



**Sphikas & another v Kaluma & 2 others; Chief Magistrate W.F. Andayi Milimani
Nairobi Chief Magistrate Court & 2 others (Interested Parties) (Criminal Revision
E062 of 2021) [2022] KEHC 12669 (KLR) (Crim) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12669 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E062 OF 2021
LN MUTENDE, J
JULY 25, 2022**

BETWEEN

CONSTATINE GEORGE SPHIKAS 1ST APPLICANT

DEBORAH ACHIENG ADUDA 2ND APPLICANT

AND

GEORGE PETER OPONDO KALUMA 1ST RESPONDENT

JOHN WAMITI NJAGI 2ND RESPONDENT

FLORENCE SEYANOI KIBERA ALIAS DOROTHY SETANOI

MOSCHION 3RD RESPONDENT

AND

**CHIEF MAGISTRATE W.F. ANDAYI MILIMANI NAIROBI CHIEF
MAGISTRATE COURT INTERESTED PARTY**

DIRECTOR OF PUBLIC PROSECUTIONS INTERESTED PARTY

**DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT INTERESTED
PARTY**

RULING

1. The Applicants moved this court pursuant to the provisions of Sections 200 (1) (b) and 362 to 365 of the [Criminal Procedure Code](#), Articles 47(2), 50 (1)(2)(9), 165 and 167 of the [Constitution](#); Sections 17, 25, 44,57,6 3A and 143 of the [Evidence Act](#); Section 318 of the [Penal Code](#); Sections 110 to 113 of the [Criminal Procedure Bench Book](#) (February, 2018); Directions of the Chief Justice Maraga in Gazette



Notice No 3137 of April 17, 2020 (Paragraph 19); Sections 2,4(2)(b), 9 and 13 of the [Victim Protection Act](#) and all enabling provisions of the Criminal Procedure Code.

2. The application is for *inter alia*, revision/reversal order of the trial court's ruling and an order holding that the applicants/victims are entitled to appear to testify at trial by teleconference video from their residence location overseas. The applicants also pray for an order that the magistrate court is obligated to accept further evidence by the victims.
3. Prayers in the application are framed as follows:
That the High court issues mandamus order that:
 - i. The ruling that ordered *denovo* trial of the matter in 2019 be reversed and/or quashed and the prior trial file and the *denovo* files be consolidated.
 - ii. Documentary evidence introduced prior to February, 3 to 5, 2014, March, 11 and 20, 2014 during the trial hearing and transcripts introduced prior to February, 3 to 5, 2014, during examination in chief of Aduda by prosecution as against the accused who completed cross examination be transferred and consolidated with the *denovo* file.
 - iii. That the victims are entitled under Section 13 (a) of the [Victim Protection Act](#) to apply for and be issued with trial court summons and warrants for relevant witness *inter alia* the CID Investigators of the matters, former advocates of the victims who exchanged relevant correspondence with the accused and other material witnesses all who are important, if not summoned by the DPP.
 - iv. An order of mandamus that the victims are entitled to be present and have accepted in trial the evidence of the affidavits of the accused filed at the High court adjudications set out above and Law Society of Kenya Disiplinary Tribunal Private Prosecutions Cause No 144/12,200/13 which established certain admitted facts and issues, if such is not presented in evidence by the DPP.
 - v. Stay of the proceedings in Chief Magistrate Criminal Case No.1134/12, Criminal Case No 1133/12 and Criminal Case No 11/13 pending hearing and determination of the judicial revision application.
4. The application is premised on the grounds that the matter was filed in the year 2012, and, that delay in its determination is caused by lack of proper prosecution. That the trial will be properly prosecuted if the applicants are granted a chance, and, that, relevant material and binding evidence may be disallowed thus denying the victims fair hearing.
5. The 3rd Respondent filed a Preliminary Objection seeking to strike out the application on grounds that:
 - a. The court is sitting in its supervisory jurisdiction under Article 165 (6) of the [Constitution](#) but the court lacks jurisdiction to hear and determine the application for prerogative orders.
 - b. The jurisdiction to hear and determine prerogative rights is exclusively reserved for the High Court Judicial Review Division in its original jurisdiction under Article 165 (3) (a) of the [Constitution](#).
 - c. The victims/ complainants to ongoing cases cannot seek aid of this court to control criminal proceedings against the 3rd respondent, and, the application is aimed at a nefarious scheme or purpose which a court of law cannot countenance.



