



**Koech v Republic (Anti-Corruption and Economic Crimes  
Revision E016 of 2021) [2022] KEHC 13066 (KLR) (Anti-  
Corruption and Economic Crimes) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 13066 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION E016 OF 2021  
EN MAINA, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**DAVY KIPROTICH KOECH ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Originating from Milimani Anti- Corruption Criminal Case No 22 of 2009 Republic  
v Dr David Kiprotich Koech. By a Judgment delivered on September 15, 2021)*

**JUDGMENT**

1. Dr Davy Kiprotich Koech, the applicant herein, was charged with 3 counts of corruption offences in Milimani Anti- Corruption Criminal Case No 22 of 2009 Republic v Dr David Kiprotich Koech. By a Judgment delivered on September 15, 2021, the trial court convicted and sentenced the applicant as follows:

- “1) Count I: a fine of Kshs 100,000/= in default to serve 12 months’ imprisonment; in addition, to pay a fine of Kshs 800,000 being the benefit received as provided for under section 48 2(b) of the *Anti-Corruption and Economic Crimes Act*, 2003, in default to serve 12 months’ imprisonment.
1. In Count II: a fine of Kshs 100,000 in default to serve 12 months’ imprisonment; in addition to pay a benefit of Kshs 6,000,000
2. In Count III: a fine of kshs 100, 000/= in default 12 months’ imprisonment; in addition to pay a fine of Kshs 12,500,000 being the benefit he received.”



2. Aggrieved by the conviction and sentence, the applicant filed the instant Chamber summons application dated November 2, 2021 supported by an affidavit sworn on even date. The application is made under the provisions of articles 2 (5) and (6), 19, 20, 21, 24, 50, 159, 165 (6) and (7) of the Constitution, section 362 and 361 of the Criminal Procedure Code cap 75 and seeks the following orders:

- “ 1) This application be certified urgent and be heard forthwith and *ex-parte* in the first instance.
- 2) The honourable court be pleased to call for the records/proceedings in Milimani Anti-Corruption Criminal Case No 22 Of 2009: Republic Versus Dr Davy Kiprotich Koech
- 3) The honourable court be pleased to quash and/ or set aside the conviction and sentence of the applicant by the Subordinate court (Hon V N Wakumile (Mr) SPM) on September 15, 2021 in the Milimani Anti Corruption Criminal Case No 22 Of 2009: Republic Versus Dr Davy Kiprotich Koech convicting and sentencing the applicant pay Kshs 19,600,000/= or in default to serve a six-year jail term
- 4) Any further order or other orders permissible in the interest of justice in the circumstances as the honorable court may deem fair, reasonable and just.
- 5) Costs of this application be awarded to the applicant.”

3. The application is made on the grounds stated on the face of it and re-hashed in the supporting affidavit as follows:

- “ 1) The applicant was charged in Milimani Anti-Corruption Criminal Case No 22 of 2009 on allegations of transfer by the applicant of Kshs 18,500,000/= from Kenya Medical Research Institute (KEMRI) into his account.
- 2) Sometimes in 2015 the applicant paid the principal amount plus interest of Kshs 3,000,000/= (ksh 21,216,136/= in total) on the undertaking by the respondent that they would not pursue the matter further.
- 3) However, in blatant violation of the applicant’s rights, the respondent did not withdraw the mater and the trial court continued to entertain the matter despite the applicant having paid the alleged amount.
- 4). On September 15, 2021 the trial court (hon V N Wakumile (Mr) SPM) convicted the applicant and condemned him to pay Kshs 19,600,000/= or in default to serve a six-year jail term.
- 5) The applicant who was recently diagnosed of acute stroke has been on and off the hospital and had been receiving rehabilitative treatment at home and is financially.
- 6) The applicant’s health has drastically deteriorated while in prison because he is unable to afford the fine unless the Honourable court urgently intervenes as sought herein.



- 7) The impugned decision is without basis and runs contrary to the public interest, the interests of administration of justice and the need to prevent abuse of the legal process in the exercise of its state prosecutorial powers by the respondent.
  - 8) It is in the interest of justice that this application be heard urgently and orders sought herein issued to obviate the injustices that have been and continue to be meted against the applicant.”
4. In his written submissions dated June 2, 2022, the applicant submits on two issues: whether the application should be allowed and costs. He contends that the jurisdiction of this court is properly invoked; that the court may under section 362 of the *Criminal Procedure Code* call for and examine the record of criminal proceedings before any court for the purpose of satisfying itself on the correctness and legality of any finding, sentence or order passed and as to the regularity of any proceedings of the subordinate court.
  5. The applicant contends that the trial was not conducted in accordance with the the *Constitution*. That to the extent that the applicant refunded the sum of Kshs 21,216,136 (consisting of principal and interest) which was the subject of the proceedings sometime in the year 2015, the criminal proceedings should have been withdrawn. Secondly, he contends that the failure to call a witness from the Centre for disease control created a gap that was fatal to the proceedings. That the funds were not public funds as they belonged to the said centre for disease control.
  6. The applicant contends that the court erred in law and fact in retroactively applying the *Public Finance Management Act* 2012, which was not in force at the material time.
  7. Lastly, the applicant submits further that the court erred in failing to state whether the sentences in the 3 counts were concurrent or consecutive. That the offences arose from the same transaction hence the sentences should be concurrent. That the mandatory fine under section 48 of the *Anti-Corruption and Economic Crimes Act* was contrary to the principle of restorative justice as the funds were fully refunded. He cited the decision in *Peter Mbugua Kabui v Republic* [2016] eKLR in support. He urged the court to allow the application.

