



**Osida v Director of Public Prosecution (Criminal Revision
E047 of 2025) [2025] KEHC 6331 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6331 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL REVISION E047 OF 2025**

S MBUNGI, J

MAY 14, 2025

BETWEEN

PETER OKOTH OSIDA APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. The applicant herein together with four others were jointly charged in Butali PM's Court Criminal Case E1059 of 2024 with two charges. The first charge was conspiracy to commit a felony contrary to section 393 of the *Penal Code*. The particulars of the offence were that on the 5th June, 2024 at Butali Sugar Mills Ltd, in Kakamega North Sub-County within Kakamega County the accused persons jointly conspired to steal 345 bags of 50Kgs Sugar valued at Kshs. 1,932,000/= using M/V Reg. No. KBS 846D Trailer No ZC 9730 the property of Butali Sugar Mills LTD. The second charge was stealing by a servant contrary to section 281 of the penal code. The particulars of the offence were that on the 5th June, 2024 at Butali Sugar Mills Ltd, in Kakamega North Sub-County within Kakamega County being servants of Butali Sugar Mills Ltd the accused persons jointly stole 345 bags of 50Kgs Sugar valued at Kshs. 1,932,000/= using M/V Reg. No. KBS 846D Trailer No. ZD 9363 and M/V Reg. No. KBR 034P Trailer No. ZC 9730 the property of Butali Sugar Mills Ltd which came into your possession by virtue of their employment.
2. Following the trial court's ruling on 4th April 2025, which allowed a site visit to inspect the alleged crime scene, the Applicant filed this revision application under Sections 362, 364, and 366 of the *Criminal Procedure Code*, alongside Article 165(6) and (7) of the *Constitution* of Kenya, 2010 seeking the following orders:
 - a. Spent
 - b. Spent



- c. Spent
 - d. That this honorable court be pleased to review and or set aside the ruling of the Principal Magistrate Hon. R.S Kipngeno delivered on 04.04.2025 in *Butali PM's Court Criminal Case E1059 of 2024 Republic v Vimal Kumar Khunti & 4 Others*.
 - e. Further in the alternative, this Honorable Court do make such other orders as it may deem just and expedient pending the hearing and determination of *Butali PM's Court Criminal Case E1059 of 2024 Republic v Vimal Kumar Khunti & 4 Others*.
3. The application was premised on the grounds on the face of it and an affidavit sworn by one Peter Okoth Osida, the 2nd accused in the lower court matter.
 4. The applicant contends that the site visit, if conducted, would be severely prejudicial to him and his co-accused for several reasons. Primarily, it was emphasized that the alleged crime scene, which also contains the sugar that forms the core of the prosecution's case (i.e., the *res* or *substratum*), has at all times remained under the exclusive custody and control of the complainant. This situation raises substantial concerns over the integrity, neutrality, and evidential value of any observations made at the scene, especially given that the accused persons had no opportunity to observe or access the same in a controlled or impartial manner.
 5. The applicant contends that the decision by the trial court undermines the foundational principle of equality of arms and the right to a fair trial as enshrined in Article 50(2)(j) of the *Constitution* of Kenya, which guarantees the right "to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."
 6. Counsel further invited the court to consider the persuasive precedent in Nairobi High Court Criminal Revision No. 469 of 2017 – *Republic v Abraham Langat*. In that case, the High Court firmly held that allowing the prosecution to introduce new evidence mid-trial or to retrieve exhibits for re-evaluation risks compromising the accused person's constitutionally guaranteed fair trial rights. The court emphasized that an accused person's defence is fundamentally built on the evidence supplied by the prosecution at the beginning of the trial.
 7. In line with this precedent, the applicant argued that permitting the site visit effectively amounts to reopening the prosecution's case through the back door. It would allow them to shore up evidentiary gaps or create new impressions long after the trial had materially progressed—potentially altering the evidential matrix in a manner that the defence had neither anticipated nor been prepared to counter.
 8. The applicant emphasized that since eight (8) witnesses had already testified, and significant documentary evidence had been produced, the prosecution ought to be confined to the evidence it initially relied upon. Any deviation at this stage would be not only procedurally improper but also constitutionally impermissible.
 9. In conclusion, the applicant urged this Honorable Court to recognize that the ruling of the trial court permitting a site visit undermines the core principles of fairness, balance, and procedural propriety. It shifts the evidential burden in a manner that unfairly disadvantages the defence and violates his rights under Articles 50(2)(j) and 25(c) of the *Constitution*. On this basis, he prayed that the court find the application meritorious and grant the orders sought to ensure that the fairness and integrity of the trial process are upheld.
 10. The court directed that the application be canvassed by way of written submissions.



