



Rutto & another v Director of Public Prosecutions & another; Cheptoyon & 3 others (Interested Parties) (Judicial Review Cause 1 of 2021) [2023] KEHC 3811 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3811 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
JUDICIAL REVIEW CAUSE 1 OF 2021**

RB NGETICH, J

APRIL 27, 2023

(FORMELY MISC. NO. E23 OF 2021 AT NAKURU)

IN THE MATTER OF AN APPLICATION BY THOMAS KIPRAMOI

AND

ALEXANDER KIPSANGUT MOI FOR AN ORDER OF MANDAMUS AND CERTIORARI

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE VIOLATION OF THE COMPLAINANT’S RIGHTS
AND CRIMINAL PROCEDURE CODE (CAP 75) OF LAWS OF KENYA**

AND

IN THE MATTER OF THE CRIMINAL CASE NO. 913 OF 2018 KABARNET COURT

AND

**IN THE MATTER OF DELIBERATE ACTION BY THE
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION**

BETWEEN

THOMAS KIPRAMOI RUTTO 1ST APPLICANT

ALEXANDER KIPSANGUT MOI 2ND APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

**SENIOR PRINCIPAL MAGISTRATE’S COURT AT KABARNET 2ND
RESPONDENT**



AND

WILLIAM CHEBET CHEPTOYON INTERESTED PARTY
JEBET CHEMJOR INTERESTED PARTY
WILLIAM CHEPTOYON INTERESTED PARTY
MATHEW JEBET INTERESTED PARTY

JUDGMENT

1. The Applicant has moved the court vide a notice of motion application dated 26.11.2022 brought under the provisions of Order 53, Rule 1(2) of the Civil Procedure Rules seeking for the following orders:-
 - i. An order of certiorari do issue to remove to this court and to quash the Kabarnet Senior Principal Court's decision orders dated 13th September, 2021 in Criminal Case No. 913 of 2018 declining to re-open the prosecution case.
 - ii. That an order of mandamus do issue directed to the Respondents being the office of the Director of Public prosecutions and the Principal magistrate's court in Kabarnet Criminal Case No. 913 of 2018, directing them to reopen the prosecution case closed on 3rd August, 2021 and allow the investigating officer and medical doctor to give evidence before proceeding to give its verdict on the matter.
 - iii. That costs of this application be provided for.
2. The application is founded on the grounds that the applicants herein were never consulted by the Office of the Director of Public Prosecution(DPP) on decision to close the prosecution case when complainants made a prayer for reopening of the case on 13th September, 2021;that the applicants are dissatisfied and feel that the Office of the DPP has not properly handled the matter to their satisfaction and the act of closing prosecution case is a tactful one to deny justice to the complainants and aide the accused persons.
3. Further that the criminal case No. 913 of 2018 is at the tail end of its hearing and if this application and conservatory orders are not granted on time, judgment is scheduled to be delivered on the 2nd November, 2021 rendering this application nugatory and the prosecution case is dead on arrival if the crucial documents are not produced despite overwhelming evidence that the accused were guilty of the acts they have been charged with.
4. The application is supported by an affidavit sworn by the 2nd Applicant (Alexander Kipsangut Moi). He states that they are the complainants in criminal case No. 913 of 2018 Kabarnet Senior Principal Magistrate's court where the accused/interested parties were charged with two counts of robbery with violence contrary to section 296(2) and malicious damage to property contrary to section 339(1) of the penal code.
5. He avers that the matter has been proceeding at the Kabarnet Lower court from the year 2018 but the proceedings halted in 2020 due to the covid pandemic after main witnesses had adduced evidence in 2019 leaving two prosecution witnesses being the investigating officer and the medical doctor who were yet.