- d. The applicants lack locus to present the motion without the consent and/or authority of the Director of Public Prosecutions and the application flies in the face of Article 157 of the Constitution.
 - e. The applicants have not met the threshold in Order 53 of the Civil Procedure Rules and this court lacks jurisdiction.
 - f. That there is nothing improper and/or illegal in the Rulings and Orders of the trial court made on September 23, 2020 and December 14, 2020 to warrant invocation of the revision jurisdiction.
 - g. The applicant victims had a right to appeal against the 1st Interested Party's decision of September 23, 2020 and December 14, 2020 but failed to do so thus the application files in the face of Section 364(5) of the Criminal Procedure Code.
6. The 3rd Respondent (Applicant) in the Preliminary Objection prays for the Notice of Motion filed on March 3, 2021 to be struck out and/or dismissed and that the Victims' Advocate be personally liable for costs of the application.
 7. The Preliminary Objection was canvassed through written submissions. It is urged by the 3rd Respondent (Applicant) that the High Court is empowered to issue judicial review orders under Article 23 (3) (f) of the Constitution and under the current constitutional dispensation, such orders should be sought through a Petition under Order 53 of the Civil Procedure Rules which is not the case herein.
 8. That the applicant filed the application under the Criminal Revision Division which does not exist. In this regard she referred to Section 11 of the High Court Administration and Organization Act, 2015 (Act) which lists the High Court divisions. The Act establishes divisions for ease of management and enhancement of administration of justice and prerogative orders are the reserve of Judicial Review division of the court.
 9. The 3rd respondent submitted that the application is faulty and not properly before court. She cited the case of Cyril J Haroo & Another vs Uchumi Services Ltd & 3 others (2014) eKLR on the commencement of a suit without following rules, where the court held that such a suit is declared a nullity.
 10. It is also argued that the instant application cannot be cured under Article 159 of the Constitution and must be struck out. On the question whether the court can be invoked to control lower court proceedings, It is submitted that when moved properly this court can exercise supervision over the lower court; That the application is a poorly executed scheme aimed at compelling the trial court to conduct the applicants' suit in a manner proposed by the applicants and not as prescribed by the law. That the applicants misdirected themselves on the scope of this court's supervisory jurisdiction. She cited the case of DPP vs Perry Mansukh Kansagara & 8 other (2020) eKLR where the court listed circumstances where courts can invoke its constitutional supervisory jurisdiction.
 11. Further, that what should be before this court is a show of how the trial court erred in pronouncing itself on issues raised therein resulting on illegality or impropriety. That what is before this court is an appeal in disguise as what the applicants seek is grant of orders which should have been a subject of appeal.
 12. That the application is brought in the name of the Republic but the only instances where a suit is instituted in the name of the Republic is in criminal matters or judicial review proceedings under Order 53 of the Civil Procedure Rules (CPRs) and the application not being a Petition it would be assumed that the applicant intended to institute judicial review for mandamus, certiorari and prohibition but



- they have not invoked Order 53 of the CPRs in seeking the said orders and did not even seek the required leave to institute the suit in the name of the Republic.
13. The office of the Director of Public Prosecutions, 2nd Interested Party supported the Preliminary Objection.
 14. In response, the applicants submitted that their intention was to file a criminal revision in the High Court Criminal Division and that the word revision is present in all documents filed. That the error in the first document filed referring to Criminal Revision Division does not detract from the clear intention of the applicant. That technicalities should not be used to dismiss applications filed where trespass of constitutional rights is alleged. They cited Article 159(2) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities, and cited the case of Anchor Limited vs Sports Kenya, Civil Appeal No 19 of 2016 where the court stated that:
 - “8. I will begin by quickly addressing the first objection by the Defendant to wit that the Application is expressed to have been brought under the wrong provisions of the law and that, ergo, it must be dismissed.
 9. I will simply state that our jurisprudence and decisional law no longer countenances this kind of technical and formalist justice. If it must be repeated the admonition that Courts can no longer deploy technicalities as the basis for their decisions comes from the Constitution: Article 159(2) (d).”
 15. That the 3rd respondent’s submission that the erroneous filing of the case as Criminal Revision Division and non-compliance with rules makes the court lack jurisdiction is frivolous. That a letter can also be used to bring applications for criminal revision; and, the court has wide powers during revision pursuant to supervisory jurisdiction under Article 165(6) of the Constitution and Section 362 and 365 of the Criminal Procedure Code .
 16. That the type of orders that can issue are not limited and that the words “any other order” under Section 362 of the Criminal Procedure Code permits the court to revise any order except an acquittal. And, the court can issue prerogative writs following the decision of Prosecutor vs Stephen Lesinko Criminal Revision No 9 of 2018 and Director of Public Prosecution vs Perry Mansukh Kasangara et al Criminal Revision No 4 of 2020.
 17. On the question whether the applicant should have appealed, the applicants urged that they do not have a right to appeal. That Section 347 (1) limits this right to a person who has been convicted, but, the victims are merely additional witnesses and not the Director of Public Prosecutions. That the applicants are also not seeking to overturn a conviction, sentence or acquittal which is for appeal but they are pursuing revision of orders of the lower court and the only possible avenue would be a revision.
 18. On the issue of *locus standi* the applicant submits that the victims do not require the prosecution’s consent. That Section 4 (2) (b) of the Victim Protection Act, 2014 enacts that every victim shall be given an opportunity to be heard and to respond before any decision affecting him or her is taken. That according to Section 9 (1) (d) of the Act they have the right to have cases determined before a competent tribunal; and an application for revision can be made by a complete stranger to the application unlike in appeal. Reliance was placed on the case of Malik Mohammed Kipsang vs Republic Revision Case 1 of 2005.
 19. I have considered rival submissions by the 3rd Respondent and Applicants herein regarding the Preliminary Objection raised. I note that in presenting arguments, Parties have also addressed what borders on the main issues in contention. Following directions given, this court which is alive to the



