



REPUBLIC OF KENYA



KENYA LAW
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Director of Public Prosecution v Ndethiu & 4 others (Criminal Revision E080 of 2023) [2023] KEHC 24449 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL REVISION E080 OF 2023
TW CHERERE, J
OCTOBER 26, 2023**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION APPLICANT

AND

PAUL MUTUMA NDETHIU & 4 OTHERS RESPONDENT

RULING

Background

1. The material presented before the court reveal that Respondents were charged in Meru CM CR. Case No. 1771 of 2018 with conspiracy to defraud contrary to section 317 of the *Penal Code*.
2. The proceedings of the trial court reveal that on 27th March, 2023 the Applicant availed its ninth witness, a document examiner to testify.
3. In the course of his testimony, he referred to an exhibit memo form, specimen signatures and handwritings of Respondents and a document examination report prepared by his colleague but before he could explain them further, Respondent's counsel opposed the documents mainly on the grounds that:
 1. The documents had not been supplied to the defence
 2. Pre-trial conference closed on 27th March, 2019
 3. The documents were prepared after close of pre-trials
4. The trial court agreed with the defence and declined the production of the documents by the document examiner.
5. Respondent have moved the court to review the trial magistrate's ruling dated 27th March, 2023 on the ground that the court declined to allow the prosecution time to avail evidence of service of the



- documents and consequently closed the prosecution case on 17th May, 2023 without the documents thereby prejudicing the prosecution case.
6. Application was opposed by Mr. Carlpeters Mbaabu for the 1st Respondent vide his affidavit sworn on 05th July, 2023 by mainly reiterating the grounds upon which the application for production of documents by the document examiner was opposed. In addition, counsel submitted that the case was over 5 years old and reopening the case would prejudice the 1st Respondent.
 7. 2nd Respondent opposed the application on the basis that the ruling by the trial court complied with Article 50 of the Constitution and was fair in the circumstances.
 8. I have considered the revision in the light of the proceedings and affidavits and grounds of opposition on record.
 9. In exercising the powers of revision, the High Court seized of the matter is not sitting on appeal from the decision of the trial court, but only invoking its supervisory jurisdiction, in cases where there are glaring acts or omissions on the part of the trial court leading to a miscarriage of justice.
 10. In George Aladwa Omwera vs. R [2016] eKLR, the powers of the High Court, on revision, were set out as follows:

“In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.
 11. In Veerappa Pillai vs Raman & Raman Ltd. And Others 1952 AIR 192, 1952 SCR 583, the Supreme Court of India has this to say:

“The supervisory powers are obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a Court of Appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made....”
 12. In Republic vs. Anthony Thuo Karimi [2016] eKLR, the court observed:

“The basic object behind the powers of revision is to empower the high court to exercise the powers of an appellate court to prevent failure of justice in cases where the code does not provide for appeal. The power however is to be exercised only in exceptional cases where there has been a miscarriage of justice owing to: - a defect in the procedure or a manifest error on the point of law, excess of jurisdiction, abuse of power, where decision upon which the trial court relied has since been reversed or overruled when the revision appeal is being heard.
 13. It is on record that the production of documents by the document’s examiner was opposed and upheld by the trial court on grounds that they had not been supplied to the defence before 27th March, 2023 and that allowing their production would amount to trial by ambush.



14. Article 50 (2) of the *Constitution of Kenya, 2010* provides for the rights of every accused person which includes the right to be presumed innocent until the contrary is proved, to be informed of the charge, with sufficient detail to answer it, to have adequate time and facilities to prepare a defence and to have the trial begin and conclude without unreasonable delay.
15. It is trite and I agree with both the defence and the trial court that it is good practice to avail all evidence to the defence before the trial commences or at least before the evidence of the relevant witness is tendered.
16. There is evidence that the documents by the document's examiner was opposed and upheld by the trial court on grounds that they had not been supplied to the defence before 27th March, 2023.
17. The production and admission of the said exhibits would not in my considered view have amounted to condemnation of the Respondents for the reason that it was within their right to request to be supplied with the documents even at that late state and no prejudice would have been occasioned to either of the parties.
18. With respect, I find that it will be highly prejudicial to the Applicant to be denied an opportunity to tender whatever evidence they have in support of their case whereas their omission of non-service of the documents can be cured by service of the same and availing the defence sufficient time to answer to them.
19. From the foregoing, I find that the orders of the trial court has resulted in manifest injustice to the Applicant and calls for the court to exercise its revisionary power.
20. In the end, the order of the trial magistrate dated 27th March, 2023 declining production of the documents examiner's exhibits is set aside. The consequent order dated 17th May, 2023 closing the prosecution case is similarly set aside and it is directed that the case be re-opened for hearing of the remaining prosecution witnesses on merit.

DELIVERED AT MERU THIS 26TH DAY OF OCTOBER 2023

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant s - Kinoti/Munene

For DPP - Ms.Rita Rotich (PPC)

For 1st Respondent - Mr. C. Mbaabu Advocate

For 2nd Respondent - Mr. Muriuki Advocate

For 3rd Respondent - Mr. Mungai Advocate

For 4th Respondent - Mr. Kaaria Advocate

For 5th Respondent - Mr. Mutegi Advocate

