criminal Case MCCR E140 of 2022- Republic – versus Samuel Kwamanjan Akoli & Virginia Muthoni Gichohi for purposes of satisfying itself as to the correctness of the orders issued by Hon. C. Muhoro 7/9/2022 and proceed to revise and set aside the said orders in the interest of justice.
 - b) That costs of this Application be provided for.
2. The grounds on the face of the notice of motion support the same namely;
 - i) That applicant is the Defence Counsel in the matter subject of the revision.
 - ii) That the Court ordered the Defence Counsel to personally pay the witnesses and the Counsel watching brief a total sum of Ksh. 5,500/=



- iii) The trial Court failed to exercise its discretion judiciously, and it is obvious that the Court Misdirected itself by ordering the Defence Counsel to pay the said costs, yet the defense counsel was already on her way to court. It would not have prejudiced anyone to wait just ten more minutes.
- iv) That court business ends at 5 p.m., and Counsel was already on her way to Court when the Court gave the said orders. Noting that on previous occasions, particularly on 13/7/2022, the court, in the presence of the applicant, waited for Counsel watching brief for the complainant up to 4 p.m. as he was conducting another trial.
- v) There is no reason why the defense Counsel should pay the costs of the suit personally.

3. The revision is also supported by the Affidavit of Wangeci Wangare, sworn on 9/9/2022, which briefly narrates as follows;

- a) That on 7/9/2022, the matter came up for hearing. The applicant informed the Counsel watching brief for the complainant Advocate Nderitu Komu and the accused persons to notify the court that she would be taking time allocation for 2 p.m. as she was also in the conduct of Nakuru Criminal Case No. MCCR/E1584/2021 Republic Versus Martha Nyokabi Mwangi, which was proceeding online. (Annexed hereto and marked WW/1 is an extract of the cause list for the said matter).
- b) That, unfortunately, the court was not ready to accommodate her and kept mentioning the matter, asking the accused to contact the applicant. Finally, the applicant was online and assured the court that she would be ready at 2 p.m. latest 2.30 p.m.
- c) That she concluded the matter at 2.30 p.m., and she was on her way to court when she was informed that the court had already adjourned the matter at 2.20 p.m. and condemned her to pay the witnesses and the Counsel watching brief a total of Ksh. 5,500/=. The witnesses had no objection to waiting. The Court, not the advocates, normally compensates witnesses in criminal matters.
- d) Notably, on 13/7/2022, counsel watching brief for the complainant requested the Honourable Court to be indulged as he was conducting another matter in another court. Accordingly, the court indulged him up to 4 p.m. when the evidence of PW1 and PW2 was taken.
- e) That the circumstances of this matter do not warrant the trial Court to make such drastic orders that undermine the spirit and letter of article 159 2 (d) of *the Constitution*.
- f) That the prosecution has previously adjourned the matter on various occasions, and the court has never condemned the prosecution counsel to pay any costs to the accused person or the applicant.



- g) That certainly, a delay of 20 minutes does not warrant the court to adjourn the matter and condemn the applicant to costs arbitrarily, yet the court business ends at 5 p.m.
4. The matter came for directions, and the court fixed the same for Ruling on 27/4/2022. The ODPP did not file a reply after they were served with the application.
5. The genesis of the matter is the orders made in criminal case No. E040/2021, where the applicant represents two (2) accused persons. That on 7/9/2022, the matter came for hearing before the trial Magistrate, but the Applicant was late to attend court; thus, the court adjourned the case and penalized the Applicant with payment of costs to three (3) prosecution witnesses at 1,000/= each and Kshs. 2500/= to the complainant Advocate
6. The Applicant, aggrieved by the said order, lodged an instant Revision Application to impugn the orders above. The provisions of the court are moved under are contained in section 362, cap 75, which are to the effect that, The High Court, in appropriate cases, can review orders issued by the subordinate court. The record of the trial court shows that;

“7/9/2022

Before Hon C. Muhoro – S R M

S/C – Fridah

C/A – Koome

Accused two present

Interpretation -Kiswahili

Komu - watching brief for the complainant.

Court Prosecutor- 3 witnesses are present; we are ready to proceed.

Court – Hearing to proceed.

Later @ 2.20 p.m.

Nderitu Komu watching brief for the complainant.

Court Prosecutor - We were ready to proceed. The defense counsel did not send anyone to represent her. The date was taken by consent. She was given up to 2 p.m., as she is away. I pray that we proceed with even one witness.

Court - The defense counsel to pay 1,000/= each cost for the three(3) witnesses present in court. The defense counsel is also to pay costs for the Advocate watching brief for the complainant of Kshs. 2500/= .”

7. The orders issued were given *ex parte* without granting the applicant a hearing which offends the provisions of article 50 and the rules of natural justice. Article 50 (h). The effect of failure to comply with the rules of natural justice is that any decision or other administrative action taken is null and void and can be invalidated by the courts. *Audi Alteram Partem* means that no person should be condemned unheard, i.e., a person should not be denied an opportunity to be heard. This is simply that a concerned person must be given a right to be heard.



8. In *Onyango Oloo v Attorney General* [1986-1989] EA 456: the court held;
“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated....”
9. If a judicial/administrative body fails to give a concerned person the right to be heard, whatever decision it makes will be invalidated upon review. It applies in common law that the right to be heard must be obtained before the court has to make any decision. It is mandatory to ensure adequate administration of justice on the grounds that a person is presumed innocent until proven guilty in a court of law.
10. The applicant was not given the opportunity to controvert the complaint that was raised against her. The court just heard one side and condemned the applicant unheard. That was a gross violation of the applicant’s rights.
 - i. Thus, the impugned orders are hereby reviewed and set aside.

Dated, Signed, and Delivered at NYAHURURU this 27 th day of APRIL 2023

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CHARLES KARIUKI

JUDGE

