



**Kahonge & another v Kiarie & another (Criminal Revision  
E227 of 2022) [2025] KEHC 2700 (KLR) (7 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2700 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL REVISION E227 OF 2022  
DO CHEPKWONY, J  
MARCH 7, 2025**

**BETWEEN**

**EDWIN WAIGURU KAHONGE ..... 1<sup>ST</sup> APPLICANT**

**PETER GITAU NYAGA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**DAVID GITAU KIARIE ..... 1<sup>ST</sup> RESPONDENT**

**OFFICE OF DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before the court for determination is the Notice of Motion application dated 13<sup>th</sup> December, 2022 filed under Certificate of Urgency seeking the following orders:
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That this Honourable Court be pleased to revise, vary and/or set aside the Ruling and subsequent orders issued on 29<sup>th</sup> November, 2022 by Hon. O. M. Wanyaga SRM in Thika CMCR No. 823 of 2020 *R v. David Gitau*.
  - e. That this Honourable Court be pleased to issue stay and withhold release and payment of the prevailing set bail/bond sum and terms.
  - f. That this Honourable Court be pleased to make such further orders and reliefs as it may deem fit and expedient in the circumstances of the case.



2. The application is based on the grounds as set out on its face and the Supporting Affidavit of Edwin Waiguru Kahonge and Peter Gitau Nyaga sworn on the instant date. According to the Applicants they are direct victims of the offence herein as the complainants who testified during the trial, hence suffered direct loss and damages as a consequence. They hold that the trial Magistrate erred in law and fact in holding that the prosecution had not established a prima facie case and even though there were discrepancies in the evidence the trial Magistrate erred in minutely examining them and concluding that the accused had no case to answer. The Applicants contend that the Ruling and subsequent orders have impeded the victims' rights to fair trial and these review proceedings should be done to provide an expedient way to resolve the dispute and ancillary matters. The Applicants submit that the application has been filed without inordinate delay and it will be in the interest of justice that the application be allowed.
3. The 1<sup>st</sup> Respondent opposed the application through a Notice of Preliminary Objection dated 9<sup>th</sup> May, 2023 on the ground that the Applicants Notice of Motion dated 13<sup>th</sup> December, 2022 was filed in clear violation of the mandatory provisions of Section 364 (1) and (5) of the [Criminal Procedure Code](#).
4. The 1<sup>st</sup> Respondent also opposed the application through Replying Affidavit also sworn on 9<sup>th</sup> May, 2023, wherein he argues that the application is vexatious and a sham meant to waste court's time in that it does not disclose an wrong doing on his part. He submits that the Applicants have filed an application for Revision on the grounds which on the face of it appear to be an appeal filed through the backdoor. The 1<sup>st</sup> Respondent contends that he was validly acquitted by the trial court under Section 210 of the [Criminal Procedure Code](#) which cannot form a basis of revision under Section 364 of the [Criminal Procedure Code](#).
5. According to the 1<sup>st</sup> Respondent, the Applicants cannot seek for revision when they had an option of appeal which they did not explore. He argues that the complainants/Applicants were represented in the course of trial and cannot claim that their rights were impeded. He further claims that the Applicants have conceded that there were discrepancies in the evidence before the trial court which they wish that the trial Court ought to have ignored in order to secure a conviction against him. He also holds that the Applicants have not disclosed why the bail/bond deposited in court should be withheld and for those reasons, he urges the court to dismiss the application.
6. On 16<sup>th</sup> September, 2022, the court directed the application and the Notice of Preliminary Objection to be canvassed simultaneously by way of written submissions and the 1<sup>st</sup> Respondent filed theirs on 22<sup>nd</sup> October, 2022.
7. With regard to the Notice of Motion application dated 13<sup>th</sup> December, 2022, I have read through the grounds upon which it is premised, both on its face and supporting Affidavit sworn by the Applicant and considered the same in terms of the grounds raised by the 1<sup>st</sup> Respondent in his Notice of Preliminary Objection and Replying Affidavit, both dated and sworn on 9<sup>th</sup> May, 2023 together with the submissions filed in respect of the same.
8. I find that what the application is seeking the court to do is to invoke its supervisory jurisdiction and or powers to call for the record in Thika CMCR. No.823 of 2020, R v David Gitau for examination so as to satisfy itself as to correctness, legality, or propriety of the finding or order and alongside the regularity of the proceedings thereof.
9. The High Court is bestowed with supervisory jurisdiction over sub-ordinate courts or any person, body or authority exercising a judicial or quasi judicial function pursuant to the provision of Article 165(3) and (6) of the [Constitution](#) of Kenya, 2010. Article 165(3) provides that:-



- (3) Subject to clause (5), the High Court shall have—
- a. unlimited original jurisdiction in criminal and civil matters;
  - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
  - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
  - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - i. the question whether any law is inconsistent with or in contravention of this Constitution;
    - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - iv. a question relating to conflict of laws under Article 191; and
  - e. any other jurisdiction, original or appellate, conferred on it by legislation.

