



**Maina v Office of the Director of Public Prosecution (Criminal Revision E010 of 2024)
[2025] KEHC 2158 (KLR) (Anti-Corruption and Economic Crimes) (14 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2158 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CRIMINAL REVISION E010 OF 2024**

BM MUSYOKI, J

FEBRUARY 14, 2025

BETWEEN

ATANAS KARIUKI MAINA APPLICANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

*(Being an application for revision of the Chief Magistrate (Honourable E.K. Nyutu) in
Milimani Chief Magistrate's Anti-Corruption case number 33 of 2018 dated 13th August 2024)*

RULING

1. In writing this ruling, I am live to the fact that the proceedings are still alive in the trial court and this court being a higher court should be cautious so as not interfere with the discretion of the trial magistrate or embarrass the proceedings before the said court. The detailed ruling which is ready comprising of thirty-five pages or so contains analysis of the evidence of the prosecution and in the circumstances, releasing the reasoned ruling at this stage would in my view be inappropriate and likely unnecessary influence on the thought process and independence of the trial court. I will read an abridged version of my ruling especially the conclusion part and hold onto my reasoning until the trial before the lower court is determined.
2. The applicant and 16 others were charged before the chief magistrate's court on 13-08-2018 with cumulative 19 counts all of which related to acquisition of land for purposes of construction of Standard Gauge Railway. Of the 19, the applicant faced only two counts which stated as follows;

Count 1:

Conspiracy to commit an offence of corruption contrary to section 47A(3) as read together with section 48 of the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003.



Particulars:

Between 1st July 1999 and 30th June 2018 within the Nairobi City County in the Republic of Kenya jointly with others not before court conspired to commit an offence of corruption namely fraud, thereby causing a loss of public funds belonging to Kenya Railways Corporation in the sum of Kenya Shillings 221,375,000/= for compensation for acquisition of L.R Nos. 9084, 9085, 9086, 9087 and 9088 being public land.

Count 13:

Breach of trust contrary to Section 127 (1) as read together with Section 127 (2) of the [Penal Code](#).

Particulars:

Between February 2014 and 30th June 2018 at the Kenya Railways Corporation offices within Nairobi City County in the Republic of Kenya, being the Managing Director of the said Corporation and person employed in public service, and being concerned with management of public property, in discharge of your duties breached the trust by failing to protect the public property to wit railways reserve causing loss of public funds Kshs 221,375,000/=, thereby affecting interests of the public.

3. The matter went through prosecution case with the court hearing 24 witnesses. At the closure of the prosecution's case, the trial court in the usual short ruling found that all the accused persons had a case to answer. The applicant was aggrieved by the trial court's finding and by an amended notice of motion dated 4th October 2024, asks this court to revise the decision. The said notice of motion prays for the following specific orders;
 - a. Spent.
 - b. The honourable court be pleased to review, vary, revise, and/or set aside the ruling of Honourable Eunice Kathure Nyutu, Chief Magistrate, delivered on 13th August, 2024 in Milimani Anti-corruption case number 33 of 2018; *R v Mohammed Swazuri Abadalla & 16 Others*.
 - c. The Honourable Court be pleased to find and hold that the Respondent failed to take out a case against the Applicant (5th Accused Person) sufficient to require him to make a defence and proceed to acquit and/or discharge the applicant from the said charges based on the evidence before Court.
 - d. Costs.
4. The application which is obviously a revision is said to be brought under Articles 47(1), 50(2)(q), 159(2) (b) and (d) and 165(7) of the [Constitution](#) of Kenya and Sections 362, 364 and 367 of the [Criminal Procedure Code](#) and is supported by affidavit of the applicant sworn on the 10th September 2024. The facts of the case are embodied in the supporting affidavit. The applicant's averments are in summary to the effect that there was no sufficient evidence to justify him being put on his defence. In addition to the affidavit, the applicant filed submissions dated 25th October 2024.
5. The respondent has opposed the application through grounds of opposition dated 3rd October 2024. The respondent argues that the application is a disguised appeal which is not allowed as Section 379 of the [Criminal Procedure Code](#) only allows appeals upon conviction or acquittal and since there is neither a conviction nor acquittal in the matter, the application is incompetent and premature. The



respondent further states that the application is meant to delay the completion of the lower court matter and allowing the application would amount to micro managing the subordinate court. The respondent takes position that the lower court is the best suited to determine the veracity and weight of the evidence produced by the prosecution and the applicant should first defend himself before the trial court where he has been given an opportunity to do so. In addition to the grounds of opposition, the respondent has filed submissions dated 26th November 2024.

6. The power of the High Court over revision of the subordinate court's decisions is derived from Section 362 of the [Criminal Procedure Code](#) Chapter 75 of the Laws of Kenya and Article 165(7) of the [Constitution](#). The said Section 362 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.’

7. While Article 165 (7) of the [Constitutions](#) states that;

‘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.’

