Republic v Koech & 5 others (Criminal Revision E278 of 2021)
[2022] KEHC 13351 (KLR) (28 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13351 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E278 OF 2021

EKO OGOLA, J

SEPTEMBER 28, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

HENRY MARITIM KOECH ..... 1ST RESPONDENT

MESHACK OREU TANKOI ..... 2ND RESPONDENT

WILSON KIPCHIRCHIR YEBEI ..... 3RD RESPONDENT

LEAH JELAGAT ..... 4TH RESPONDENT

HENRY KIBII KIRUI ..... 5TH RESPONDENT

MAKIKI AGENCIES LTD ..... 6TH RESPONDENT

RULING

1. The applicant filed a Letter dated October 13, 2021 wherein the following orders were sought:
    a. Spent
    b. Spent
    c. The High Court to call for and examine the record in Eldoret Chief Magistrate Anti-Corruption Case No 5 of 2020 against Henry Maritim Koech and Four (4) others so as to satisfy and pronounce on the correctness, legality, regularity and propriety of the subject order of the subordinate court in the interests of fair administration of Justice;
    d. The court be pleased to revise, vary and/or set aside the orders given by the subordinate court on October 4, 2021 in the proceedings so as to accord with fair administration of justice.

e. The court be pleased to invoke its powers and jurisdiction to review or revise the orders of the subordinate court under articles 165(6) of the *Constitution* and section 362 of the *CPC* and to issue any such orders as it may please and deem necessary to meet the demands of fair administration of justice.

f. The parties to this application be heard under section 365 of *CPC*Cap 75 Laws of Kenya.

2. The 1st and 2nd respondent filed a replying affidavit by Henry Maritim Koech sworn on January 27, 2022 wherein the following issues emerged *inter alia*:

i. The application lacks merit, as it seeks remedies that can only be granted on appeal since the ruling of the subordinate court issued on October 4, 2021 does not amount to an illegality or an irregularity to warrant the intervention of the court in the manner sought;

ii. The applicant admits in their application at paragraph 4(h) that PW11 and PW 12 saw the original documents but the said original documents were not produced in court and no reason was given for their absence, no section 68 (*cap 80*) notice was issued to the defence and no evidence was tendered to indicate that the disappearance of the original documents was reported to the police or other relevant agencies; and

iii. The accused persons will be prejudice in the event that the court sanctions the production of secondary evidence that can be easily computer originated (sic) and doctored.

3. The applicant and the respondent filed written submissions dated January 26, 2022 and March 4, 2022 respectively.

Brief Facts

4. During the hearing in Eldoret CM ACC Case No 5 of2020 Rebuplicv Henry Maritim Koech & 4 otherson May 11, 2021, the former county secretary of the county government of Nandi, Francis Ominde (PW10), testified that he signed Three (3) contracts all dated May 22, 2014 and marked as MFI 17,18 and 19 between Makiki Agencies and the county government of Nandi together with Henry Koech's appointment letter as a chief officer dated September 30, 2015 marked as MFI 27.

5. Counsel for the 1st, 2nd, 3rd, 4th, 5th and 6th respondents objected to the production of certified copies of the aforementioned documents marked as MFI 17,18, 19 and 27.

6. When the matter came up on July 8, 2021, the prosecutor and the counsel on record made oral submissions in support of and against the production of certified copies of MFI 17,18,19 and 27 and it was agreed by consent that the advocates who certified the aforementioned documents attend court for cross examination.

7. On August 16, 2021 the Maureen Chepng'etich (PW 11) and George Tarus (PW12) attended court for cross examination noting that they certified the documents in issue.

8. On October 4, 2021 the trial court delivered its ruling expunging the documents marked as MFI 17,18 and 19 from the record of the court.

Summary of the applicant's Submissions

9. The applicant submitted that the Three (3) contracts marked as MFI 17, 18 and 19 could not be traced as they were in the custody of the head of procurement, the 2nd respondent herein. Thus, it was necessary that the prosecution places reliance on certified copies of the aforesaid contracts therefore, the trial court should not have expunged the aforementioned documents.

10. The applicant further submitted that the trial court should not have expunged the letter of appointment of Henry Koech marked as MFI 27 since the advocate who certified the copy had not complied with section 34 of the *Advocates Act* noting that the proviso to section 34 states that public officers are not subject to the restrictions provided in section 34 while in the course of duty.