6. He further states that on 3rd August, 2021 the office of the DPP closed the prosecution case without calling the two remaining crucial witness and 13th September, 2021, the court declined the ex parte applicants application to reopen the prosecution case on the ground that the prosecution closed the case on their own volition amongst other reasons and proceeded to make a ruling on whether the accused had a case to answer; that the court found that the interested parties had no case to answer on offence of Robbery with violence on ground that the prosecution failed to produce documents which the doctor would have produced but found the interested parties had a case to answer for offence of malicious damage to property
7. The ex parte Applicant states that the prosecutions closure of the case without following due procedure is a violation of the complainant's rights to a fair determination of the criminal case and violation of the office of DPP's mandate to properly and fairly prosecute criminal cases on behalf of the complainants as enshrined in the constitution.

2Nd Respondents Response

8. In response to the application, the 2nd Respondent filed the grounds of opposition dated 7th February, 2022 opposing this application on the following grounds:-
 - i. That the application does not meet the qualifications of the prayers sought.
 - ii. That the application is incurably defective and ought to be dismissed at the first instance.
 - iii. That the application offends the provisions of section 9(2) of the fair Administrative Action Act on the doctrine of exhaustion.
 - iv. That it is filed in total disregard of the provisions of section 347 and/or 364 of the criminal procedure code which provides for the appeal and revision;
 - v. That the application is scandalous, frivolous, vexatious and an abuse of the court process and should be struck out.

Interested Parties Replying Affidavit

9. In response, the interested parties filed a replying affidavit sworn by Mathew Jebet (the 4th interested party) dated 18th July, 2022 and states that the 1st, 2nd and 3rd interested parties are his father, brother and uncle respectively. He confirmed that they are the accused persons in Kabarnet Criminal Case No. 931 of 2018.
10. He states that the Applicant arrested them on diverse dates culminating into several files which were consolidated to one file being Kabarnet Criminal case No. 931 of 2018 with a consolidated charge sheet now containing two counts of malicious damage to property and robbery with violence which was read to them and they denied.
11. He states that 4 prosecution witnesses testified in the case, the last being on 9th November, 2020 and thereafter the prosecution sought several adjournments stating that they had two witnesses remaining, the investigating officer and a doctor; that they were granted adjournments in the presence of the Applicants and their advocate contrary to the Applicant's allegation that the prosecution closed its case without consulting them.
12. He further states that after several adjournments, the prosecution closed their case on the 3rd August, 2021 and the court proceeded to deliver a ruling on whether the accused/interested parties had



a case to answer and the court proceeded to acquit them in respect of count 1 being offence of robbery with violence.

13. He stated that their being acquitted of count 1 cannot be a subject of judicial review but an appeal; that the applicant's application is incompetent, inept, full of false allegations and an attempt to subvert the cause of justice and ought to be dismissed with cost; that granting the orders sought herein will greatly prejudice them as it will take away any benefit of doubt which might have accrued to them.

Applicants Submissions

14. In submissions dated 1st April, 2022, the applicant submitted that the DPP exercises power donated by Article 157 of *the constitution* and whereas they appreciate that the decision to institute criminal proceedings by the DPP is discretionary and is not subject to the direction or control of any authority as provided under Article 157 (10) of *the constitution*, the DPP must be accountable

15. The Applicants cited the case of Peter Ngunjiri Maina Vs Director of Public Prosecution (2017) eKLR where the court held that: -

“The decision of the DPP is unfettered but it must be accountable. The discretion of the part of the court to interfere with the decision of the DPP is untrammelled but it is not to be exercised whimsically”.

16. The applicant further submitted that the DPP must have regard to the public interest, the interests of the administration of justice, the need to prevent and avoid abuse of the legal process and where he deviates from this constitutional standard, then his actions must be called into question and scrutinized by this very court as the concierge of *the constitution*.

17. The applicant restated averments in the affidavit in support of the application and cited the case of Republic vs Council of legal Education & 2 others Ex parte Michelle Njeri Thiongo Nduati (2019) eKLR.

18. The applicant further cited the case of Republic v Director of Public Prosecutions & 2 others; Evanson Muriuki Kariuki (interested party); Ex parte James M. Kahumbura [2019] eKLR and submitted that in line with the above authority, the prosecution's decision to withhold material witnesses amounted to failure to prosecute effectively, undermined public interest and confidence in the criminal justice system and curtailed the applicants' right to access to justice.