Article 165(6) goes on to state that:-

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court”.

10. The power of revision in Criminal Case lies in exercise of the High Court’s supervisory jurisdiction as provided for under Section 362 and 366 of the [Criminal Procedure Code](#). Section 362 provides that:-

“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.”

11. For purposes of this ruling, the court wishes to consider the Notice of Preliminary Objection first as the same may have the effect of disposing the entire application, if it succeeds. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors*[1969]EA, 696, a ‘Preliminary Objection’ is defined as:-

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.



In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

12. The 1<sup>st</sup> Respondent has raised an objection to the prayers sought in the application on the ground that the same are in clear violation of the mandatory provision of Section 364(1) and (5) of the [Criminal Procedure Code](#).
13. A reading of the Applicant’s prayers and the reasons thereof as stated in their affidavit alongside the proceedings in Thika CMCR. Case No.823 of 2020, R v David Gitau, it has been established that the Applicants were the complainants where the 1<sup>st</sup> Respondent had been charged with eight (8) Counts of Obtaining Money by False Pretences contrary to the provision of Section 313 of the [Penal Code](#). The 1<sup>st</sup> Respondent pleaded ‘Not Guilty’ to all the offences and the matter proceeded to trial whereby the 2<sup>nd</sup> Respondent called and adduced evidence of ten (10) witnesses and closed their case. Upon considering the evidence of the ten (10) witnesses, the trial court found that the 1<sup>st</sup> Respondent had failed to establish a prima facie case against the 1<sup>st</sup> Respondent, to warrant him being placed on his defence in respect of any of the eight (8) counts and was accordingly acquitted on all of them under Section 210 of [Criminal Procedure Code](#).
14. This finding aggrieved the Applicants who believe that their rights to fair trial had been impeded and urge that the same be revised by setting aside the ruling and orders of the court so that the dispute and ancillary matters in the case be resolved.
15. The 1<sup>st</sup> Respondent contends that his acquittal under Section 210 of the [Criminal Procedure Code](#) is not a matter for revision under Section 364 of the [Criminal Procedure Code](#) hence application by the Applicants is in violation of the said provision.
16. Section 364 of the [Criminal Procedure Code](#) provides that:-

[364]. Powers of High Court on revision (1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—

- (a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
  - (b) in the case of any other order other than an order of acquittal, alter or reverse the order.
- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence:



Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

- (3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence.
- (4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.
- (5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

17. Given that the decision in the impugned ruling delivered on 27<sup>th</sup> July, 2022 was an acquittal, it is clear that the court’s revisionary power is limited in scope in terms of the correctness, propriety and legality of a decision and or order and cannot apply in this case where the Applicant’s right to have lodged an appeal. In the case of *Martin Mavuti Kiyuyi v Republic*, HCCR Revision No.27 of 2013, the court faced with similar scenario rendered itself as follows:-

“... the very nature of revision as a discretionary remedy explains the policy underpinnings of Section 364(5) of the *Criminal Procedure Code*; that revision should not be a substitute for an appeal whatsoever or insisted upon by a party who has not filed an Appeal where one was provided for. Revision primarily serves to put right instances where a finding, sentence, order or proceedings of a lower court are tainted by incorrectness, impropriety, illegality or irregularity...”

18. In this case, the court finds that the Notice of Motion application dated 13<sup>th</sup> December, 2022 offends the provision of Section 364(1) and (5) of the *Criminal Procedure Code*, and thus the Notice of Preliminary Objection dated 9<sup>th</sup> May, 2023, has merit. In the upshot:-

- a. The Notice of Preliminary Objection dated 9<sup>th</sup> May, 2023 be and is hereby upheld.
- b. As a result, the Notice of Motion application dated 13<sup>th</sup> December, 2022 is dismissed.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 7TH DAY OF MARCH, 2025.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

M/S Muthoni holding brief for Mr. Muchoki counsel for the Applicant

M/S Ndeda counsel for the 2<sup>nd</sup> Respondent

Court Assistant - Martin