11. Section 64 of the *Evidence Act* provides that the contents of documents may be proved either by primary or secondary evidence and Section 66 (a) of the *Evidence Act*, provides that secondary evidence includes certified copies given under the provisions of the Act. In Republic v Abdallah Kahi [2019] eKLR, the Court stated as follows:

> "The general principle of evidence is that the maker of the document is the person to prove the contents of the documents. Sections 64 and 65 of the *Evidence Act* provide that a document may be proved by either primary or secondary evidence. Section 66 of the *Evidence Act* provides for instances where secondary evidence may be given for example by way of proof of certified copies."

12. Section 67 of the *Evidence Act* requires that documents must be proved by primary evidence, except in the cases mentioned in section 68. The applicant emphasized the contents of section 68(1)(a), (e) and (f) and section 68(2) (a) and (c) are applicable to its case as they provide that:

> "68 (1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases: -
>
> (a) when the original is shown or appears to be in the possession or power of:-
>
> (i) the person against whom the document is sought to be proved: or
>
> (b) when the original is a public document within the meaning of section 79 of this *Act*
>
> (f) when the original is a document of which a certified copy is permitted by this act or by any written law to be given in evidence
>
> 68(2)(a) In the cases mentioned in paragraphs (a), (c) and (d) of subsection (1). any secondary evidence of the contents document is admissible.
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> 68(2)(c) In the cases mentioned in paragraphs (e) and (f) of subsection (1), a certified copy of the document, but no other kind of secondary evidence, is admissible.

13. The applicant submitted that the original contracts marked MFI 17, 18 and 19 were in the custody of the 2nd accused person who was the head of procurement thus the trial court ought to have admitted the aforesaid documents on the basis of the provisions of section 68(1)(a)(i) of the *Evidence Act*.

14. The applicant relied on the decision of the court in *Kenya Anti-Corruption Commission v Job Keittany & another* (2017) eKLR where the Court held as follows:

> "18. Similarly. Sergon J also dealt with the issue of secondary evidence in Hans Mollin v Festus Oganda [2006] eKLR Civil Case No 284 of 2000 and held inter-alia that:

"The plaintiff has also sought to produce items Nos. B 14 15 16, 17, 18, 19. 20A, 20B. 21. 22 and 23 as exhibits in evidence but the defendant has raised an objection on the round that the originals should be produced. The plaintiff has said that it is not possible to get the originals because they got lost in his residence which is also accessible to the defendant. The plaintiff ran short of blaming the defendant for being the culprit. The uncontested fact is that both the plaintiff and the defendant live in the house in dispute. The only reason advanced by the defendant to oppose the production of the above documents is that they are not in their original form. The defendant does not dispute the fact that the original is alleged to be lost. I have come to the conclusion that the objection should be dismissed. I admit the documents to be produced in evidence pursuant to section 68(1) (c) of the *Evidence Act*. The same are produced and marked as plaintiffs Exhibits 13 14 15 16 17 18 19 20A 20B 21 22 and 23."

15. M/s Okok, learned counsel for the applicant submitted that it is clear that the original MFI 17,18, 19 and 27 cannot be traced. There are photocopies, which therefore fall within the meaning of secondary evidence which are admissible in evidence if they satisfy the requirements set out in section 68 (1) of the *Evidence Act* particularly section 68 (1) (c).

16. Conversely, counsel submitted, the respondents have not demonstrated what prejudice they would suffer if the court was to allow the use of copies of the missing documents whose copies will be supplied to them. M/s Okok referred to the Supreme Court of Kenya in *National Bank Of Kenya v Anaj Warehousing Limited* [2015] eKLR which held as follows:

> " 53 What is the real intention of section 34 of the *Advocates Act*? Is it aimed exclusively at advocates "without practising certificates", or persons who are not advocates within the terms of sections 2, 12 and 13 of the *Advocates Act*? Does one cease to be "an advocate", on account of not taking out a practising certificate? Or does one remain "an advocate". but "one who is not qualified to perform the tasks of an advocate"?
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> (57) Thus. the issue still remains: whether Section 34 of the *Advocates Act* actually invalidates all instruments of conveyance prepared by advocates who do not have current practising certificates. In our opinion, it is essential to establish the main objective of Section 34, as a basis for any conclusions. This section prohibits unqualified persons from preparing certain documents. It is directed at "unqualified persons". It prescribes clear sanctions against those who transgress the prohibition. The sanctions prescribed are both civil and criminal in nature. But the law is silent as to the effect of documents prepared by advocates not holding current practising certificates.
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> (58) In these circumstances, how does the citizen's position rest? If he or she were to walk into an advocate's office, for a conveyancing service at a fee, would there be an initial obligation resting on him or her to demand the advocate's practising certificate. Would he or she be in breach of the law if after the service it turned out that the advocate lacked a certificate? The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document, by the advocate. and not the seeking and receiving of services from that advocate. Likewise, a financial institution

that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practising certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate and ought not to be apportioned to the client.