19. The Applicant further submitted that it is trite law that a victim of an offence is not a mere pawn in our criminal justice system and a toll by the prosecution to achieve its end but he/she is vital component to the extent that his/her voice must be heard before any decision affecting him or her is made and cited the case of Republic v Inspector General of Police & 4 others EX parte Charles Ocheing Wamiya [2020] eKLR noted thus:-

“What comes to mind is the question of triangular of rights in the criminal justice system. The right to the accused person, the right to the prosecution and the rights of the complainant. At the center of all these rights is the need to balance, protect and uphold public interest. It is in public interest that the complainant of a crime be afforded justice. This court is now being asked to terminate the criminal case without hearing the complainant.”

20. The applicants submitted that their application is proper to the extent that the Respondents' impugned decision violated and or threatened to violate the applicants' rights under the bill of rights and the provisions of *the Constitution* and cited the case of Republic v Chief Magistrate's Court at



Milimani Law Courts; Director of Public Prosecutions and 2 others (interested parties); Ex-Parte Applicant: Pravin Galot [2020] eKLR.

21. In conclusion counsel submitted that it is incontestable that the decision of the office of the Public Prosecutions is an administrative action and therefore subject to the authority of this court and the only issue for consideration is whether the decision of the Principal Magistrate in Kabarnet Criminal Case No. 913 of 2018 is amenable to judicial review jurisdiction of this court.

1st Respondents Submissions

22. The 1st Respondent filed written submissions on the 19th July, 2022 and submit that the Applicants' application dated 26th November, 2021 is without merit and should be dismissed as allowing it is against the rule of expeditious disposal of cases as enshrined in Article 50(2)(b) of *the Constitution* of Kenya which requires that trial commence and conclude without unreasonable delay.
23. That the case was registered on 18th October, 2018 and the last prosecution witness testified on 3rd August, 2020 and on 9th October, 2020, the trial court granted the prosecution the last adjournment and having no other witnesses on 3rd August, 2021, the prosecution had no option but to close its case.
24. The 1st Respondent further submitted that the right of the victims/complainants to be heard should also be balanced with the accused persons' right to have their case concluded without unreasonable delay and cited the case of *Kuria & 3 others vs The Attorney General* [2012] eKLR where the court stated as follows: -

“It would be a travesty to justice, a sad day for justice should the procedures or the process of the court be allowed to be manipulated, abused and or misused, all in the name that the court simply has no say in the matter because the decision to utilize the procedure has been made.
25. The 1st respondent further submitted that that there was inordinate delay by the investigating officer and the medical doctor in presenting themselves before the court to testify and as such the prosecution was to follow the court's directive having been granted the last adjournment, to close its case. That the court orders/directives ought not to be given in vain as it was emphasized in *Republic v County Government of Kitui Ex Parte Fairplan Systems Limited* [2022] eKLR.
26. That the instant application is mere attempt by the Applicants to delve this court into the merits or otherwise of a criminal process. That in criminal proceedings, the principles for consideration on such applications was aptly captured in the case of *Johnson Kamau Njuguna vs Director of Public Prosecutions* [2018] eKLR where the court held that the court is not permitted to delve into merits or otherwise of criminal process as that would amount into trespassing into arena reserved for criminal trial and ought not usurp the constitutional and statutory mandate of the respondent.
27. The state counsel submitted that this court must bear in mind that a court sitting on judicial review is only concerned with the process leading to the making of the decision and should not go into the merits of the decision itself and relied on the case of *Municipal Council of Mombasa v Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No. 185 of 2007 (2002)* eKLR where the court held that position.
28. Counsel further submitted that the ex-parte Applicants in their application have sought orders for mandamus and certiorari and the court of appeal held in *Kenya National Examinations Council vs.*



Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 inter alia as follows as regards the nature of the order of certiorari:

“...only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the Respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter.”

