



**Nabwayo v Republic (Criminal Revision E208 of 2022)  
[2022] KEHC 13103 (KLR) (Crim) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13103 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E208 OF 2022  
JM BWONWONG'A, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**JOYCE AYUMA NABWAYO ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an application for revision of the ruling of the Hon. M. Nanzushi, Principal Magistrate delivered on 29/07/2022 in the Chief Magistrate's Court at Milimani (Nairobi) in Criminal Case No. 2195 of 2018, Republic versus Joyce Ayuma Nabwayo)*

**RULING**

**The case for the accused/applicant**

1. The applicant moved this court pursuant to article 50 (1) (2) (k) (2c), 22 and 24 of *the Constitution* of Kenya, section 362 and 364 of the *Criminal Procedure Code* (cap 75) Laws of Kenya and seeks the following orders.
  1. Spent
  2. And order to stay the proceedings in the above magisterial court pending the hearing and determination of this application.
  3. An order to call for the lower court file and revise the orders made by the trial court on August 29, 2022 which denied the accused the right to rely on documents and evidence filed on July 12, 2022 in her defence and allow the accused to rely and adduce the evidence and documents filed on July 12, 2022.



2. The application is supported by nine grounds that are set out on the face of the notice of motion dated August 18, 2022 with the major grounds being the following. The accused is charged with stealing by servant contrary to section 281 of the Penal Code (cap 63) Laws of Kenya. She was put on her defence on July 27, 2022 after the court found that she had a case to answer.
3. Additionally, on July 12, 2022 the accused filed a list of documents, a list of witnesses and a witness statement all dated July 5, 2022, which she intended to rely in her defence hearing.
4. On July 27, 2022 the prosecution objected to the accused relying on the documents as filed arguing that there is no provision of the law that enables her to do so. The ruling delivered by the court on July 27, 2022 upheld the objection and ordered those documents to be struck off from the record.
5. The matter is coming for the defence hearing on August 19, 2022 and the accused is apprehensive that that the order of the lower court has denied her the right to adduce and challenge the prosecution evidence.
6. Among the documents the accused intends to rely on is an independent forensic accounting audit report.
7. In addition to the grounds in support of his application, the applicant has deposed to a twelve (12) paragraphs supporting affidavit, whose averments I do not need to reproduce herein for reasons that will appear below in this ruling.

#### **The submissions of the accused/applicant**

8. Counsel for the applicant (Mr. Atonga) filed written submissions in support of the application for revision.
9. He submitted that the accused was charged with stealing by servant contrary to section 281 of the Penal Code (cap 63) Laws of Kenya. The particulars being that she stole shs 3,268,454.95 the property of State Bank of Mauritius (SBM), previously Chase Bank Ltd.
10. He further submitted that when she was placed on her defence, the accused indicated to the court that she would be calling three witnesses, file their statements and documents that she intended to rely on in her defence hearing. The applicant also indicated that she was going to give sworn evidence and adopt her statement as filed.
11. Counsel further submitted that on July 12, 2022 the applicant, filed and served her witness statement, list of witnesses and documents to be relied upon at the trial. The prosecution objected to that procedure of reliance and adoption of the witness statement and list of witnesses and documents as filed on July 23, 2022.
12. The court in its ruling dated July 29, 2022 sustained the prosecution objection and ordered that the defence could not rely on the statement and documents as filed; which prompted this application.

#### **The case for the Respondent**

13. The respondent filed six grounds of objection with the major grounds being the following. It stated that the application is premature. The trial court properly rejected the defence application to adopt and rely on the filed documents. The application is misconceived as sections 362 and 364 of the Criminal Procedure (cap 75) Laws of Kenya are not applicable in the circumstances of the case.
14. The applicant's fair trial rights under article 50 (2) of the 2010 Constitution were not violated as the applicant is yet to give evidence in her defence.



## Issues for determination

15. I have considered the grounds, the submissions and the authorities of the applicant. I have also considered the grounds of objection by the respondent.
16. Additionally, I have perused the ruling that is sought to be revised.
17. As a result, I find that the following are the issues for determination. 1. Whether the ruling and order of the trial court are ripe for revision.