(59) Is such reasoning in keeping with a perception that section 34 of the *Advocates Act*. invalidates all documents prepared by an advocate who lacks a current practising certificate? We do not think so.

(68) The facts of this case, and its clear merits, lead us to a finding and the proper direction in law. that, no instrument or document of conveyance becomes invalid under section 34(1)(a) of the *Advocates Act*, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates or advocates whose names have been struck off the roll of advocates, shall be void for all purposes."

17. The applicant submitted that the documents that form the subject of this claim are public documents as is defined by section 79 of the *Evidence Act*. Section 80 provides that a public officer may issue certified copies of public documents and Section 81 provides that certified copies of public documents may be produced in proof of the contents of the documents or parts of the documents of which they purport to be copies. However, I hasten to note that this argument is not accurate noting that section 79 defines public documents in the following terms:

79 (1) The following documents are public documents—

(a) documents forming the acts or records of the acts—

(i) of the sovereign authority; or

(ii) of official bodies and tribunals; or

(iii) of public officers, legislative, judicial or executive, whether of Kenya or of any other country;

18. In *Lilian Kagendo Muriithi & another v Republic* [2020] eKLR the court observed that:

"

" 21. ...The *Evidence Act* section 68 (1) (e) allows for the proof of documents by secondary evidence. For public documents, only a certified copy is admissible. With regard to proof of public documents. Section 81 of the *Evidence Act* provides that:

"Certified copies of public documents may be produced in proof of the contents of the document or parts of the documents of which they purport to be copies."

The provision is not couched in mandatory terms. My view is that it leaves room for the court to exercise discretion as to whether to admit the certified copy or not. The intention of Parliament is however clear that certified copies of public documents be produced to prove the contents."

19. The applicant submitted that contents of MFI 17,18,19 and 27 are relevant to the criminal case and further that they laid a basis for its production as follows: PW10 testified that he was the retired county secretary of the county government of Nandi and that while he was still in employment, he was authorised to sign contracts on behalf of the county government of Nandi and when Makiki Agencies were awarded tenders for road works, PW 10 identified his signature on the certified copies of the contracts marked as MFI 17, 18 and 19. Further, PW10 confirmed that Henry Maritim Koech, the 1st respondent was appointed the chief officer, finance and economic planning vide a letter dated September 30, 2015 which letter (MFI 27) contained PW 10's signature.

20. The applicant relied on the decision of the court in *Republic v Mark Lloyd Stevenson* [2016] eKLR where production of evidence was discussed at length as follows:

> " 38. To avoid confusion, it is important to set out where authentication fits into the evidence map. The admission and consideration of tangible exhibit in evidence follows the following steps:
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> a. First, the court determines if the proposed evidence is relevant. Here. The court simply determines the probative value of the proposed evidence: whether the proposed evidence has tendency to make the existence of any fact that is of consequence to the determination of a fact in issue more or less probably that it would be without the evidence. If the proposed evidence passes the Relevancy Test, it proceeds to the second step.
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> b. Second in the case of tangible exhibits (like the two documents in this case). the Proponent for the evidence authenticates the proposed piece of evidence that is the Proponent must prove that the evidence is what the proponent claims it to be. The court only proceeds to the third step if the proposed evidence passes muster under the authentication test. It is important to explain here that the term "authentication" though the technically correct word which is widely used for this step can be misleading. In fact, what is meant by "authentication" at this stage is merely that a proper foundation for admission of the document or exhibit has been laid. It does not at all mean that the exhibit must now be accepted and believed. The trial court, as the fact finder, must ultimately weigh (in step 4 below) the admitted evidence in light of all the circumstances. The weighing can only happen after the foundation for the proposed evidence has been laid.
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> c. Third. the court, at the urging of the parties or on its own motion determines if there is any other rule of evidence that excludes the proposed evidence. Here the court considers whether the evidence is excluded by the Constitution (for example the right against self-incrimination discussed above, prohibition against hearsay evidence or whether the proposed evidence would lead to unfair prejudice with its probative value substantially outweighed by the danger of unfair prejudice. If the proposed evidence survives this exclusion test, then the proposed evidence

is admitted into evidence and the court proceeds to the fourth step.

d. Fourth. the court considers the weight to be accorded to the admitted evidence. At this stage the opponent may still bring to the court's attention evidence opposing authenticity of the evidence, thereby allowing the court to give less weight to the evidence or no weight at all."