- question of not touching a matter without jurisdiction, will refrain itself and thus only deal with the objection raised at this stage.
20. The law on Preliminary Objections was set out in the case of *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd* [1969] EA 696 where the court held that:

“...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 the suit.”
 21. Issues raised in the objection must be correct and must not be disputed. The court must also not be involved in determining evidence as this should be left for the trial process.
 22. In the case of *Nitin Properties Ltd vs- Singh Kalsi & another* [1995] eKLR, the Court of Appeal captured the legal principle as follows:

“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”
 23. In this matter, the 3rd respondent has filed the objection contesting this court’s jurisdiction to determine the application; the applicants *locus standi* to bring application, and, she also cites breach of the applicable law and have argued that this takes away the court’s jurisdiction to determine the case. These are points of law which if successful would dispose off the application.
 24. Other grounds as to whether the trial court orders were merited and whether the applicant ought to file an appeal are in my view contested facts which can only be determined after interrogation of the subordinate court’s record. This is a process that is also dependent on this court’s discretion under Section 362 and 365 of the Criminal Procedure Code. Further contention that the applicants seek to control the criminal proceedings is also a matter to be determined during the hearing of the application. Therefore, at the outset, the Grounds cited as No 3,6,7 in the objection are dismissed.
 25. As to whether the applicants have *locus standi*, the term *locus standi* refers to the right to address a court of law. It signifies a right to be heard and that a person must have a sufficiency of interest to sustain his standing to sue in a Court of law. This is stated in the case of *BV Narayana Reddy vs State of Kamataka Air* (1985) Kan 99, 106 (The Constitution of India, ARD 226) cited in *Law Society of Kenya vs Commissioner of Lands & 2 others* [2001] eKLR by Ombija J.
 26. *Locus standi* goes to the root of the case and jurisdiction of the court since a court cannot hear a party who does not have audience and such case would be void *abinitio*. The applicants have brought the revision in their capacity as complainants in the lower court criminal cases. This fact is not disputed by the 3rd respondent. The facts also point out that the applicants moved to this court after the trial court ruled against their application for certain orders. The applicants are not strangers but are key parties with respective rights under the *Victim Protection Act* (Act)
 27. Section 4 of the Act enacts that the victim has the right to present any information that is relevant to the proceedings. The Section ensures that the victim has a right to be heard during pendency of the trial and up to the sentence stage. Section 4 (2) (b) of the Act provides as follows:
 - (2) Subject to subsection (1), a court, administrative authority or person performing functions under this Act shall ensure that—
 - (a);



- (b) Every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken;

28. It is also trite that the right is enforced further to our constitutional edict to ensure fair hearing and administrative action. The rights under the Act are an independent right from the State or the offender as it allows the victims to address the Court in their own capacity. It is also trite that any aggrieved party may move to a higher court for revision pursuant to Section 362 of the Criminal Procedure Code. The applicants' right to approach this court are, therefore, not limited by any law. Hence, the 3rd Respondent's submissions that the applicant required the 2nd Interested Party's consent is unmerited and misconceived.

29. I must, therefore, interrogate whether criminal revision is similar to judicial review and whether the court has jurisdiction in the instant matter. Article 165 (6) & (7) of the Constitution provides 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.

In the case of *Prosecutor vs Stephen Lesinko* [2018] eKLR, the court held that Judicial review is a separate limb of the High Court's supervisory jurisdiction.

That : 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.

30. The process of revision and judicial review are both pursuant to the courts special power under Article 165 where the High court exercises superintendence over the subordinate courts.