## 2. Whether I should revise the orders of the trial court.

### Issue 1

18. I find that the ruling sought to be revised is an interlocutory ruling. I further find that it was made after the close of the prosecution case. The accused was then placed on her defence by the trial court.
19. It therefore follows that it is not ripe for revision. In other words, it is premature. The reason why applications of this nature are not revisable is that this court would be called upon to micro-manage the trial process in the lower court with dire consequences in terms of delay and its attendant inconveniences. In this regard, this court in (Bwonwong'a, J) in *Mobamed Asif Rehman v The Chief Magistrate Court, Makadara* in Nairobi High Court, Criminal Revision No. E398 2021, pronounced itself as follows:
20. Furthermore, it is equally important to point out that it is only final orders that are subject to be revised; which orders are usually made after judgement (conviction and sentence) or after the acquittal of the accused. Interlocutory orders that are made in the course of a trial are not ripe for revision. If this were to be allowed it will result in delays and inconvenience to the parties. It may also administratively lead to congesting the registry of this court with magisterial court files that are called by the Deputy Registrar of this court with the result that the magisterial court proceedings will be stopped administratively because their files will have been taken to the High Court. This should be avoided in the interests of speedy disposal of trials, among other rights, that are guaranteed to an accused person in article 50 (2) (e) of the 2010 Constitution of Kenya; which reads as follows:

“to have the trial begin and conclude without unreasonable delay...”

21. As regards the issue of micro-managing the trial process of the trial proceedings in magisterial courts, the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley v Republic*, (2008) KLR 190, observed that the revisionary jurisdiction of the court should not be invoked so as to micro-manage the proceedings in the magisterial courts.
22. It therefore follows that the application is premature and is not ripe for revision.

### Issue 2

23. In passing, I note that the magisterial courts are courts of limited jurisdiction in criminal matters. The procedure to be followed in trial cases is exclusively set out in the Criminal Procedure Code in respect of the method in which an accused has to testify in his defence; if the accused decides to give sworn evidence. Where the accused decides to give sworn evidence, he is subject to cross examination as set out in section 146 (1) (2) of the *Evidence Act* (cap 80) Laws of Kenya. In the current application the accused elected to give sworn evidence. It therefore follows that she is subject to be cross examined by



the prosecution. The adoption procedure which is contended for by counsel for the accused/applicant is totally foreign and is unknown in this jurisdiction in criminal matters.

24. I am aware that the adoption procedure of the statements by parties is used in election petitions in respect of members of Parliament and members of the county assemblies. There is a specific enabling statute and rules that authorize this procedure. See [Elections Act](#) No. 24 of 2011 and the Rules made thereunder. In the instant application, there is no such enabling statutory procedure in the [Criminal Procedure Code](#).
25. The accused/applicant has to testify and be cross examined in the course of which she may produce any documentary evidence as exhibits.
26. Furthermore, it is important to point out that the prosecution is required by article 50 (2) (j) of the 2010 [Constitution](#) of Kenya to inform the accused “*in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.*” There is no corresponding requirement for the accused to do so. The reason being that an accused may decide (elect) not to give any evidence in his defence; since it is up to the prosecution to prove their case beyond reasonable doubt.
27. However, if the accused voluntarily decides to file in court and serve the prosecution with their statements and any documentary evidence for his defence, nothing stops such an accused from doing so. But even then, such an accused is liable to testify orally and be cross examined, if he decides as was the case here to give sworn evidence. An accused who decides to conduct his case in such a manner is free to do so; for such is his trial strategy. It is then incumbent upon the court to assist the accused in giving his evidence as authorized by law.
28. Furthermore, the accused has a right to challenge the prosecution evidence in terms of article 50 (2) (k) of the 2010 [Constitution](#) of Kenya. In the instant application, the accused was entitled to give sworn evidence and produce any documentary evidence either in person or through her witnesses in accordance with the law as stipulated in section 211 of the [Criminal Procedure Code](#). This does not include the adoption procedure as a substitute for oral evidence
29. In the premises, the application fails and is hereby dismissed in its entirety.

**RULING SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2022.**

**J M BWONWONG'A**

**JUDGE**

In the presence of-

Mr. Kinyua court assistant

Mr Atonga for the accused/applicant

Ms Edna Ntabo for the Respondent