8. The applicant has argued that the ruling of the Honourable Magistrate he seeks to have reviewed was not correct and lacked propriety since his culpability was not proved and he was actually exonerated by the investigation officer (PW24). What I understand the applicant saying is that putting him on his defence was a violation of his right and the law and went against the prosecution's own confirmation that he had no role to play in the events or actions leading to the alleged commission of offences.
9. In my mind, the powers of this court under Article 165(7) of the [Constitution](#) are wide and covers all aspects of decisions or records of the bodies mentioned therein in including appealable decisions. A Judge would not be able to know the reasons for the trial magistrate to find an accused person with a case to answer in a ruling where such reasons are not given, which is allowed and appropriate but where in the opinion of the Judge after looking at the grounds set forth in an application like the one before me, there is apparent possibility that the decision of the magistrate is obviously wrong, nothing in my opinion should prevent the Judge from reviewing the evidence to ascertain propriety and correctness of the decision.
10. It has been submitted and averred by the applicant and indeed not denied by the respondent that the investigations officer in his testimony absorbed the applicant from criminal culpability. This alone has convinced me that it will not be micromanagement or imprudent for me to review the evidence adduced so far in respect of the applicant to ascertain whether the magistrate's decision was correct. Indeed, an accused person has a right to benefit from exculpatory evidence adduced by the prosecution and where such evidence is in favour of an acquittal under Section 210 of the [Criminal Procedure Code](#), taking him through the process of defending himself would be a violation of his right to be presumed innocent until proven guilty.
11. It is on the basis of the above that I found it fit to go through the evidence produced against the applicant which I have reproduced in my reasoned ruling to satisfy myself whether the applicant had a case to answer as held by the magistrate.



12. I have gone through the evidence produced by the prosecution. This being a criminal case, the culpability of the accused persons must be personal. It cannot be that a managing director would be criminally culpable for acts of his predecessors. I say so because the acts of confirming that land in question belonged or did not belong to Kenya Railways Corporation were done in 2011 and 2012 or thereabout. It is clear that the managing director of Kenya Railways Corporation then was one Nduva Muli. The prosecution did not lead evidence to show when the applicant assumed responsibility at Kenya Railways Corporation but it is generally accepted across the prosecution and the defence that it was some time in 2014.
13. The applicant does not appear to have written any correspondence for the compensation or consideration of status, ownership and availability of the parcels of land in question. It is apparent that the transfer of responsibility of compensation from Kenya Railways Corporation to National Land Commission was done when the applicant was in charge of Kenya Railways Corporation. However, all that the applicant did was to abide by the reality of the new constitutional order by handing over the pending compensation inventory and funds kitty to the National Land Commission.
14. The prosecution produced a letter from the Chairman of National Land Commission dated 11-10-2016 as exhibit 21 indicating that the Commission had reversed its decision to revoke the titles and proceeded to uphold them instead. The managing director of Kenya Railways Corporation in particular the applicant did not sit in the meetings of the National Land Commission neither has it been proved or even claimed that he knew that there were appeals pending before the Commission. The only other letter written to the applicant by the same Chairman of the National Land Commission which spoke of decision to revoke the grants was dated 7-10-2015 (exhibit 18) but is said to have been received in the office of Kenya Railways Corporation on 20-12-2016 after the compensation had been paid. These two letters were the only exhibits out of 104 that could be connected to the applicant but I find their probative value as relates to the charges facing the applicant wanting.
15. The prosecution did not in my opinion prove or even make attempt to prove that the applicant had conspired with others to facilitate registration of the titles or pay out the compensation. Indeed, none of the witnesses mentioned the culpability of the applicant other than the above mentioned two letters which were addressed to him and that he approved of transfer of the corporation's compensation kitty funds to National Land Commission. This was a statutory and constitutional requirement and the applicant cannot be criminally liable for doing what was required of him under the law.
16. While being cross-examined by Prof Muma, the investigations officer stated that the Kenya Railways Corporation did not at any time report to Ethic and Anti-Corruption Commission that any of the five properties had been grabbed but it had complained of many others which had been grabbed. What comes out of the officer's evidence is that the lands were not properly surveyed or alienated but it is indisputable that the applicant was not involved in that process. The witness added that he had no evidence that Kenya Railways Corporation interacted with anyone at National Land Commission during the process of issuing instructions to the bank to pay the registered owners of the land. He also admitted that in his letter dated 31-08-2017 to the Office of Director of Public Prosecutions, he did not make recommendation that the applicant to be charged.
17. Based on the analysis in my reasoned ruling and what I have stated above, it is my finding that the prosecution did not establish a case to warrant the applicant being placed on his defence. I consequently make the following orders;
 1. The ruling of the trial court dated 13th August 2024 is hereby set aside to the extent that it found the 5th accused person (applicant herein) with a case to answer.



2. The applicant is acquitted of the charges in counts 1 and 13 under Section 210 of the *Criminal Procedure Code* in Milimani Chief Magistrate's Anti-Corruption Court corruption case number 33 of 2018.
3. For clarity this ruling is in favour of the 5th accused (Atanas Kariuki Maina) only. The other accused persons in Milimani Chief Magistrate's Anti-Corruption case number 33 of 2018 shall defend themselves as ordered by the trial court.
4. The trial court shall upon conclusion of the matter before it, alert this court for purposes of releasing and publishing the reasoned ruling.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Agwara holding brief for Professor Muma for the applicant and Mr. Mwasaro holding brief for Mr. Nyamache for the respondent.

