



REPUBLIC OF KENYA



**Yongo v Republic (Criminal Revision 16 of 2023)
[2025] KEHC 1014 (KLR) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 1014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL REVISION 16 OF 2023
DR KAVEDZA, J
MARCH 4, 2025**

BETWEEN

BRYAN YONGO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. This ruling concerns two applications by the Applicant who faces three charges before the trial court: preparation to commit a felony contrary to Section 308(1), *Penal Code*, threatening to kill contrary to Section 223(1) of the *Penal Code*, and possession of a firearm and ammunition without a firearm certificate contrary to Section 4(1) of the *Firearms Act*.
2. In a letter dated 12th May 2022, the Applicant sought revision of a ruling by Honourable A. Onginjo, Chief Magistrate, delivered on 18th October 2016, alleging a misinterpretation of the law. The key issue is whether a criminal case abates upon the complainant's death.
3. The Applicant argued that the ruling acknowledged the deceased complainant, Jacob Juma, would have been required for cross-examination on counts II and III but proceeded to rely on the charge particulars. He contended this contravened the law and violated his fair trial rights under Article 50 of the *Constitution*.
4. The Applicant also challenged a ruling by Honourable Gandani issued on 11th May 2017 denying a request for a fresh hearing (*de novo*). He also claimed the magistrate misapplied the res judicata doctrine and refused to withdraw the case under Section 202 of the *CPC*, despite prosecution failures to call witnesses indicating bias.
5. The Applicant further alleged that Count III of the charge sheet referred to a non-existent offence, rendering it unconstitutional under Article 50(2)(n). The complainant's death before re-examination deprived him of a fair trial.



6. The Applicant sought declarations that the rulings were unconstitutional, demonstrated judicial bias, and violated Articles 25(c), 48, and 50. He also sought confirmation of his presumption of innocence and an acquittal under Section 202 of the [CPC](#) due to prosecution failures, arguing the case amounted to persecution.
7. In a second application dated 28th June 2022, the Applicant challenged charges in *Kibera Criminal Case No. E010 of 2022* for unlawful firearm possession. The case arose from an incident on 17 November 2021 at Fine Diamond Apartments, Westlands. A preceding *miscellaneous application (E629 of 2021)* filed on 1st November 2021 relied on intelligence reports. An order was issued on 15th November 2021 against the apartment owner. The Applicant argued the supporting affidavit was speculative and unsubstantiated.
8. The Applicant drew parallels with Kibera Criminal Case No. 5022 of 2014, where similar charges were filed. A Firearms Licensing Board letter dated 23rd September 2016 confirmed his firearm certificate was valid until 25th July 2017, suggesting insufficient evidence in that case. The Board recommended delaying any charges pending investigation.
9. In 2019, the Applicant sought access to his firearms held by DCIO Gigiri for ministerial vetting. The court denied this request, despite vetting not being a statutory offence. A late vetting attempt on 6th January 2022 failed as the firearms remained in police custody.
10. The Applicant contended the current charges lacked proper investigation and violated Articles 47 (fair administrative action) and 50(2)(n) (protection from prosecution for non-existent offences). He alleged procedural irregularities, including the court's refusal to withdraw the case under Section 202 of the [CPC](#) despite prosecution delays and its dismissal of his revision application on 21st February 2022, which the ODPP did not oppose.
11. The applicant asserted that the Firearms Licensing Board confirmed on 16th February 2018 that Certificate No. 004614 was lawfully issued. A ballistic analysis dated 19th November 2021 found no link between his firearms and criminal cases.
12. The Applicant argued that the trial court failed to assess the charge's validity under Section 382 of the [CPC](#), which requires magistrates to ensure charges are not defective. He asserted that the charges wrongly conflated administrative vetting with statutory offences, making them legally untenable.
13. In response, the Respondent filed grounds of opposition, raising nine grounds. It was contended that the Application lacked merit, was misconceived, and remained unsubstantiated. The Respondent argued that the Application constituted an abuse of the court process, frustrating the provisions of Section 362 of the [Criminal Procedure Code](#) by failing to demonstrate any incorrectness, illegality, or impropriety in the trial court's ruling.
14. Further, the Respondent submitted that under Article 157(6)(a) of the Constitution, the Director of Public Prosecutions (DPP) holds the authority to institute and undertake criminal proceedings. Additionally, Section 25 of the [Office of the Director of Public Prosecutions Act, 2013](#), allows the DPP, with court permission, to discontinue a prosecution before judgment. Under Article 157(11), the DPP is mandated to consider the public interest, the administration of justice, and the need to prevent abuse of legal processes, thereby having the right to pursue a case to its logical conclusion.
15. Moreover, the Respondent argued that the DPP is the complainant in all criminal matters and that the court cannot usurp its powers. It was further contended that accused persons do not have the right to determine whether they should be tried.