Applicant's Submissions.

11. *Vide* his submissions dated 09.05.2025, the applicant submitted that it was improper for the prosecution to be allowed to visit the site since it was never secured, and further the said scene of crime is a substratum of the prosecution case against the applicant and his co-accused who have been in the custody of the complainant from the onset of trial.
12. The applicant averred that by allowing the application by the prosecution for site visit was prejudicial since it was contrary to their right to fair trial as espoused in Article 50(2)(j) of the Constitution of Kenya. He referred the court to Nairobi High Court Criminal Revision No. 469 of 2017 Republic v Abrahamlangat. Respondent's submissions
13. The respondent isolated the key issue for determination as whether this court should exercise its supervisory jurisdiction and review and/or set aside the ruling in *Butali PM's Court Criminal Case E1059 of 2024 Republic v Vimal Kumar Khunti & 4 Others*.
14. The respondent submitted that the applicant was merely speculating on the grounds of revision of the ruling of the trial court since he has failed to point out which of the aspects of right to fair trial under article 50(2) of the Constitution of Kenya, 2010 will be violated, should the respondent be allowed to visit the crime scene.
15. It was the respondent's submission that the trial court had received in abstract form through witness testimonies and photographs, evidence of the scene of crime and the accused persons had conducted witness examination to the aforesaid evidence.
16. The respondent further submitted that contrary to the accused's submission, the scene of crime touches on four areas; the parking yard where the lorries with extra bags of sugar were secured before reweighing, the weighbridge area, the loading area and the store where the extra 345 bags of 50 kg bags of sugar are secured.
17. Further, the respondent averred that as per Chapter 33, Order 4(b) of the *National Police Service Standing Orders*, the police have the discretion to determine the evidence room or its authorized location, and the secure isolated storage facility where the sugar(evidence) is stored qualifies as such as deponed in the replying affidavit filed by the Investigating Officer.
18. It was their submission that the prosecution is yet to close its case and the defence has a right to cross examine the Investigating Officer on an aspect of the subject evidence without being prejudiced as per the provisions of Section 150 of the CPC, Chapter 75 of the Laws of Kenya.
19. Moreover, the respondent submitted that the site visit shall be in the presence of all parties, including the court thus balancing all the rights of the parties to participate in the proceedings. They referred the court to the Kenya Judiciary Criminal Procedure Bench Book, 2028, page 105, which allows the trial court to visit the scene to understand the evidence given and to clarify any doubts that may have arisen during trial.
20. The respondent further averred that visiting the crime would enable the prosecution to complete the adducing of the evidence contained in the Crime Scene Report which was produced as Exhibit 7, and allowing this application would lock out critical prosecution evidence which militates against the accused's constitutionally guaranteed right to fair hearing under Article 50 of the Constitution on Kenya.
21. The respondent submitted that this application by the applicant seeking review was an abuse of the court process since it invites this Honorable Court to interfere with the fair trial of the matter before



the trial court and averred that this Honorable court has no jurisdiction to grant the revision orders sought as it will be in violation of its obligation under Article 10,20,25(c), 47(1) and 50(1)&(2)(q) of the Constitution of Kenya. The respondent prayed that the application be dismissed.

