



REPUBLIC OF KENYA



**Republic v Ibrahim (Criminal Revision E189 of 2023)  
[2023] KEHC 24576 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24576 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL REVISION E189 OF 2023  
A. ONG'INJO, J  
OCTOBER 31, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NEDIM MOHAMED IBRAHIM ..... RESPONDENT**

**RULING**

**Application**

1. The application dated 11<sup>th</sup> October 2023 was brought under Articles 50, 159, 165 (6)(7) of *the Constitution* of Kenya 2010, Sections 362 and 364 of the *Criminal Procedure Code* and all other enabling provisions of the law seeking that the proceedings in Mombasa Chief Magistrates Court Criminal Case no 973 of 2018 be stayed pending the hearing and determination of the application for revision.
2. The application is premised on grounds that the matter, Mombasa Criminal Case no 973 of 2018, *Republic v Nedim Mohamed Ibrahim*, the accused was charged with the offence of forgery contrary to Section 350 (1) of the *Penal Code* and a second count of uttering a document without authority contrary to Section 353 of the *Penal Code*.
3. That six prosecution witnesses gave their evidence and before the prosecution closed their case and parties directed to file written submissions, the prosecution counsel made an oral application under Section 150 of the *Criminal Procedure Code* to have the court summon the court administrator to produce records of civil proceedings in Mombasa High Court Civil Case no 122 of 2014. That the court failed to address and/or give a ruling on this application before directions to file written submissions were taken.
4. The applicant therefore prays that this court be pleased to exercise its power under Section 364 of the *Criminal Procedure Code* for reopening of the prosecution's case for purposes of addressing the



application made by the prosecution counsel for production of records in Mombasa High Court Civil Case no 122 of 2014 before proceeding with the ruling on a case to answer.

5. The application is supported by the affidavit sworn by no xxxx Chief Inspector Moreen Kioko on 11<sup>th</sup> October 2023 that the source of the crucial evidence (a forged affidavit) to be produced before the trial court in the criminal matter herein is in the records of civil proceedings in Mombasa High Court Civil Case no 122 of 2014. That justice in Mombasa Criminal Case no 973 of 2018 will only be served once the said civil case file is thoroughly inspected and that it is only fair and just that the state is given an opportunity to present its case before ruling on a case to answer by the trial court can be delivered.

### **Applicant's Submissions**

6. The applicant submitted that records before the trial court shows that the prosecution did not apply to close its case after PW6 gave his evidence. That the correct position was that the prosecution made an oral application inviting the court to exercise its discretion for production of records in civil proceedings number 122 of 2014. That the applicant's contention was that the trial court ought to have made a determination of the oral application, instead the court gave directions for parties to put in written submissions on a case to answer and technically closing the prosecution's case without addressing the issue. That court records are clear on what actually transpired and that is the main reason why the present revision for the court to satisfy itself as to the correctness, legality or propriety of the proceedings.
7. The applicant relied on Section 150 of the *Criminal Procedure Code* which empowers the court at any stage of the trial to summon a new witness or recall a witness already examined for reexamination, where the applicant in the trial court prayed to have the Deputy Registrar summoned to produce records of civil proceedings in High Court Civil Case Number 122 of 2014.
8. The applicant cited the decision of Joel Ngugi, J. in Criminal Revision no 4 of 2016, *Stephen Mburu Kinyua v Republic* (2016) KLR where he acknowledged that Section 150 of the *CPC* can be invoked by the prosecution in an appropriate case as follows: -

“... the section appears to bifurcate the first part which states that ‘A court may at any stage of a trial or other proceeding under this code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall or reexamine a person already examined ...’ from the second part which reads ‘... and the court shall summon and examine or recall and reexamine any such person if his evidence appears to it essential to the just decision of the case.’ ... several authorities have suggested that the first part clothes the trial court with discretion to call a witness while the second part creates an obligation on the trial court to call the witness if that person's evidence appears essential to the just decision of the case. For example, in *Kulukana Otim v R* (1963) EA 257, the Court of Appeal in considering Section 148 of the Ugandan Criminal Procedure Code which is, word for word, the same as our Section 150 ... It will be seen that the first part of the section confers a discretion, but under the second part, it appears to a judge that the evidence of a person is essential to the just decision of a case, there is a mandatory duty on the judge (if the witness has not been called) to call him himself ...”