The main difference is that the operating law in judicial review is the Law reform Act and the procedural rules of Order 53 of the Civil Procedure Rules while the criminal court is given jurisdiction under Section 362 and 364 of the Criminal Procedure Code.

31. The applicants are clear that they moved this court in its capacity as a revisionary court under Section 362 as read with Section 364 of the Criminal Procedure Code. This court therefore has jurisdiction to determine the application and it would be a defeatist argument to strike out the matter for want of jurisdiction or to refer parties to the Judicial Review, Division of the High Court. Similarly, the 3rd respondent's contention that the Civil Procedure Rules ought to be invoked in the process of seeking revision is misplaced.

32. As noted, the applicants did not intend to file judicial review though they seek orders that are ordinarily issued in suits against executive and administrative bodies. Further to this the criminal procedure code does not provide that the civil procedure rules, which is specific for civil claims, shall apply to the criminal justice system in revision. Therefore, there is no requirement for leave before filing revision nor is there requirement to specifically bring a Notice of Motion as legislated under Order 53 of the Civil Procedure Rules.

33. The 3rd respondent has argued that the applicant's prayer to be heard through video conference is resjudicata as this was determined by the trial court in an earlier ruling. Resjudicata is a point of law but in order to determine whether issues raised in the application are resjudicata the court has to interrogate



- the trial court record, affidavits and evidence which would assist in determining whether the issues were similar and whether they were fully disposed of.
34. The 3rd respondent further argues that the orders sought are reserved for judicial review, while the applicants responded on this argued that the revision court has wide powers under Article 165(6) of the Constitution. Under the current constitutional dispensation, the High court has unlimited jurisdiction over civil and criminal matters, the High court may also issue all necessary orders for administration of justice in exercise of its supervisory jurisdiction.
35. In Republic vs Juma & 2 others (Criminal Revision E160 of 2021) [2022] Mativo J (As he then was) stated that:
- “...Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs”. The court referred to the English case of *Gallagher vs Gallagher*, 212 So. 2d 281, 283 (La Ct App. 1968).
36. The applicants primarily seek setting aside and/or quashing of the chief magistrates ruling. The applicants also seek compelling orders allowing their prayer for the 2nd applicant to testify via teleconference and further orders to be allowed to produce judgments and rulings of cases between them and the accused in the matter. I agree that the nature of orders that can be issued under Section 362 and 364 of the Criminal Procedure Code are to reverse, annul, vary or to set aside the findings of the subordinate court as long as the accused is given audience.
37. In the case of Reuben Mwangi Nguri vs Republic [2021] eKLR Kariuki J held that:
- “...it is to be appreciated that the ambit created by the provisions of section 362 of the code empowers this court to exercise discretion as to the correctness, legality and propriety of the order or proceedings. There is no dispute that the trial court which held the sessions complained of by the applicant is inferior to this court as outlined in our Constitution of the Republic. The subordinate court is therefore a subject of supervisory and superintendent by this court in both judicial and administrative function. The court can therefore annul, review, vary or issue further directions on the matter complained of by an aggrieved party or which came into the attention of the court suo-moto. The only rider in the circumstances of this jurisdiction is to ensure the accused has an opportunity to be heard or his legal counsel before any decision is reached.”
38. The applicant has also invoked the provisions of Article 165 of the Constitution which refers to the unlimited supervisory power which is not bound by statutory limits. There is nothing to prevent this court from issuing the orders sought in the application if allegations are proved.
39. As already noted the Criminal Procedure Code does not specify how the application may be brought, the court has further power to issue orders on its own motion. The applicant has rightly argued that a revision may be brought by way of a letter, in practice, but that is not in issue since the applicant moved this court through a formal application. What is in issue is the heading of the application referring to the Republic as the Applicant and the particular High Court Division moved. As clarified by the applicants, the intention was to invoke this court’s jurisdiction under Section 362 and 364 of the CPC. Bringing the application in the name of the republic can only be taken as erroneous and the court should not delve into technicalities while shutting out a party who has brought issues that can be



determined on merit. The application may also not be defeated for want of form. Striking out pleadings is a drastic measure which can only be invoked where the errors cannot be cured by amendment. The orders sought in the application are poorly framed but the application may be amended in the course of the proceedings.

40. The upshot of the above is that the Preliminary Objection raised fails and is dismissed.

41. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2022.

L N MUTENDE

JUDGE

IN THE PRESENCE OF:

Ms Ajwang for Applicants

Ms Kibathi for the 2nd and 3rd Interested Parties

Ms Ngare for 3rd Respondent

Mr Wamiti Njagi for 2nd Respondent.

Court Assistant – Mutai

