



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njage v Republic (Criminal Revision E002 of 2023)  
[2023] KEHC 21819 (KLR) (9 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21819 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL REVISION E002 OF 2023  
LM NJUGUNA, J  
AUGUST 9, 2023**

**BETWEEN**

**MORRIS GUCHURA NJAGE ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant has filed revision dated March 29, 2023 under certificate of urgency, being aggrieved and dissatisfied by the order of Hon DN Ogoti to consolidate Criminal Case Numbers Embu Chief Magistrate's Court Criminal Case No 1234 of 2018 and 131 of 2019. The order was made in Embu Chief Magistrate's Court Criminal Case No 1234 of 2018 for which applicant now seeks stay of proceedings pending hearing and determination of this revision. He also seeks that the court call for the record in the said case for purposes of satisfying itself on correctness, legality and propriety of the ruling dated January 16, 2023.
2. The application was supported by grounds, inter alia, that the ODPP filed notice of motion dated November 14, 2022 seeking an order of consolidation of Embu Chief Magistrate's Court Criminal Case Nos 1234 of 2018 and 131 of 2019, which application was opposed by the applicant herein. That the court directed that the application be canvassed by way of written submissions but when the appellant's advocate went to file his submissions within time, he was informed that the file had been transferred to Kisumu where the trial magistrate had been transferred to. That the said trial magistrate proceeded to deliver a ruling allowing consolidation of the cases, in the absence of the parties, long before the diarized ruling date and without notice to the parties.
3. The revision was certified as urgent and proceedings in Embu Chief Magistrate's Court Criminal Case Nos 1234 of 2018 stayed pending hearing and determination of this application.



4. The respondent filed its replying affidavit stating that the date for ruling had been set for March 22, 2023 but it was delivered on January 16, 2023. The respondent conceded that the ruling was indeed delivered without notice and in the absence of both parties. On submissions, it was submitted that the court directed that submissions be filed within 21 days which ended on January 10, 2023. That the applicant has not demonstrated that he indeed was ready to file his submissions by the end of the 21 days.
5. The revision herein was canvassed by way of written submissions and both parties complied.
6. It was the appellant's case that he could not file his submissions to the notice of motion dated November 14, 2022 because of the Christmas holidays and the earliest he could do so, was January 2023. That the appellant's constitutional right to a fair trial was infringed when the ruling was delivered in his absence and he was denied his right to appeal against such decision. The applicant cited section 362 of the Criminal Procedure Code and the case of Joseph Nduvi Mbuvi Vs Republic (2019) eKLR to emphasize the courts revisionary powers.
7. The applicant also cited Article 50(1) of the Constitution of Kenya on his right to fair hearing. That the said ruling denied the applicant the right to appeal since it was delivered in his absence. He further rode on the concession by the respondent where both parties agree that the ruling ought to have been delivered in the presence of both parties and on notice. He urged the court to find that the actions of the trial court between December 20, 2022 and January 16, 2023 were grossly irregular and they infringe on the applicant's constitutional right, while citing the case of Patrick Simiyu Vs Republic (2021) eKLR.
8. The respondent in its submissions, relied on Article 50(f) of the Constitution of Kenya and Sections 194 and 362 of the Criminal Procedure Code to argue their case that the accused person ought to be present throughout the trial unless his conduct makes it impossible for trial to proceed. That the court was correct in delivering the ruling after expiry of the 21 days' notice for parties to file submissions, however, it was wrong to deliver the ruling without notice to the parties and in their absence. They also relied on the case of Patrick Simiyu Vs. Republic (ibid) where it was held that "any orders likely to impact negatively on the accused person should as much as possible be made in his or her presence"
9. I have considered the application together with the competing written submissions and, in my view, the issue for determination is whether the revision application herein has merits. In order to do so, this court reminds itself of its powers under section 362 of the Criminal Procedure Code 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."
10. In the Malaysian case of Public Prosecutor Vs Muhari bin Mohd Jani and Another [1996] 4 LRC 728 at 734, 735 it was held:

"The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of "paternal or supervisory jurisdiction" in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we



should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.

11. The kind of supervisory jurisdiction to be applied in this instance is limited to the lower court’s findings, sentences, orders and regularity of any proceedings. I shall explain. In interrogating the findings of the court according to the ruling in question, upon perusal of the lower court file, the arguments made were straight-forward and the court proceeded to allow consolidation of the 2 cases. The reasoning applied was that the complainant, suit property and the time of the crime were common in both cases and that the only difference was the names of the accused persons.
12. On the issue of regularity of proceedings, I take note that there is no notice issued from the court to notify the parties of the change of date for delivering the ruling. As a result, the parties were not present when the ruling was delivered.
13. According to the 9<sup>th</sup> Edition *Black’s Law Dictionary* “ruling” is as good as a judgment and is defined therein as “The outcome of a court’s decision either on some point of law or on the case as a whole”. Therefore, the ruling arising from this revision is in the category of judgment, which is provided for under section 168(3) of the *Criminal Procedure Code* as follows:
  - “(1) The judgment in every trial in a criminal court in the exercise of its original jurisdiction shall be pronounced, or the substance of the judgment shall be explained, in open court either immediately after the termination of the trial or at some subsequent time, of which notice shall be given to the parties and their advocates, if any:

Provided that the whole judgment shall be read out by the presiding judge or magistrate if he is requested so to do either by the prosecution or the defence.
  - (2) The accused person shall, if in custody, be brought before the court, or, if not in custody, be required by the court to attend, to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of a fine only or he is acquitted.
  - (3) No judgment delivered by a court shall be invalid by reason only of the absence of a party or his advocate on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their advocates, or any of them, the notice of the day and place.
  - (4) Nothing in this section shall limit in any way the provisions of Section 382.”
14. Additionally, and with reference to section 168(3) of the *Criminal Procedure Code*, Chapter Four of the *Judicial Criminal Procedure Bench Book*, page 109 provides that the absence of a party during delivery of the judgment or failure to notify the parties of the said judgment, does not invalidate the judgment. The appellant alleged that the basis of the revision is that the ruling in question was delivered in the absence of the parties and without notice. Given the above cited sections, I am persuaded that the trial court’s decision is not invalidated by virtue of the absence of and lack of notice to parties.
15. On submissions, the court directed that the parties file their submissions within 21 days. The ruling was delivered 06 days after the lapse of the timeline and yet the appellant had still not made sufficient effort to file his submissions. If the applicant is of the view that he was disadvantaged by his failure to file submissions for whatever reason, his recourse lies in appeal and not revision. Further, nothing



barred the court from delivering its ruling before the scheduled date. In fact, the court did so in the interest of justice and to achieve the intention in Article 159(2)(b) of the Constitution of Kenya. The court held thus in the case of Sylvester Mwai Vs Republic [2021] eKLR where it was faced with similar circumstances:

“If the court intends to pass judgment at some subsequent time, it must give Notice of the date and time to the parties and their advocates, if any. While the Criminal Procedure Code does not prescribe a period within which judgment should be pronounced, the right to a speedy trial demands that the trial court issue a judgment without unreasonable delay, especially if the accused is detained....Article 159(2)(b) of the Constitution obliges courts of law to administer justice without delay”

16. By dint of the above discussion, I do find that though the ruling was delivered in the absence of the parties there is no reason to interfere with the ruling by way of this revision. I therefore find no merit in the revision and hereby dismiss it. For the avoidance of doubt, the order dated March 30, 2023 staying the lower court proceedings is hereby vacated.

17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 9<sup>TH</sup> DAY OF AUGUST, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent

