



**Republic v Ali & 2 others (Criminal Revision E055 of 2023)
[2023] KEHC 23567 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E055 OF 2023
DO CHEPKWONY, J
SEPTEMBER 28, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

HUSSEIN MOHAMMEDABDILIE ALI 1ST ACCUSED

UNKNOWN ALIAS MIRE ABDULAMI ALI 2ND ACCUSED

MOHAMMED ABDI ALI 3RD ACCUSED

RULING

1. What is before the court for determination is the notice of motion application dated April 4, 2023 which seeks the following orders:
 - a. Spent;
 - b. That the decision by the Chief Magistrate Court- Kahawa in Criminal Case No.3 of 2021 delivered on the 21st February, 2023 where the trial court ruled that PW38 will not adduce evidence pursuant to forensic examination of the accused/respondents mobile phones be set aside and revised.
 - c. That an order for stay for the lower court proceedings be granted pending the hearing and determination of this application.
 - d. Any further orders this Honourable court may deem fit.
2. The application is based on affidavit of Michael Sang sworn on April 4, 2023. The grounds as set out in the application are as follows:



- a. That the Accused persons are facing various charges arising from the [Prevention of Terrorism Act](#) which arose from the terrorist attack that took place at the Dusit D2 Hotel Complex on the January 15, 2019;
 - b. That on the November 28, 2022, PW 38 Chief Inspector Joseph Kolum sought to rely on several electronic evidence that was obtained pursuant to forensic examination of mobile phones which were seized from the Accused person. The Defence Counsel objected the use of the said evidence;
 - c. That the Trial Court presided over by Lady Justice Diana Mochache on the February 21, 2023 ruled that PW 38 will not rely nor adduce the mobile phones on the basis that no separate Search warrant was obtained before the forensic examination was done.
 - d. That the decision of the Trial Court is not Correct nor proper and is legally erroneous and puts at risk the National Security and ongoing criminal trials and other criminal trials in other Courts.
 - e. That the charges that the Accused/Respondent are serious and attract very stiff sentences and hence there is need to ensure that all evidence is on record so as to ensure that justice is done and seen to be done. The matter at hand is of great public interest and touches on national security
 - f. That the applicants seeks that the High Court exercises its discretion as provided for under section 362 of the [Criminal Procedure Code](#) and it is the interest of justice that the orders sought be issued.
3. The Accused persons' Counsel filed preliminary objection and grounds of opposition dated April 26, 2023 on the following grounds:
- i. This Honourable Court lacks jurisdiction to hear & determine the application herein for the reason that the decision that is been challenged was penned off by a Judge & not a Magistrate;
 - ii. Nowhere in the prayers sought by the Applicant is there a call (prayer) for the court to satisfying itself as to the correctness, legality or propriety of the decision in question as to the regularity of any proceedings of any such subordinate court, hence limiting their remedy to an Appeal & not a revision application;
 - iii. Besides reference being made to National Security there is no other basis that is being raised to want to upset the decision of Hon. Lady Justice Diana Kavetsa and neither does the Applicant bring out any exigent and/or special circumstances that would have justified the violation of the right to privacy so as to align the said evidence to the dictates of article 50(4) of the [Constitution of Kenya](#), 2010;
 - iv. The Applicant has failed to justify the inclusion of the said evidence and if the admission of that evidence would not render the trial unfair, or would otherwise not be detrimental to the administration of justice.
 - v. Other grounds to be adduced during the hearing of our preliminary objection to the Application herein.
4. Basically, the prosecution's (applicant's) application dated April 4, 2023 brought under section 362 of the [Criminal Procedure Code](#) seeks reviewing of the ruling delivered on February 21, 2023 wherein the objection by accused persons' counsel on production of forensic evidence obtained from exploitation



the accused person's mobile phone with their consent but without first seeking warrants to conduct such exploitation by PW38, was upheld.

5. According to the prosecution, given the seriousness of the charges accused persons' are facing, it calls that the available evidence be presented before court in its entirety and the court should not sacrifice the same at the altar of its inadmissibility.
6. In response, the respondent objected to the application vide a notice of preliminary objection dated April 26, 2023 wherein the main ground raised is whether this court has jurisdiction to exercise supervisory jurisdiction to revise the subject of Honourable Lady Justice Diana Kavedza, a Judge of the High Court hence seized with parallel jurisdiction with this court. To which the prosecution responded by submitting that the preliminary objection was frivolous and misguided given that the Honourable Lady Justice Diana Kavedza was granted leave by the Honourable Chief Justice to continue with her Magistrial duties and finalise this matter, which is subject of this ruling.
7. It serves repetition for this court to state that anything that purports to be a preliminary objection must not deal with disputed facts and it cannot derive its foundation from factual information which stand to be tested by rules of evidence. A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point, may dispose of a suit. In the celebrated case of *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* [1969] E.A 696, an objection on jurisdiction of a court has been found to be a pure point of law which should be addressed at preliminary stage.
8. Out of abundance of caution, in view of the application and the objection raised against it, the issue for this Court to consider is whether it can exercise an oversight mandate over the subject ruling delivered on February 21, 2023 by Honourable Justice Diana Kavedza.
9. It is not in dispute that Honourable Justice Diana Kavedza was appointed a High Court Judge while serving as a Chief Magistrate at Kahawa Law Courts, where among other cases, she was presiding over Kahawa Chief Magistrate's Criminal Case No.3 of 2021. She was then granted leave by the Honourable Chief Justice to continue her Magistrial duties, hear and finalize the said case. In the course of this, she delivered the subject ruling which this court has looked at and confirms that indeed she signed of as a Judge and not a Chief Magistrate. This is what the record reflects:-

“Dated and delivered this 21st day of February, 2023”.

.....

D. K. Mochache

Judge

10. The oversight role is entrusted to this court by virtue of article 165(6) and (7) of the [Constitution](#) which provide 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.



11. This Constitutional mandate is replicated under Section 362 and 364 (1) of the [Criminal Procedure Code](#). Section 362 of the [Criminal Procedure Code](#) provides:-

“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”.

On the other hand, Section 364 of the [Criminal Procedure Code](#) provides:-

- (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 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 sections 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 subsection 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”.

12. Although not expressly stated, the above provisions take cognisance that the jurisdiction of the court be general or specific or limited and, in that regard, the Constitution limits the High Court supervisory authority only to court subordinate to it but not courts superior or of equal jurisdiction with it. It then follows that in exercise of the mandate under Section 362 of the [Criminal Procedure Code](#), “the court may call and examine, the record if 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 but not a record, order, ruling or Judgment issued by the Superior Court.

13. In considering the above principles, with regard to the subject ruling in the instant revision application, this court has established that the same is indicated to have been issued by a Judge. The [Interpretation and General Provisions Act](#), Cap 2 of the Laws of Kenya defines “Judge” to mean a Judge of the High Court or a Judge of the Court of Appeal and includes a Commissioner of Assize and any person appointed temporarily to be or to act as a Judge of the High Court or the Court of Appeal.

14. It goes without saying that as a High Court, this Court cannot exercise its oversight mandate over a decision issued by either a Judge of the High Court or by the Court of Appeal unless it is indicated in the decision that the same was issued in his/her capacity as a Magistrate or in exercise of the powers of a subordinate court within the meaning of Article 169(1)(a) of the [Constitution](#) which provides that:-
169.

- (1) The subordinate courts are—
 - (a) the Magistrates courts;

15. Whatever the case, this Court as a creature of the Constitution and statute, must only exercise the jurisdiction conferred to it by either of the two. This Court is thus persuaded, and associates itself



with the decision of the Supreme Court of Kenya In the Matter of Interim Independent Electoral Commission, Constitutional Application No.2 of 2011, where it was observed that:-

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

16. Having pointed out that Article 165(6) and (7) of the *Constitution* and Section 362 and 364 of the *Criminal Procedure Code* confer supervisory jurisdiction to this Court only for matters, orders, ruling and or judgment by a subordinate court but not those issued by a Judge of equal jurisdiction or Superior Court, then it cannot exercise jurisdiction it does not have or exceed jurisdiction on itself through some form of innovation. Any action taken by the court without jurisdictions or exceeding jurisdiction would be unconstitutional and illegal.
17. With the above said, this Court finds that the ruling dated 21st February, 2023, having been issued and signed by a Judge in a matter that is still properly before the Magistrates’ Courts’, has compromised this Court’s supervisory or appellate jurisdiction.
18. It is therefore this Court’s considered view that the matter be placed before the Honourable Judge for directions on her jurisdiction in Kahawa Chief Magistrates Criminal Case No.3 of 2021.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF SEPTEMBER, 2023.

D.O CHEPKWONY

JUDGE