9. The respondents filed their submissions on 19<sup>th</sup> October 2023 but were only brought to the attention of the court on 27<sup>th</sup> October 2023. The said submissions were to the effect that the prosecution told the court about production of High Court Civil Case no 122 of 2014 after PW6 had testified and after the prosecution had closed its case. That the issue of production of the above file was brought out in cross examination of PW6 but the prosecution dismissed the issue and even confirmed its position while



writing its submissions and that the application for revision is to create a factual basis for reopening of the case that was closed voluntarily.

10. The respondent further argued that during discovery on 5<sup>th</sup> November 2019, the prosecution supplied accused person with documentary evidence and there was no mention of High Court Civil Case no 122 of 2014 and no statement was obtained from court official to produce the same. It was contended that request for revision was unconstitutional and attempt to apply Section 150 is therefore sinister and intended to abuse [the constitution](#) and violate the right of the respondent.
11. The respondent's counsel also argued that had the prosecution intended to call additional evidence, it could have made an application under Section 144(1) and not Section 150 of the [Criminal Procedure Code](#) which is meant for the court to act suo moto. It was argued that it was not clear what the court was supposed to revise.

### **Analysis and Determination**

12. The Applicants sought the proceedings in Mombasa Chief Magistrates Criminal Case no 973 of 2018 be stayed pending the hearing and determination of the application for revision *vide* a letter dated 11<sup>th</sup> August 2023. The Applicant stated that the prosecution had made an oral application under Section 150 of the Criminal Procedure Court to have the court summon the Court Administrator to produce court issues in High Court Civil Case no 122 of 2014 but the court failed to give directions and/or ruling on the application before directions to file written submissions were taken. The applicant therefore sought that the trial court file be called so that the High Court satisfies itself on the correctness, legality and/or propriety of the order closing the prosecution's case and fixing a ruling date before the trial court address the application made by the prosecution.
13. The power of the High Court in revising orders for subordinate court and tribunal is provided under Article 165 (6) and (7) of [the Constitution](#) as well as Section 362 and 364 of the [Criminal Procedure Code](#) where the High Court may call for records of the subordinate courts or other inferior tribunals and examine its legality, correctness, propriety or regularity. The purpose of revisional jurisdiction of the High Court is to enable the High Court in manifest cases to correct manifest irregularities of illegalities and give appropriate directions on the manner in which the trial should be proceeded with in the subordinate court. (See [Joseph Mbuvi Nduvi v Republic](#) (2019) eKLR).
14. The last witness in this matter Chief Inspector Jackson Guyo testified on 25<sup>th</sup> September 2023. On 13<sup>th</sup> September 2023, the prosecutor informed the court that they were remaining with two witnesses and one of the witnesses was in court on that day and they were given two dates, 25<sup>th</sup> and 26<sup>th</sup> September to have 2 witnesses testify and summons were issued to the Investigating Officer to bond all the remaining witnesses. The Investigating Officer was put on notice. On 25<sup>th</sup> September, Daniel Gutu, Forensic Document Examiner testified and when PW6, CIP Guyo testified, the issue of the affidavit in High Court Civil Case no 122 of 2014 emerged and the defence counsel objected to production of the document but after both sides argued as to whether the same could be produced, the trial court simply ordered PW6 to proceed and he went ahead to produce the letter forwarding the affidavit which production had been objected to but said nothing as to whether the affidavit should be produced or not. PW6 then concluded its testimony in chief and was examined and reexamined. Thereafter the Respondent's advocate said they could file submissions.
15. This court has considered the application for revision, the Applicant's and Respondent's submissions and the legal provisions that the application was brought under as well as records of the trial court. The issue for determination is whether the application is merited for the orders sought to be granted.



16. This court finds that the trial magistrate had an obligation to make a finding as to whether or not the application by the Prosecuting Counsel to produce the affidavit by PW6 or the Court Administrator was allowed or not. In the event that the application was not allowed, the trial court had a duty to ensure that the prosecution closed its case before giving its directions as to filing of submissions. As it stands, the prosecution's case remains open and there is therefore an error on the face of the record that warrants an order of revision. The application for revision is allowed. The trial court should regularize its records as to production of the affidavit and closure of the prosecution case. Orders accordingly. Copies of ruling to be supplied to parties. Leave to appeal granted within 14 days. Mention on 20.11.2023 before the trial court.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of: -**

Ogwel- Court Assistant

Mr. Ngiri for the Republic

Mr. Paul Mwangi Advocate for the Respondent

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**

