



REPUBLIC OF KENYA



**Kinuthia & 6 others v Republic (Criminal Revision E009 of 2024) [2025] KEHC 2948 (KLR)
(Anti-Corruption and Economic Crimes) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2948 (KLR)

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

CRIMINAL REVISION E009 OF 2024

BM MUSYOKI, J

MARCH 14, 2025

**IN THE MATTER OF: REVISION OF RULING/ORDER OF THE CHIEF
MAGISTRATE'S COURT (HON. Z. W. GICHANA (PM) DELIVERED ON 30.7.2024
AT NAIROBI IN MILIMANI ANTICORRUPTION CRIMINAL CASE NO.28 OF
2019: REPUBLIC VERSUS- STEPHEN NDUNG'U KINUTHIA & 19 OTHERS.**

AND

**IN THE MATTER OF: ARTICLES 2 (5) AND (6), 19, 20, 21, 24, 25,
27, 50, 159, 165 (6) AND (7) OF THE CONSTITUTION OF KENYA.**

AND

IN THE MATTER OF: SECTIONS 362 AND 364 OF THE CRIMINAL PROCEDURE CODE

BETWEEN

**STEPHEN NDUNG'U KINUTHIA 1ST APPLICANT
CHARLES KARISA MWADUNA 2ND APPLICANT
DESMOND IRUNGU KINUTHIA 3RD APPLICANT
NELSON KARANJA KINUTHIA 4TH APPLICANT
MARS TECHNOLOGY ASSOCIATES LIMITED 5TH APPLICANT
KENYA MILK FARMERS INVESTMENT LIMITED 6TH APPLICANT
ENKEI HOLDINGS 7TH APPLICANT**

AND

REPUBLIC RESPONDENT



RULING

1. The applicants were aggrieved by the trial court's ruling delivered on 30-7-2024 in Milimani Anti-Corruption Criminal Case No. 28 of 2019; *Republic v Stephen Ndung'u Kinuthia & 19 Others* where the court declared that Charles Mbugua is a competent witness to testify in the proceedings. The said Charles Mbugua was an advocate for the applicants at the time and in the transactions which are the basis of the alleged offence were committed.
2. The applicant's notice of motion dated the 13th of August 2024 seeks the following orders:
 - a. Spent
 - b. Spent
 - c. The Honourable Court be pleased to call for the records/proceedings in Milimani Anti-Corruption Criminal Case No. 28 of 2019; *Republic v Stephen Ndung'u Kinuthia & 19 Others*.
 - d. The Honourable Court be pleased to review and/or set the Ruling/Order of the Chief Magistrate's Court (Hon. Z. W. Gichana (PM) delivered on 30.7.2024 at Nairobi in Milimani Anti-Corruption Criminal Case No. 28 of 2019: Republic versus Stephen Ndung'u Kinuthia & 19 Others by which the trial court declared that Charles Mbugua, Advocate is a competent witness to testify in the proceedings.
3. The applicants are the 1st, 7th, 8th, 9th, 14th, 19th and 20th accused persons respectively in the trial court charged with various corruption related offenses. The application is supported by the affidavit of Stephen Ndung'u Kinuthia sworn on the same date, a supplementary affidavit dated the 5th of November 2024 and submissions dated the 7th of November 2024.
4. The applicants state that Charles Mbugua Njuguna, Advocate (hereinafter referred to as the "advocate") represented them in the matters that are currently the subject of the criminal proceedings against them. The applicants further contend that the advocate was also their co-accused in the criminal case until recently when charges against him were withdrawn and he was converted to a prosecution witness.
5. It is the applicants' submissions that there exists a conflict of interest on the part of the advocate and the impugned ruling contravenes the their right to a fair trial and hearing contrary to Articles 10, 25(c), 27(1)(2) and 50 (1) and (2) (a) of the *Constitution*. The applicants have referred this court to *Patriotic Guards Ltd vs. James Kipchirchir Sambu* [2018] eKLR where the court emphasized the importance of observing the right to a fair trial. The applicant further relies on *Manani Lilan & Mwetich Co. Advocates v Veronica Sum* [2022] eKLR where the court stated that;

“...an advocate/client privilege binds an advocate not to be compellable to disclose a client's affairs without express authority or consent of his or her client. An advocate cannot therefore be compelled to breach the said requirement either by court or any other person. The waiver/lifting of the same can only be done by the client.”
6. The respondent filed a replying affidavit dated the 27th of August 2024 sworn by Delroy Mwasaru, a prosecution counsel in the Office of the Director of Public Prosecutions and submissions dated the 19th of November 2024. The respondent submits that the application is aimed at causing delay in the prosecution of the trial at the lower court. The respondent further submits that the advocate was



chosen as a prosecution witness by the respondent after they examined the Ethics and Anti-Corruption Commission's full investigation file in compliance with the law and among several other laws such as, the Constitution, the *Evidence Act* (Cap 80), the *Office of the Director of Public Prosecutions Act* (Cap 68) and the ODPP Decision to Charge Guidelines.