### **The Respondent’s Case**

8. The Republic through the Director of Public Prosecutions opposed the application through its grounds of opposition dated February 14, 2022 and written submissions dated June 20, 2022.
9. The respondent raises 5 grounds of opposition:
  - 1) the orders sought are untenable since the applicant has not demonstrated any error, illegality or impropriety or reasonable grounds upon which this honourable court can revise and/or vary the sentence of the trial court;
  - 2) the fact that the applicant settled the civil aspect of the case vide High Court Civil Suit No 316 of 2010 is not itself a bar to the criminal proceedings as in the instant case;
  - 3) the sentence meted out by the trial court is proper and sound in law;
  - 4) the sentence meted by the trial court is not excessive in the circumstances; and
  - 5) the application is devoid of merit in law and ought to be dismissed.



10. In its written submissions, the respondent contends that there was no impropriety in the sentencing as Section 48(2) of the *Anti-Corruption and Economic Crimes Act* provides for a mandatory sentence. That the sentence met the objective of deterring the applicant from committing similar offences.
11. The respondent submitted that the contention that the applicant paid the principal sum and interest was not a bar to criminal proceedings against him. To support this submission reliance was placed on the case of *Simon Nyoike Gakuo v Republic* [2019] eKLR.

### Analysis and Determination

12. The gist of this application is that the criminal proceedings and the subsequent conviction and punishment of the applicant was unjust to him having refunded all the sums that the state was claiming from him. It is his contention that the trial court overlooked the principle of restitution and for that reason the conviction and sentence ought to be quashed. He also raised the issue that the funds were not public funds as they belonged to the centre for disease control.
13. Section 56B of the *Anti-Corruption and Economic Crimes Act*, 2003 provides for out of court settlement of corruption-related cases. However, the law envisages a formal undertaking by the commission not to institute criminal proceedings against a person who has inter alia, refunded all property he acquired through corruption or economic crime and made a disclosure of all his corrupt conduct.
14. The undertaking takes the form of an oath and is prescribed in form c under regulation 7 of the *Anti-Corruption and Economic Crimes (Amnesty And Restitution) Regulations*, 2011. For it to be binding it must be registered in court. In regard to criminal proceedings the relevant section is section 56B(3) and regulation 7 and the same state:-

“ 56B. Out of court settlement

- (3) The commission may tender an undertaking in writing not to institute criminal proceedings against a person who-
  - (a) has given a full and true disclosure of all material facts relating to past corrupt conduct and economic crime by himself or others; and
  - (b) has voluntarily paid, deposited or refunded all property he acquired through corruption or economic crime; and
  - (c) has paid for all losses occasioned by his corruption conduct to public property.
- (4) A settlement or undertaking under this section shall be registered in court.”

Regulation 7 states:-

“7. Undertaking not to institute criminal proceedings

An undertaking by the commission under section 56B(3) of the *Act* shall be in form C in the schedule.”



15. The applicant was charged on July 15, 2009. The alleged refund of the subject funds was made sometime in the year 2015, during the trial. There is no evidence of the registration in court of an undertaking, if any, by the Commission under the provisions of section 53(B) (3) and (4) of the *Anti-Corruption and Economic Crimes Act*. The evidence of payment referred to by the applicant are letters by his Advocates, which unfortunately do not meet the mandatory provisions of section 53(B)(3) of the *Anti-Corruption and Economic Crimes Act*. There was no formal undertaking by the commission therefore registered in court capable of being upheld in favour of the applicant so as to annul the criminal proceedings and the subsequent conviction. Accordingly, the contention that the applicant's right to a fair trial was violated lacks merit.
16. As regards the jurisdiction of this court to make orders on revision the same is provided for under section 362 of the *Criminal Procedure Code* which states: -
- “Power of High Court to call for records
362. 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.”
17. While exercising this jurisdiction, the court is barred from dealing with matters which should otherwise be dealt with on appeal. Section 364(3) of the *Criminal Procedure Code* provides as follows in that respect:
- “When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”
18. In principle this application is challenging the conviction and sentence of the trial court. More particularly, prayer no 3 of the application seeks an order that this court “be pleased to quash and/or set aside the conviction and sentence of the applicant by the subordinate court (Hon V N Wakumile (Mr) SPM) on September 15, 2021 in the Milimani Anti- Corruption Criminal Case No 22 Of 2009: Republic Versus Dr Davy Kiprotich Koech”.
19. The applicant did have an automatic right of appeal against the trial court's decision which right is also guaranteed under article 50 (2) (q) of the *Constitution* which provides:-
- “if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”
20. By virtue of section 364(3) of the *Criminal Procedure Code*, reproduced above, having already filed an appeal, the applicant is precluded from seeking revision orders. He should instead pursue his appeal where the merits of the decision and the sentence shall be canvassed and determined. A revision is concerned with errors, irregularity, procedural impropriety of the proceedings and legality of the decision none of which have been demonstrated in this application.
21. The upshot is that the application for revision is unmerited and it stands dismissed.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022**

**E N MAINA**

**JUDGE**