29. The 1st Respondent proceeds to argue that the Applicant has not demonstrated that the prosecution’s decision to close the case is either illegal, irrational or procedurally improper.

Interested Parties’ Submissions

30. The interested parties filed their submissions dated 13th March, 2023 and argues that an acquittal by the lower court under section 210 and/or 306 of the CPC is appealable to the High court under Section 347(1a) and/or 364 of the Criminal Procedure Code.
31. Counsel for the interested party submitted that the magistrate acquitted the interested parties of count 1 after finding that the 1st Respondent had not presented sufficient evidence to warrant the interested parties be placed on their defence and the remedy available to the Applicants was to lodge an appeal through the 1st Respondent if they were dissatisfied with the acquittal for the High court to evaluate evidence and find if the evidence adduced had established prima facie case.
32. The interested parties contend that a judicial review application cannot suffice where the acquittal has been rendered under section 210 of the CPC and the decision of the trial court to decline the re-opening of the prosecution’s case was well founded as the 1st Respondent had taken two years without availing the two witnesses.
33. Counsel submitted that if the applicants were aggrieved by the decision of the trial court not to reopen prosecution case, they ought to have moved the High court under section 364(1) of the CPC for revision and not judicial Review and the attempt to re-open the prosecution’s case is an abuse of the court process and must be resisted
34. In conclusion counsel for the interested party submitted that it is clear from the proceedings in the lower court that the prosecution applied for numerous adjournments and summons to call the said two witnesses were granted and therefore the prosecution followed due process in attempting to secure their attendance.

Analysis And Determination

35. I have considered averments by parties herein and submissions filed. What I consider to be in issue is whether the applicant has met threshold for grant of orders sought.
36. Article 47 of *the Constitution* provides for the right to a fair Administrative Action and to give effect to Article 47 of *the Constitution*, Parliament enacted the *Fair Administrative Action Act* No. 4 of 2015. Section 2 of the Act defines an “administrative action” to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
37. The exparte applicants’ argument is, the prosecution closed the prosecution case in Criminal Case No. 913 of 2018 Kabarnet Senior Principal Magistrate without consulting the complainant leading to evidence of the doctor and Investigating Officer being locked out resulting in acquittal of the interested



parties of the offence of robbery with violence due to failure by prosecutions to produce documents which would have been produced by the doctor.

38. The Applicant's further argue that the 1st respondent failed to follow due procedure and violated the complainant's rights to a fair determination of the criminal case and violated DPP'S mandate to properly and fairly prosecute criminal cases on behalf of the complainants as enshrined in *the constitution*.
39. The Respondents and the interested parties on their part contend that the action of closing the prosecution case was administrative and in line with the accused person's constitutional right and the duty of the court to expeditiously conclude the matters before it.
40. The Respondents and the interested parties further argue that the Applicants had other forums to raise their complaints other than filing judicial review application and have not therefore exhausted the available remedies provided by the law hence the application before court is an exercise in futility.
41. The principles which guide the grant of the orders sought herein are now well crystallized in this jurisdiction which should be applied according to facts of each case. However, while applying the said principles to a particular case, the court, must always be cautious in its findings so as not to prejudice the intended or pending criminal proceedings and transform itself into a trial court.
42. This court would not therefore delve into the merits or otherwise of the criminal process as that would amount to unnecessarily trespassing into the arena specially reserved for the criminal or trial court. This court is limited to looking at the process leading to closure of the prosecution case and denial to reopen prosecution case for the two remaining witnesses to testify.
43. In *Municipal Council of Mombasa =vs= Republic & Another (2002) eKLR*, the Court of Appeal stated as follows: -

“Judicial review is concerned with the decision-making process, not with merits of the decision itself... The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

44. Further *Matavo J in R vs Chief Magistrate Court Milimani and Director of Public Prosecutions & 3 Others JR Misc. Application No. 662 of 2018 (eKLR)* held: -

“Judicial Review is about the decision-making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.”



