



**Republic v Koto & another (Criminal Revision E280 of 2024)
[2025] KEHC 5929 (KLR) (9 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 5929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL REVISION E280 OF 2024**

A MABEYA, J

MAY 9, 2025

BETWEEN

REPUBLIC APPLICANT

AND

CHARLES JUMA KOTO 1ST RESPONDENT

HILLARIUS OUMA ONYANGO 2ND RESPONDENT

*(From original conviction and sentence in Kisumu
Chief Magistrate Criminal Case No. E397 of 2024)*

RULING

1. By a Motion on Notice dated 20/11/2024 made under Article 165 (6) and (7) of the Constitution and sections 362, 364 and 367 of the Criminal Procedure Act Cap 75 Laws of Kenya, the State prayed for, inter alia, that this Court do call for the records of the KSM CMCRC No. E397 of 2024 – *Republic v Charles Juma Koto & Hillarius Ouma Onyango* (“the record”) and satisfy itself as to the correctness thereof under its supervisory jurisdiction.
2. The State sought the setting aside of the decision of 20/11/2024 whereby the Subordinate Court acquitted the accused therein under section 202 of the Criminal Procedure Code and for the reopening of the matter for hearing on merit.
3. The grounds for the Motion were set out in the body of the Motion and the Supporting Affidavit of No. 92258 PC Richard Machuki sworn on 20/11/2024. These were that; the matter is about conspiracy to defraud. That after investigations, consent to arrest was granted to the DCI by the office of the Director of Public Prosecution.



4. That two suspects, Hillarious Ouma Onyango and Charles Juma Koto were arrested and arraigned in Court No. 5 Kisumu presided over by Hon. Obina, SPM. That 20/11/2024 was the first day for the hearing. That the Investigating officer delayed in taking the file to the prosecutor.
5. That on the said date, the Investigations officer was held up by a personal emergency that he delayed and reached court at 10.25hrs. That he found that the Court had already acquitted the accused. That the 2 hours requested by the prosecutor was not granted to enable him deliver the court file to the prosecutor.
6. It was also alleged that the Presiding Magistrate had made a communication to the Court Users Committee that since he was on transfer to Kendu Bay Law Courts, he will not be taking fresh matters. That the hurried acquittal of the accused was irregular.
7. Section 362 of the *Criminal Procedure Code* provides: -

“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.”
8. From the foregoing, this Court has the jurisdiction to call for any record of a criminal trial at any stage, with or without application to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded and as to the regularity of any proceedings.
9. Article 50 of the *Constitution* of Kenya guarantees the right to fair trial. That right includes expedited trial. Article 159 of the *Constitution* also requires that justice should not be delayed. It is expected that once the State charges an accused person, it shall at all times be ready to prosecute the case without any delay.
10. Section 202 of the *Criminal Procedure Code* provides: -

“If, in a case which a subordinate court has jurisdiction to hear and determine, the accused person appears in obedience to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear, the court shall thereupon acquit the accused, unless for some reason it thinks it proper to adjourn the hearing of the case until some other date, upon such terms as it thinks fit, in which event it may, pending the adjourned hearing, either admit the accused to bail or remand him to prison, or take security for his appearance as the court thinks fit.”
11. That section is in mandatory terms, that if the complainant fails to attend court on the date appointed for the hearing and the accused attends, the Court shall acquit the accused unless for some reason that it thinks its proper to adjourn the case to some other day.
12. In the present case, the accused were charged on 14/10/2024. They were released on bond on 17/10/2024 and the trial fixed for 20/11/2024. On the date of trial, the accused attended with their advocate and the State was represented by Mr. Okoth, the prosecutor. The defence was ready to proceed while Mr. Okoth requested that the matter be placed aside as he was waiting for the police file.
13. At 9.40am, the matter was called out again and Mr. Okoth informed the Court that the Police file had not yet been brought. He prayed for 2 hours to enable him procure the same and be able to proceed



with the trial. The Court placed the matter aside for another 30 minutes. At 10.20am, the matter was once again called out and the Prosecutor still informed the court that he was waiting for the file from the Banking Fraud Investigations Department. He still requested that the matter be placed aside.

14. It is then that the Court invoked its powers under section 202 of the *Criminal Procedure Code* and acquitted the accused. The only reason given by the court for its decision was that the court could not wait indefinitely and that the counsel for the accused was travelling to Nakuru.
15. The questions that arise are, was justice done to the victim? Did the court exercise its discretion correctly? Were the proceedings regular? Was the request to wait for 2 hours from 9.00am too unreasonable that the court could not wait? Was it regular to terminate the proceedings on the first day of trial when no adjournment had been sought and the prosecutor was throughout in court? What about the communication the court had made earlier that the presiding magistrate being on transfer to Kendu Bay Law Courts effective 9/12/2024, he would only be dealing with matters that were nearing completion and finalize his judgments and ruling?
16. In a communication extracted from the Court Users Committee WhatsApp wall, the Learned Magistrate had posted: -

“Hallo Colleagues, Court 5, Obina is on his way out to Kendu Bay effective 9th December. I will only deal with matters that were nearing completion and finalize with my judgments and rulings. Further directions will be given by the Honourable Chief Magistrate 1. Kisumu has always been good to me and I thank you. Blessings.”
17. From the Charge Sheet, the prosecution was to parade a total of 5 witnesses. The matter was fresh and was coming for hearing for the very first time. Would the court have been able to hear and conclude the matter in view of the transfer? In any event, this was not a matter nearing conclusion that required to be dealt with expeditiously.
18. In my view, since the prosecutor had not applied for adjournment, the fact that the defence Counsel was travelling to Nakuru was no good reason to prematurely terminate the proceedings. Victims also have rights as accused do. Even if the prosecutor had applied for an adjournment to another day which is not the case, still in the circumstances of this case, that would not have called for the termination of the proceedings as the Court did.
19. Accordingly, in view of the foregoing, I find that the orders of 20/11/2024 acquitting the accused under Section 202 of the *Criminal Procedure Code* were irregular. I allow the Motion dated 20/11/2024 in terms of prayer Nos. 3 and 4 thereof and reinstate the charges. The accused be tried by another court.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF MAY, 2025.

A. MABEYA, FCI Arb

JUDGE