7. Additionally, the respondent states that according to Article 50(2) of the *Constitution*, the respondent must inform the applicants of all the materials that will be used in a criminal trial's prosecution. Consequently, in order to achieve this, the applicants were given access to the advocate's testimony and the supporting documentation that the witness would rely on in 2019. The respondent further submits that an examination of the aforementioned statement and supporting documentation reveals that the evidence of the advocate will present hinges on commercial transactions between the advocate and the applicants via the advocate's clients account, and as such, it is neither privileged nor confidential.

8. The respondent relies on the case of *Director of Public Prosecutions v Tom Ojienda t/a Prof. Tom Ojienda & Associates Advocates & 3 others* (2019) eKLR where the court held that;

'The client's protection is not absolute, as there are instances stated in the provision, where the advocate may be required, for the stated compelling reasons to disclose such communication or content and conditions of documents.'

9. The respondent adds that the issue before court for determination is the question of privilege and the credibility of the advocate being a prosecution witness. It is further averred that Section 134(1)(a) & (b) of the *Evidence Act*, Cap 80 does not cover privileged information which relates to communication made towards furtherance of an illegal purpose. The respondent relies on *Manani Lilan & Mwetich Co. Advocates v Veronica Sum* (Miscellaneous Civil Application 63 of 2019) (2022) eKLR where the court stated the following;

'There can be breach of the privilege but only in two instances. First, where the communication between an advocate and the client furthers an illegal purpose and secondly, where the advocate observes that the client used the privilege to commit a crime.'

10. The respondent urges that Section 134(1)(a) of the *Evidence Act*, Cap 80 must be invoked because, the Ethics and Anti-Corruption Commission's investigations showed that the communications between the applicants and the advocate were used to further the laundering of the Kshs. 36,089,966/- through the law firm of Charles Njuguna advocate disguised as professional instructions.

11. The single issue I have identified is whether the advocate can be a witness in the matter regardless of him having been a co-accused and an advocate for the applicants in respect of the matter which is the subject to the criminal proceedings. Under Section 362 of the *Criminal Procedure Code* the High Court has powers to 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. In *Joseph Nduvi Mbuvi v Republic* [2019] eKLR, Honourable Justice G.V. Odunga (as he then was) stated that;

'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.’

13. Section 134(1) of the *Evidence Act* provides that;

‘(1) No advocate shall at any time be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure; –

- a. any communication made in furtherance of any illegal purpose;
- b. any fact observed by any advocate in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether the attention of such advocate was or was not directed to the fact by or on behalf of his client.

12. This provision therefore shows as clear as day that the advocate-client privilege is not absolute, and can be waived at the instances indicated in the proviso. I take position that a party cannot hide under the umbrella of advocate/client privilege to prevent an advocate testifying in criminal proceedings where the communication between the party and the advocate was in furtherance of an illegal act. The justification for this is simple. It will be against the public policy and mockery of law and order for any professional, not limited to advocates only, to be used as a conduit for furtherance of illegalities or breach of the law. Doing so would be tantamount to placing professional dealings above the law. As much as parties have a right to privacy in respect to communication with their advocates or other privileged professionals, the greater public interest would dictate that such privacy should not violate the laws and order which is undoubtedly lifeline of a civilized society.

13. In the case before the lower court, Kshs. 36,089,966/- which is the bedrock of the charges facing the applicant is alleged to have been transmitted through the advocate’s firm bank account. In the case of *Mohammed Salim Balala & Anor vs Tor Allan Safaris Ltd* (2015) eKLR, the Court of Appeal ruled that the advocate-client privilege is only breached when the advocate observes the client using the privilege to commit a crime or when the advocate’s communications with the client serve an unlawful purpose.

14. I find that the argument made by the applicant that they fear the witness may use information gathered during the existence of the advocate-client relationship without basis as the witness statements provided are only limited to the flow of the money deposited in the client’s account. In this regard, the applicants will have the right to make objections to any evidence which may seek to go beyond what is contained in the statement. In view of this I leave it to the trial magistrate to determine the level of disclosure during the testimony of the advocate.



15. Based on the above analysis, this application is disallowed.

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

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Mr. Midenga for the applicant and Mr. Akula for the respondent.