45. I note from the proceedings that on 13th September 2021 Mr. Kangethe who was watching brief for the complainant informed court that the investigating officer was not reached because he had gone for training in Kiganjo since march 2021 and completed training in September 2021 and was ready to testify; counsel added that it was the investigating officer's failure not to bond the doctor.
46. The prosecutor informed court that he learnt that morning that the witness had not attended court and was willing to avail witnesses the soonest possible. Defence counsel opposed reopening of the case on ground that the matter was very old and the accused would be prejudiced and upon hearing the parties, the court indicated that the matter was pending ruling and would proceed to deliver the ruling.
47. There is no doubt that the prosecution closed their case after being granted last adjournment and before delivery of the ruling, the prosecution applied together with the complainants Advocate to be allowed to reopen the case after learning that the witness was available after completing training.
48. In my view, the prosecution had no option but to close their case as the witness had not attended court; on learning of availability of the witness the state counsel and counsel watching brief for complainant applied for the case to be reopened but the court declined.
49. In my view, the window open for the applicants was either to seek revision against the order declining to open prosecution's case or appeal ruling delivered.
50. From the above authorities, it is clear that judicial review is only concerned with the process leading to the making of the decision and not the merits of the case and by entertaining this application, this court will be acting as an appellate court hence going against the principles of judicial review.
51. Section 347 (1a) of the Criminal Procedure Code provide a person convicted on trial by a subordinate court of the first or second class may appeal to the High court; and An appeal to the High court may be on a matter of fact as well as on a matter of law.
52. Further Section 364(1) 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 order, 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 section 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.
 - (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; provided that this section shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
 - (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High court shall not inflict a greater punishment for the offence which in the opinion of the High court the accused has committed than might have been inflicted by the court which imposed the sentence.
 - (4) Nothing in this section shall be deemed to authorize the High court to convert a finding of acquittal into one of conviction.
 - (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.



53. The High Court is vested with revisionary powers under Article 165 (6) and (7) of *the Constitution* of Kenya, 2010 which provides as follows;

Article 165

- “(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.”

54. Section 362 of the Criminal Procedure Code CAP 75 also provides 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.”

55. In the case of the Republic vs. James Kiarie Mutungei [2017] eKLR Nyakundi J. highlighted the role of the high court in exercising the revisionary power vested upon it by *the Constitution* and statutory provisions as follows;

“The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party or suo moto made by the court itself, to call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, propriety or correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits.”

56. I agree with the Respondents and the interested parties that the application before court offends the provisions of 347(1a) and Section 364 of the C.P.C that the only remedy available to the Applicants was to lodge an appeal through the 1st Respondent if they were dissatisfied with the acquittal. The Applicants ought to have moved the court for revision orders when the court declined to re-open the prosecution case and not wait until a decision is rendered.
57. Having considered what transpired before the trial court, the applicant has not demonstrated that the court denied the applicant the right to be heard. Despite being granted several adjournments to bring the 2 remaining witnesses to testify in court, the court issued an order of last adjournment and prosecution were forced to close prosecution case when the remaining 2 witnesses failed to attend court.
58. From the foregoing the applicants have failed to demonstrate that DPP failed to follow the right procedure in closing prosecution case. The applicants failed to invoke supervisory powers of the High court by seeking revision in respect to the trial court refusal to reopen prosecution case or file appeal against the court’s ruling. Applicants have not therefore established that the prosecution acted illegally, irrationally or that there was procedural impropriety in arriving at its decision.



59. From the foregoing, I find that the applicant has failed to meet threshold for grant of prayers sought in the application dated 20th November, 2021.

60. Final Orders: _

1. Application dated 20th November, 2021 is hereby dismissed.
2. Each party to bear own cost.

JUDGEMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET

THIS 27TH DAY OF APRIL 2023.

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RACHEL NGETICH

JUDGE

In the presence of

Mr. Sitienei - Court Assistant.

Mr. Kangethe for Exparte/Applicant.

Ms Ratemo for DPP.

