



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Kithuku (Criminal Revision E219 of 2022)
[2022] KEHC 15653 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15653 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL REVISION E219 OF 2022
MM KASANGO, J
NOVEMBER 24, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

NICHOLAS MWANDWA KITHUKU RESPONDENT

(Being a Criminal Revision from an order of 16th November, 2022 in Kiambu Chief Magistrate's Court (Hon. W. Rading, SRM) in Misc. Criminal Case No. E955 of 2022)

RULING

1. Article 165(6) of the [Constitution](#) gives the High Court supervisory power over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function. Article 165(7) furthermore provides how the High Court can exercise its supervisory power. That article 165(7) is in the following terms: -

“(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.”

2. The above constitutional provisions in respect to criminal trials are embodied in section 362 and 364 of the [Criminal Procedure Code](#). Section 362 is in the following terms:-

“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 subordinate court.”



3. Section 364 confers the High Court power to revise subordinate court's decision.
4. In the case *Jorum Muigwa Warukira & Another v Republic(2022) eKLR* discussed this revisionary jurisdiction and stated:-

“ 10. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of *Joseph Nduvi Mbuvi Vs Republic [2019] eKLR*:-

‘In my considered view, the object of the revisional jurisdiction of the High Court is to enable the High Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.’”

5. Also, the court in case of *Harrison Kamoko Wachum & Another v ODPP & 2 Others(2022) eKLR* stated thus:-

“ 4. 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. – See Criminal Revision No 4 of 2019 at Machakos – *Joseph Nduri Mbuvi v Republic(2019) eKLR*.”

6. It becomes obvious from the constitutional and statutory provisions discussed above that the High Court has wide powers to review orders, decisions of subordinate courts and other judicial and quasi-judicial bodies.
7. The application dated November 16, 2022 by the Director of Public Prosecutions (DPP) has sought to invoke the High Court’s supervisory power. The prayers in that application are:-

“That this Honourable Court be pleased to urgently call for and examine the recording Criminal Case No E955 of 2022 R v Nicholas Mwendwa Kithukuso as to satisfy and pronounce itself on the correctness, legality and propriety of the orders of the trial court vis-a-vis interest and fair administration of justice.

That this honourable court be pleased to revise vary and or set aside the orders issued by the trial court on November 16, 2022 so as to allow the applicant to commence criminal proceedings against the respondent.

That this honourable court be pleased to issue such other and/or further orders as it may deem fit in the interest of justice and public interest.”

8. What is before this court is determination of whether the order made by the ruling of November 16, 2022 by senior resident magistrate Wilson Rading was correct, legal or right.
9. The said ruling was delivered in Kiambu Chief Magistrate’s Court Criminal Miscellaneous Case No E955 of 2022. In that matter, Nicholas Mwendwa Kithuku(Mwendwa) challenged the legality of the



charge sheet dated July 7, 2022. Mwendwa also filed before this court Constitutional Petition No 16 of 2022 challenging the same criminal proceedings and the charge by the DPP.

10. The existence of the High Court Constitutional Petition was brought to the attention of Hon Rading by this court in an internal memo. On November 16, 2022, the day the said magistrate was due to rule on the substantive matter before him which challenged the legality of the criminal charge, he stated in part:-

- "4. This court is bound by the decision of the High Court and it has since come to the attention of this court that a petition No 16 of 2022 has been filed in the High Court by the applicant herein.
5. The court takes judicial notice of the memo dated November 3, 2022 communicating existence of the said petition.
6. This court is apprehensive that the decision by the High Court may have a direct effect on the matter before it and in the interest of justice and in avoidance of two conflicting decisions, it is imperative that this court defers its ruling awaiting the outcome of the decision of the High Court."

11. The said magistrate then ordered:-

"In the circumstances and in the interest of justice, the court directs that the proceedings herein be stayed pending the decision of the High Court Petition No 16 of 2022."

12. Although the respondent in the affidavit and in the submissions before court gave the history of the criminal charges, Mwendwa has faced in the past as a basis for not entertaining the application for review, that background is not relevant to what needs determination. What is relevant is consideration whether the magistrate's order staying the Kiambu Chief Magistrate's matter pending determination of the High Court Petition was correct or legal.
13. In my view, the stay of the magistrate's court matter was not issued on sound grounds. This is because there is no stay in the High Court Petition and therefore there was no basis for the magistrates court matter to be stayed. There is no direct nexus which legally permitted the magistrate to grant the stay. The stay was granted without jurisdiction in as far as it was hinged on the High Court petition. It is for that reason this court shall vacate the stay granted. This court in vacating that stay shall not give directives as DPP sought in the application for DPP to commence criminal proceedings against Mwendwa. To give such direction would be to impede the prosecutorial powers of DPP.

Disposition

14. The orders of the court in respect to the notice of motion dated November 16, 2022 are:-
- a. The order in Kiambu Chief Magistrate's Court Criminal Miscellaneous No E955 of 2022 staying the proceeding of that matter is hereby set aside and vacated.
 - b. This file shall henceforth be closed.

RULING DATED and DELIVERED at KIAMBU this 24th day of NOVEMBER, 2022.

MARY KASANGO

JUDGE

Coram:



Court Assistant : Mourice/Julia

For the applicant (DPP) : - Ms Nanjaya with Kahoro and Ms Keli & Ms Otieno

For the Nicholas Mwendwa Kithuku :- Mr E Mutua, Victor Omwebu, Charles Njenga and Ms. Matasi

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE

