



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wandakusi v Republic (Miscellaneous Criminal Revision  
19 of 2025) [2025] KEHC 1255 (KLR) (3 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 1255 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
MISCELLANEOUS CRIMINAL REVISION 19 OF 2025**

**RK LIMO, J  
MARCH 3, 2025**

**BETWEEN**

**CLEOPHAS WAFULA WANDAKUSI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. Cleophas Wafula Wandakusi, the applicant herein has moved this court vide a Notice of Motion dated 14/2/2025 asking for the following reliefs namely;-
  - i. Spent
  - ii. That this Hon. Court be pleased to call for the Cr. Cases Numbers 2326 of 2021 and E1434 of 2024 before the Chief Magistrate's Court and review the order made on 27/1/2025 by Hon. L. Kabuteh Resident Magistrate.
  - iii. That there be a stay of proceedings in the two cases pending determination of this application.
2. The applicant relies on the following grounds;-
  - a. That he fought with one Lawrence Owino Kadima on 26/5/2021 in a public place.
  - b. That they both sustained injuries and were issued with P3 Forms.
  - c. That the applicant was charged with grievous harm vide Kitale CM's Court Cr. Case number 2326 of 2021 while Lawrence Owino Kadima was charged Vide Cr. Case 1434 of 2024 with assault.
3. In his supporting affidavit the applicant contends that he fought with Lawrence Owino in a public place and that he raised the issue on 27/1/25 at the trial court urging the trial court to suspend the proceedings but was overruled.



4. He is urging this court to review the order of the trial court so that both of them can be charged for affray because he maintains that the incident occurred in a public place.
5. He has exhibited copies of charge sheets in the two criminal cases pending at the CM's Court.
6. He, through counsel contends that he did not ask for consolidation of the two cases but asked for suspension of the case so that they can be both charged with affray.
7. The State through the office of Director of Public Prosecution through Mr. Mugun opposed this application citing that the office of DPP has the mandate to prefer whatever charges that they consider is supported with sufficient evidence. Mr Mugun learned counsel for the Respondent submits that this application is an invitation by the applicant to interfere with that mandate.
8. The respondent further contends that this application is improper because it is a revision to challenge the discretion of a trial court. The State takes the position that revision is only limited to legality, propriety and correctness of an order or proceedings.
9. It submits that the application seeks to challenge the merit of the decision made by the trial court yet the applicant has not said that the order made was illegal or irregular. He contends that the proceedings sought to be stayed have been going on for four years. The respondent supports the trial court's decision to decline consolidation of the 2 cases.
10. This court has called for both the cited criminal cases before the CM's Court with a view to checking their legality, regularity, correctness and propriety of the proceedings and in the particular the decision of the trial court made on 27/1/2025 in Kitale CM's Court Cr. Case No.E2326 of 2021.
11. I have perused through the 2 files and note that the particulars of the charge sheets in the 2 cases relate to the same date and place which is the 26<sup>th</sup> May 2021 at Jovena Area of Trans-Nzoia West. It is also true that in Cr. Case No.2326/2021, Cleophas Wafula Wandakusi is accused while Lawrence Kadima is the victim while in Cr. Case No.E1434/2024, Lawrence Kadima is the accused while Cleophas Wafula is the victim.
12. It is also worthy to note that while the Cr. Case No.E2326/2021 began on 28/2/2021 almost immediately after the incident, the other case Cr. Case No.1434/2024 began on 23/4/2024. The reason for that may better be given by the ODPP through the investigating officer or officers.
13. The issue at hand for this court is whether the order or the decision made by the trial court on 27/1/2025 fails in terms of its correctness, legality or propriety. Section 362 of the [Criminal Procedure Code](#) provides as follows;-

“The High Court may call for and scrutinize 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”.
14. The applicant in this case had sought through counsel that he should be charged with affray together with the complainant and pointed out the existence of the other criminal case. He therefore sought for consolidation of the 2 cases. The prosecution on the other hand opposed the application stating that the latter case (meaning Cr Case No.1434/2024) had been in court for more than a year and no application for consolidation had been sought. The DPP read bad faith in the application pointing out that the applicant was out to delay the case by adjourning the trial. The State insisted that no report



- on assault was reported by the applicant in 2021 and that it had the mandate to prefer charges when complaints are made.
15. The trial court declined the prayer to consolidate the 2 cases finding that the decision to charge rests on ODPP. The trial court further found that the applicant was facing a different charge from the charges preferred against the complainant (Lawrence Kadima). It further found that the application had been made belatedly one year down the line. The court directed that matter proceeds for further hearing and the matter proceeded. The record shows that the prosecution closed its case on that day and the applicant sought for time to file submissions on whether there is a case to answer. The trial court gave the defence time and listed the matter for mention on 19/3/2025.
  16. Now the applicant in this application seeks to review the order made by the trial court declining to have the 2 cases consolidated. The applicant's counsel during the hearing of this application insisted that she had not sought for consolidation of the 2 cases in Cr. Case No.E2326/2021 but the record shows that the prayer for consolidation was the gist of her application with affray being the reason for her prayer for consolidation.
  17. It is apparent that a prayer for consolidation is within the preserve of the ODPP just like the decision to charge or not to prefer charges. Article 157(10) of the Constitution provides as follows;-

“The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority”.
  18. The only limitation to the exercise of that power of discretion by the DPP is provided under Article 157(11) of the Constitution which states;-

“In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process”.
  19. The genesis of this application for revision is the refusal by the trial court to consolidate the 2 criminal cases. The applicant herein has not faulted the ODPP in any way in their exercise of their power and mandate under Article 157(10) of the Constitution or for misuse of the power under Article 157(11) of the Constitution. Instead the applicant has faulted the decision of the trial court to decline adjournment and consolidation.
  20. I have examined the record as I have shown above. The trial court's decision was based on the merit of the application and facts presented to that court. There is nothing to suggest that the applicant faults the decision on its legality, correctness or its propriety. What the applicant says is that the trial court was wrong not to have decided that consolidation was proper given that facts indicated an affray rather than the charges preferred.
  21. This court is not persuaded by the above argument for the following reasons;-
    - i. For one, the applicant's challenge is directed at the merit of the decision of the trial court which means that the right channel is an appeal rather than revision given that the legality, correctness, regularity or propriety of the decisions has not been faulted.
    - ii. Secondly, the contention by the applicant is an issue for his defence that can be ventilated in trial.



- iii. Thirdly and more importantly, the issue of consolidation is a preserve of the ODPP under Article 157(1) of the *Constitution* and the applicant has not challenged the DPP for misusing the powers selectively or in any other manner contrary to public interests or the administration of justice. The applicant's grievances are directed at the wrong party.
- iv. Lastly, the applicant's delay in raising the issue from when the trial began in 2021 indicates either indolence or bad faith. Either way this court is not persuaded to intervene and stay proceedings. A stay of proceedings is a serious matter because it interferes with the right to access to justice guaranteed under Article 48 of the *Constitution*. It is a relief that should only be granted sparingly and in clear cases where it is demonstrated that there is likelihood of miscarriage of justice. In this instance there is no suggestion to that effect.

In the premises this court finds no merit in application dated 14/2/2025. The same is disallowed.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 3<sup>RD</sup> DAY OF MARCH, 2025.**

**R.K. LIMO**

**JUDGE**

Ruling delivered in open court

In the presence of;-

Bukundo holding brief for Munialo for the Applicant

Mugun for Respondent/State

Court assistants – Duke/Chemosop