16. The Respondent maintained that the Applicant had failed to demonstrate any miscarriage of justice and, therefore, urged the court to dismiss the Applications.
17. The application was canvassed by way of written submissions which have been duly considered. The issue for consideration is whether the applicant should be granted the revisionary orders sought.
18. The applicants are asking this court to quash the orders pursuant to its supervisory jurisdiction under Article 165 (6) and (7) of the Constitution and its revision powers under Section 362 of the Criminal Procedure Code. Article 165 (6) and (7) of the Constitution. The enactment of section 362 as read with section 364 of the code is substantially part of the provisions of the statute to actualize the provisions of Article 165 (6) and (7) of the Constitution.
19. The function of the court under section 362 of the Criminal Procedure Code as read with section 364 is to enable the court to scrutinize and examine the correctness of facts of a subordinate court or tribunal to make a finding on legality or propriety. Legality means lawfulness, strict adherence to law, correctness, and propriety ordinarily having the same meaning. The interference under section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous, to justness appropriateness, and suitability to trial.
20. The purpose and nature of the revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of Joseph Nduvi Mbuvi v Republic [2019] eKLR in which he observed as follows:

“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.”
21. In order to succeed the Applicant must demonstrate that the decision of the trial court was incorrect, illegal, or irregular or that the court acted without or in excess of its jurisdiction. Having considered the application and the arguments advanced by the applicants, the issue for determination therefore is whether orders issued by the trial court were illegal, improper, grossly irregular, or whether they were made without jurisdiction or in excess of jurisdiction to warrant this court to interfere.
22. The Applicant contends that the trial magistrates misinterpreted the legal question of whether a criminal case abates upon the death of the complainant.
23. This Court finds that the determination of whether a complainant is deceased cannot, in itself, warrant interference in a part-heard criminal case. It is the prerogative of the trial court to assess the evidentiary value of the testimony before it and determine its probative worth in light of the complainant’s availability or lack thereof.
24. The Applicant further asserts that Honourable Gandani misapplied the doctrine of res judicata instead of substantively addressing the legal issues raised. While a misapplication of res judicata may constitute a procedural irregularity, its invocation does not, in itself, establish illegality unless it is shown to have



improperly barred reconsideration of a matter that warranted fresh adjudication. This is a matter of legal interpretation within the trial court's jurisdiction. This Court, in its supervisory role, cannot substitute itself for the trial court or exercise appellate jurisdiction at this stage.

25. The Applicant alleges judicial bias, particularly the refusal to withdraw the case under Section 202 of the Criminal Procedure Code (CPC) despite the prosecution's failure to produce witnesses. Judicial bias must be objectively demonstrated beyond mere dissatisfaction with a ruling. The alleged bias must be manifest on the record, not merely perceived. (See *R v Hashimu* (1968) EA 636.)
26. The Applicant argues that the trial magistrate wrongfully denied a request for a fresh hearing (*de novo*). The issue before this Court concerns the exercise of discretion under Section 200(3) of the CPC, which provides:
 - “(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and reheard and the succeeding magistrate shall inform the accused person of the right.”
27. The desirability of a trial magistrate to conclude proceedings they commenced is recognised in law. However, circumstances such as death, retirement, transfer, or incapacity may necessitate a case being taken over by another magistrate. Section 200 of the CPC and Section 34 of the Evidence Act address such contingencies.
28. This Court holds that Section 200 of the CPC does not mandate a fresh trial in every instance of a change in presiding magistrate. As established in *Abdi Adan Mohamed v Republic* [2017] eKLR, factors such as trial progress, witness availability, memory retention, and potential prejudice to either party must be considered. The decision to deny a *de novo* hearing falls within judicial discretion and does not amount to illegality or impropriety unless exercised arbitrarily or contrary to the interests of justice.
29. The Applicant contends that Count III of the charge sheet refers to a non-existent offence. If established, this would render the proceedings null and void *ab initio* under Article 50(2)(n) of the Constitution. However, upon examination, the charge of being in possession of a firearm without a valid certificate under Section 4(1) of the Firearms Act is recognised in law. The Applicant's argument appears to challenge the evidence rather than the existence of the offence itself. No illegality or impropriety is found in the charge.
30. The Applicant also argues that the trial magistrate erred in declining to withdraw the case under Section 202 of the CPC due to prosecutorial delays. Judicial discretion must be exercised judiciously, and prolonged prosecutorial inaction may infringe the accused's right to a fair and expeditious trial under Article 50 of the Constitution.
31. As stated in *Mbogo v Shab* (1968) EA 93, appellate courts should only interfere with discretion where the lower court misdirected itself, considered irrelevant factors, or failed to consider relevant factors, resulting in an erroneous conclusion.
32. While another magistrate might have exercised discretion differently, this alone does not warrant interference under Section 362 of the CPC. The trial magistrate was entitled to proceed as she did, and any dissatisfaction with the ruling falls within the purview of an appeal rather than revision.
33. In determining criminal revision applications, this Court must exercise extreme caution to prevent parties from disguising an appeal as a revision application. The Applicant has raised issues that are best addressed through an appeal if dissatisfied with the trial court's final determination.



34. Consequently, the application dated 12th May 2022 and the application dated 28th June 2022 lack merit and are hereby dismissed in their entirety.

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 4TH DAY OF MARCH 2025

D. KAVEDZA

JUDGE

In the presence of:

Applicant Present

Mr. Mutuma for the Respondent

Tonny Court Assistant