21. The applicant submitted that the respondents have not demonstrated what prejudice they will suffer in the event the court allows the production of certified copies of MFI 17,18,19 and 27.

22. The applicants urged the court to allow their application as prayed to enable the production of MFI 17,18, 19 and 27 as secondary evidence.

Summary of the respondent's Submissions

23. The respondents submitted that prosecutors are required at all times to apply the law to criminal cases, protect the rights of the persons involved in criminal proceedings, respect human dignity and fundamental rights; and most importantly uphold and promote the rule of law.

24. The respondents submitted that the applicant attempted to produce secondary evidence without complying with requirements of the *Evidence Act* on the production of secondary evidence.

25. The prosecution did not adduce evidence to prove or show that Meshack Oreu Tankoi, the second respondent herein was held liable for the loss of the original documents. Not even an Occurrence book number was produced to show that the documents were lost. Furthermore, no notice was given as required by section 69 of the *evidence Act* for the production of secondary evidence. The respondents referred to *Midroc Water Drilling Co Ltd v National Water and Conservation & Pipeline Corporation* [2020] eKLR where the case of *Re the Estate of Charles Ndegwa Kiragu alias Ndegwa Kiragu (Deceased)* (2016) eKLR, was cited where the court observed:

> "Section 67 of the *Evidence Act* provides that, documents must be proved by primary evidence except otherwise provided for in cases set out in section 68, of the Act, where secondary evidence may be given of the existence, conditions or content of a document. Further, secondary evidence shall not be given unless a notice to produce a document has been given under section 69. The meaning of primary evidence is found in section 65, which is basically the document itself."

26. They cited *Wanjiru Kiiru (Suing as the Administrator (Sic) of the Estate of the Late Jecinta Wangui Keiru v Doris Ochieng Oluoch & 5 others* [2017] eKLR where the court held as follows:

> "The applicant has demonstrated that the original receipt is lost and has produced a police abstract and the O.B extract for October 29, 2015, section 68(a) is not applicable, therefore, section 69 is not applicable as notice to produce is required only in respect of the provisions of 68(1) (a). The upshot of the above is that the plaintiff is allowed to rely on PMFI 5 to be produced in accordance with the law and that PW1 to be recalled to produce the document."

27. The respondents also referred to *Jane Wambui v Stephen Mutembei & another* [2006] eKLR where the court held that

> "I have considered those submissions of the learned counsels. Under section 67 of the *Evidence Act*, cap 80, documents must be proved by primary evidence except in the cases set out in section 68 of the Act where secondary evidence may be given of the existence, condition or contents of a document. The definition of primary evidence is to be found in section 65 of the same Act. Generally speaking, primary evidence means the document itself produced for the inspection of the court. There is no dispute that the typed copy of minutes sought to be introduced in evidence by PW4 constitutes secondary evidence, None of the exceptions set out in section 68 aforesaid have been invoked, and none of them have been established, either by the testimony of PW4 or by any other circumstance placed before the court. I therefore find that the document in question cannot in law be produced in evidence. I so hold. The petitioners' objection is thus upheld with costs."

28. The respondents submitted that the trial court was right to exclude the copies of the documents certified by the PW 11 noting that she had not complied with the provisions of section 9 and 34 of the *Advocates' Act*. The respondent sought to distinguish the holding of the decision in *National Bank of Kenya v Ndolo Ayah* (2009) eKLR.

29. The respondents urged the court to dismiss the application for review herein noting that the issues raised are issues that ought to be raised on appeal.

Determination

30. I have considered the contents of the letter dated October 13, 2021 together with the 1st and 2nd respondent's replying affidavit in opposition thereto. I have also read and considered the contents of the Written Submissions filed by applicant and the 1st and 2nd respondents and I find that the primary issue for determination by this court is whether the revision orders sought ought to be granted.

