



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**REVISION CASE NO. E5 OF 2020**

**CHARLES VATERO MWANZIA & 7 OTHERS.....APPLICANTS**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENT**

**HON. ATTORNEY GENERAL.....RESPONDENT**

**RULING**

1. By a Notice of Motion dated 4<sup>th</sup> November 2020 the applicants herein

Pursuant to Article 36 and 50(1) of the Constitution of Kenya and Sections 325, 362 and 367 of the Criminal Procedure Code sought that the court file in Taveta Principal Magistrates Court CR.C. No. 381 of 2016 be called to the High Court, for examination & revision of the order of the trial Magistrate.

2. Hon. B.S. Khapeya PM putting the Applicants on their defence & substitute. It with an order of no case to answer and accordingly acquit the applicants of all the charges. That pending the hearing and determination of the instant revision application that there be a stay of the proceedings in the Taveta Principal Magistrates Court CR. Case No. 381 of 2016 – Republic vs Charles Vetaro Mwanzia and 7 others.

3. The application was supported by the grounds on the face of the application and supporting affidavit of Ramadhan Mathenge Kamosu sworn on 3<sup>rd</sup> November 2020. The application was brought on the ground that it would be manifest injustice and a glowing and mission to vet applicants stand trial merely because they attend a lawful meeting of a group which they are members and with their offices in exercise of freedom of association which is protected under Article 36 of the constitution.

4. The applicants claimed that 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> applicants were placed on their defence and yet there was no evidence mentioning them. It was claimed that the trial Magistrate failed to analyse the applicants submissions in support of no case to answer. In the supporting affidavit the 2<sup>nd</sup> Applicant averred that he had the authority of his co-appellants to appeal against the ruling of Hon. B.S. Khapepa.

5. It was averred that there was no known offence for which applicants were placed on their defences and that they would be at a loss as to what exactly they were defending themselves against as they met as Kenyans as permitted by Article 36 of the constitution.

6. The application was opposed by the Replying Affidavit sworn by Grace Nyambura Mwakangu on 2<sup>nd</sup> December 2020 and she averred that the prosecution evidence proved the applicants had established a prima facie case as the applicants met without authority and Article 36 of the constitution was therefore not infringed and there was a legal basis as provided by Section 78(1) of the penal code for the applicants to be arrested and charged. It was argued that the trial Magistrate did not shift burden to the applicant.

7. The application for revision was canvassed by way of written submissions after Applicants had filed a

further affidavit shown on 22<sup>nd</sup> December 2020 by Julius Kimondo. Having considered the application for revision I do find that pertinent issues have been raised regarding the ruling which would ordinarily qualify for grounds of appeal rather than revision of the trial Magistrates orders or that would be raised in a constitutional petition and require proof in terms of affidavit evidence on voir voce evidence to enable the court to conclusively determine the substance issues in question.

8. Although the deponent of the affidavit in support and the further supporting affidavit refer to an appeal the applicants preferred an application to revision. The Applicants ought to have brought a constitutional petition in the initial stages of the trial and not after they have been placed on their defence.

9. Some of the issues raised are tantamount to grounds of appeal and indeed authorities relied on decisions in constitutional petitions and not miscellaneous application or revisions. This court finds that grounds upon which an order for revision can be granted have not been satisfied and the same is dismissed. The applicants ordered to go before the trial Magistrate and tender their defence.

**Dated, signed and delivered at Mombasa this 18<sup>th</sup> day of March, 2021.**

**HON. LADY JUSTICE A. ONG'INJO**

**JUDGE**