Submissions by Counsel watching brief for the Complainant.

22. The complainant's counsel filed submissions and isolated two main issues for determination:
 - i. Whether the revision application before this court is merited.
 - ii. Whether the ruling by Hon. R.S Kipngeno (SPM) in Butali *CMCR No. E1059 of 2024* issued on 04.04.2025 was legal, correct and proceedings thereof regular.
23. On issue(i), counsel submitted that the application for revision was incompetent as it was not founded on any law and/or statute. He averred that from the trial court proceedings of 04.04.2025, the applicant's counsel sought and was granted leave to appeal against the said ruling by the trial court. He submitted that the filing of this instant revision by the applicant operates contra inertia the provisions of section 365(4) of the CPC CAP 75 Laws of Kenya. It was his submission that the applicant has a right to appeal thus making this revision application non-meritorious as was held in the case of Martha v Republic (Criminal Revision 238 of 2023)[2023]KEHC 26294(KLR)(5 December 2023)(Ruling).
24. He further submitted that as per Article 50(q) of the Constitution of Kenya 2010, the accused person has a right to appeal or apply for a review, if convicted. He averred that the accused persons are yet to be convicted, neither has the prosecution closed its case yet and should this court exercise its revisionary powers at this stage, it would fetter the applicant's right of appeal.
25. On issue (ii), counsel submitted that the prosecution's application to visit the scene in order to prove the facts as divulged by all the witnesses during the ongoing hearing was in order pursuant to section 107(1) of the Evidence Act which elucidates that the burden of proof in criminal cases is always borne by the state.
26. Further, the counsel submitted that the law provides for the trial court to visit the scene in order to demystify issues that may have arisen during the hearing. He also averred that the Crime Scene Investigation Report which was produced during hearing as PEXB-7 showed four scenes of crime marked as areas of interest and the decision of whether or not to conduct a view is left to the discretion of the trial judge. He referred the court to the case of *Nzioka v Republic* [1973] 1 EA 91 (HCK).
27. Finally, counsel submitted that the review application by the applicant has no jurisprudential value and ought not to be entertained by this honorable Court.

Replying Affidavit sworn by the Investigations Officer.

28. There is also a replying affidavit on record sworn by one IP Kiarie Njine(No. 241255), the Investigations Officer in the trial court matter.
29. He has stated that due to the nature of sugar as highly perishable and the difficulty encountered in identifying and sourcing for a long term suitable storage facility within the Jurisdiction of the trial court, Senior Sergeant Ruth Anzala sourced for two padlocks and securely locked the bags of sugar in a suitable isolated secure storage facility within Butali Sugar Mills and the Investigations Officer is the sole custodian of the keys in accordance with Chapter 33 of the *National Police Service Standing Orders*.
30. He further stated that the evidence has been in the custody of the National Police Service at all times, and stated that the present application is mischievously opposed to a visit to the crime scene holding



the 345 bags of 50kg sugar only, yet the prosecution case identified five scenes of crime in its case. He prayed that the application be dismissed.

Analysis and Determination.

31. I have looked at the application, the submissions filed by the parties and the replying affidavit filed.
32. The main issue for determination is whether the ruling by Hon. R.S. Kipngeno (PM) delivered on 04.04.2025 in *Butali PM's Court Criminal Case E1059 of 2024*, allowing a prosecution site visit, was irregular, illegal, or improper so as to warrant the supervisory intervention and revisionary powers of this Court under Sections 362, 364, and 366 of the *Criminal Procedure Code* and Article 165(6) and (7) of the *Constitution* of Kenya, 2010.
33. It is not in dispute that the trial is ongoing as submitted by all parties. However, this court did not have the chance to go through the record, since despite calling for the lower court file, it was not availed. From the application and submissions, the impugned ruling allowed the prosecution's request to conduct a site visit to various identified scenes including the store where the disputed 345 bags of sugar are kept. The applicant challenges this ruling on grounds that the site has been exclusively under the complainant's control and that allowing a visit to it would prejudice the defence and violate the accused persons' right to a fair trial.
34. The applicant has invoked Articles 25(c) and 50(2)(j) of the *Constitution*, emphasizing that a fair trial includes the right to be informed of and to access prosecution evidence in advance. He has relied on persuasive authority, notably *Republic v Abraham Langat* (Criminal Revision No. 469 of 2017), where the High Court disallowed a prosecution attempt to retrieve and reintroduce exhibits mid-trial on grounds that it would alter the evidentiary landscape to the prejudice of the defence.
35. While the applicant's concerns about control and access to the sugar are understandable, this court must consider whether the site visit, as permitted by the trial court, truly amounts to introducing new evidence or whether it serves the permissible purpose of clarifying already admitted testimony.
36. I agree with the respondent, the *Kenya Judiciary Criminal Procedure Bench Book* (2028) at page 105 acknowledges the trial court's discretion to visit a scene of crime where necessary to clarify contested facts.
37. Section 150 of the *Criminal Procedure Code*, allows the court at any stage of the proceedings to summon or examine any person if their evidence appears essential to the just decision of the case. The applicant can still invoke the provision during the site visit if he wants to examine a witness on the status of the scene.
38. Furthermore, the prosecution and the investigating officer have clarified that the visit involves not only the store but also other relevant scenes—such as the loading bay, weighbridge, and parking yard—which are material to establishing the chain of custody and events on the material day. The site visit will be conducted in the presence of all parties, including the court, and will not exclude the applicant from participating or raising objections.
39. On the issue of whether the application offends Section 365(4) of the *Criminal Procedure Code*, which prohibits revision where an appeal lies and has been filed. no appeal appears to have been filed. However, even if an appeal had been filed, the power of revision is discretionary and should be sparingly invoked in ongoing criminal proceedings, especially where no final order or conviction has been made. In this case, the trial court's ruling is interlocutory and does not conclude the matter.



40. Additionally, as submitted by counsel for the respondent and the complainant, the site visit is intended to contextualize and complement the evidence already tendered, including photographs and crime scene reports (specifically PEXB-7). It does not on its face amount to the introduction of new exhibits but rather serves to clarify previously admitted testimony.
41. The court must also be cautious not to micromanage the conduct of proceedings before the trial court or preemptively interfere with prosecutorial discretion unless there is clear evidence of abuse, illegality, or injustice. The court in *Nzioka v Republic* [1973] 1 EA 91 (HCK) held that trial courts are permitted to visit scenes of crime at their discretion to better appreciate the evidence and resolve doubts arising during trial.
42. From the material before this court, I find that the trial magistrate did not act illegally, improperly, or in abuse of discretion in allowing the site visit. No demonstrable prejudice has been shown that would infringe the applicant's rights in a manner warranting revision. The accused persons retain the right to cross-examine the investigating officer and challenge the evidentiary value of the site visit and raise any objection for the trial court consideration if there is an attempt to introduce in admissible evidence during the site visit.

Conclusion

43. In the result, I find no merit in the application for revision. The applicant has failed to demonstrate that the ruling delivered on 04.04.2025 was illegal, incorrect, or irregular so as to warrant interference by this Court under its supervisory jurisdiction.
44. Accordingly, the application dated April 17, 2025 is hereby dismissed.
45. The matter shall proceed before the trial court as scheduled.
46. Orders accordingly.

**DATED, SIGNED ON 14TH MAY, 2025 AND DELIVERED IN OPEN COURT AT KAKAMEGA
THIS 20TH DAY OF MAY, 2025**

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a

Mr Oloo for the Respondent present online.

Mr. osoro for the Respondent present online.

Mr Lugano for the applicant present online.