31. This court has the jurisdiction to issue revisionary orders as is provided by article 165 (6) and (7) of the *Constitution of Kenya* which provide as follows:

> "(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."

32. Section 362 of the *Criminal Procedure Code* provides 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."

33. In *Director of Public Prosecution v Joseph Murimi Mugweru* [2020] eKLR the court made the following observation:

> " The purpose of the revisionary powers of the High Court is to correct manifest irregularities or illegalities and give appropriate directions. The court is also empowered to determine the regularity of any proceedings of any such subordinate court. - Criminal Revision No 4 of 2019 at Machakos – Joseph Nduri Mbuvi v R (2019) eKLR."

34. In *Republic v John Wambua Munyao & 3 others* [2018] eKLR the court made the following observation as relates to the court's jurisdiction as relates to its revisionary orders:

> " 33. Therefore it is my view that that jurisdiction should not be invoked so as to micro-manage the lower courts in the conduct and management of their proceedings for the simple reason that if every ruling of the lower court and which went against a party were to be subjected to the revisional jurisdiction of the court, floodgates would be opened and the court would be inundated with such applications thus making it practically impossible for the lower courts to proceed with any case to its logical conclusion.
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> 34. Where an issue arises as to whether the decision of the Court below is correct in its merits either as a result of wrong exercise of discretion or otherwise, but which decision does not call into question, its legality, correctness or propriety, the right approach is to appeal against the same preferably at the conclusion of the proceedings or in limited instances before then...
>
> 36. In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person."

35. I have noted that at all material times, the applicant seemed to have held the view that the maker of a document is at liberty to produce the documents they made without reservation whether or not the aforesaid documents are original (primary evidence) or secondary evidence (copies whether certified or not). It is very apparent that the applicant failed to appreciate the fact that secondary evidence ought to be handled differently from primary evidence.

36. The 1st and 2nd respondents' contention is the fact that the law outlines a procedure to be followed in adducing secondary evidence and the respondents hold the view that the applicants failed to observe the aforesaid procedure.

37. I have reviewed the proceedings of the trial Court in Eldoret CM Acc Case No 5 of 2020 *Republic v Henry Maritim Koech & 4 others*. I note that on May 11, 2021, PW 10 attended Court and during examination in chief he attempted to produce certified copies of MFI 17, 18, 19 and 27. Counsel for the respondents objected to the production aforementioned stating that notice was not issued in accordance with the provisions of section 68 of the *Criminal Procedure Code* which outlines how secondary evidence may be adduced.

38. I noted further that on July 8, 2021, the counsel on record made oral submissions in support of and against the production of MFI 17, 18, 19 and 27. The applicant's primary submission was that PW 10

was well within his right to produce the aforementioned documents noting that he is the maker and also that it is irrelevant that the advocates who certified the aforementioned documents being employees of the county government of Nandi had no valid practicing certificates at the time. The respondents on the other hand argued that the applicants have not observed the requirements for the production of secondary evidence as they failed to issue the notice required by section 69 of the *Evidence Act*, the Advocates that certified the aforementioned documents were not qualified to do so noting that they had no valid practicing certificates.

39. Subsequently on August 16, 2021 the Maureen Chepng'etich (PW 11) and George Tarus (PW12) attended court for cross examination to establish whether or not they had valid practicing certificates when they certified MFI 17,18, 19 and 27. It was established that they both did not have valid practicing certificates by then.

40. The trial court considered the law and the facts before arriving at a decision as was embodied in its ruling delivered on October 4, 2021 to the effect that MFI 17,18, 19 and 27 be expunged from the court record.

41. Noting that the applicant approached this court seeking revisionary orders, this court will not delve into ascertaining the merits of the decision of the trial court. This court is enjoined to consider the correctness, legality or propriety of the proceedings of the trial court's decision aforementioned with a view to establish whether the aforesaid decision is manifestly irregular or illegal.

42. This court is not oblivious of the far reaching consequences of the ruling of the trial court delivered on October 4, 2021 whose effect is to expunge MFI 17, 18, 19 and 27. This court does not find any glaring irregularities or illegalities in the manner in which the trial court conducted itself leading up to the delivery of the ruling aforementioned.

43. I am persuaded that this court must decline the invitation to exercise its revisionary jurisdiction in this matter.

44. The applicant's application for revision dated October 13, 2021 is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE