



REPUBLIC OF KENYA



**Mwatee & 9 others v Republic (Criminal Revision E114 of 2024)
[2025] KEHC 8831 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL REVISION E114 OF 2024
AN ONGERI, J
JUNE 20, 2025**

BETWEEN

OMAR MWAKIO MWATEE & 9 OTHERS APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The application coming for consideration in this Ruling is the one dated 21st October 2024 brought under Section 362 and 364 of the [Criminal Procedure Code](#), Article 49 and 50 of the [Constitution of Kenya](#) and all the enabling provisions of the law seeking the following orders:-
 - i. Spent.
 - ii. Spent.
 - iii. That this honourable court do exercise its discretion in revision of the ruling and orders by the Hon. Senior Principal Magistrate Hon. D. Wangeci made on the 12th September 2024 wherein the said Magistrate allowed the prosecution witness PW6 PC Patrick Lumumba to testify and produce Pexhibit 12a, 12b, 13a, 13b, 14a and 14b without the same being brought earlier in court to be marked for identification by the complainants before production as exhibits thus being in contravention with the Applicants Constitutional rights.
 - iv. That costs of this application be provided for.
2. The application is based on the following grounds:-
 - i. That the Applicants were arrested and charged with the offences of arson, malicious damage to property and assault causing actual body harm.



- ii. That on the 12th September 2024 the matter was coming for hearing on the part of the prosecution side and the prosecution brought 3 witnesses i.e PW4, PW5 and PW6 to testify in the matter.
3. The application is supported by the affidavit of Mwazighe Micar in which it is deponed as follows:-
- i. That I am an Advocate of the High Court of Kenya practicing as such in the name and style of Mwazighe & Company Advocates and I personally have the conduct of this matter on behalf of the applicants hence competent to swear this affidavit.
 - ii. That it is within my knowledge that the Applicants were arrested and charged with the offences of arson, malicious damage to property and assault causing actual body harm at Wundanyi Law Courts.
 - iii. That I have been in conduct of the matter and it had proceeded on the well previously save for what transpired on the 12th day of September 2024.
 - iv. That on the 12th September 2024 the matter was coming for hearing on the part of the prosecution side and the prosecution brought 3 witnesses i.e. PW4, PW5 and PW6 to testify in the matter.
 - v. That PW6 was the investigating officer who testified and the prosecution wanted the said witness to produce some exhibits which were gas cylinders and car seats.
 - vi. That I timely raised an objection for the production of those exhibits since they were never presented before court earlier when the complainants were testifying as they were brought before court on the 12th September 2024 for the first time and they were never marked for identification by the complainants.
 - vii. That the court went on and ruled that it will not guide the prosecution on which evidence to call or not to call thus making the prosecution to proceed and produce the exhibits.
 - viii. That technically the court had dismissed the objection but it was not clear in its ruling thus making PW6 to proceed and adduce evidence thus going contrary to the letter and spirit of the Constitution.
 - ix. That I swear this affidavit in support of the Applicants application for orders that this matter be certified as urgent and service of the same be dispensed with in the first instance.
 - x. That I also swear this affidavit in support of the Applicants application for a revision by the High Court of the ruling and orders by the Senior Principal Magistrate allowing the prosecution to proceed with PW6 to testify and produce evidence that were not brought in court earlier for identification by complainants.
4. The Respondent filed a Replying Affidavit sworn by Evah Kanyuira as follows:-
- i. That I am a female adult of sound mind and disposition and working for gain as a Prosecution Counsel in the Office of the Director of Public Prosecutions, Voi within Taita Taveta County well conversant with the facts and issues herein thus competent to make this affidavit.
 - ii. That I have read the contents of the Notice of Motion application brought under certificate of urgency and supporting affidavit dated 21st October 2024 and I wish to respond to the same as hereunder.



- iii. That the application dated 20th November 2024 is unmerited, misconceived, an abuse of the court process and the same ought to be dismissed ab initio.
 - iv. That the issue on contention is the production of the gas cylinders as exhibits by the investigating officer before they are identified by the complainant.
 - v. That production or not of documents is a discretion of the court as the revisionary powers of the High Court do not include review of the evidence tendered in the lower court.
 - vi. That from the reading of *Njuguna Mwangi & Another v Republic* (2019) KLR, it is clear that identification and production of exhibits during the trial is purely within the authority of the trial court and it has immense powers to admit or reject exhibits depending on its credibility.
 - vii. That there is no law that was contravened by the prosecution or the witness in production of and reliance on the said gas cylinder as an exhibit as it does not mean condemnation of the Applicant.
 - viii. That the guilt or not of the Applicant will be determined by the trial court upon looking at the evidence of the prosecution as a whole and the Applicant shall be given an opportunity as a matter of right to fair hearing to call his evidence in rebuttal.
 - ix. That the gas cylinders in question had been brought to the attention of the court and the accused persons through the testimony of PW2 who is the complainant when listing the items that were destroyed by the fire at page 20 and 21 of 43 of the typed proceedings.
 - x. That a fire report that captured through photographs the gas cylinders in question had been mentioned and marked for identification as prosecution exhibit number 3 and through the testimony of PW2.
 - xi. That following the aforementioned, it is clear that the issue of gas cylinder was not novel to the accused persons and there is no law barring the investigating officer from marking and producing exhibits.
 - xii. That the Applicant has not mentioned any law that was contravened by the prosecution in their bid to have the gas cylinder produced by the investigating officer who clearly stated in his testimony that he was in conduct of the subject case.
 - xiii. That the application lacks merit and should be dismissed to pave way for the trial court to conduct the case to its logical conclusion.
5. The parties filed written submissions as follows:-
 6. The Applicants submitted that they are seeking revision of the ruling and orders made by the Senior Principal Magistrate on 12th September 2024 in Wundanyi Criminal Case No. E179 of 2023, wherein the court allowed the prosecution witness (PW-6) to testify and produce exhibits (PEXB 12a, 12b, 13a, 13b, 14a, and 14b) without these exhibits first being marked for identification by the complainants.
 7. The Applicants argued that this procedural lapse violated their constitutional right to a fair trial under Article 50(2)(j) of the *Constitution*, which guarantees the accused the right to be informed of and have reasonable access to the evidence the prosecution intends to rely on.
 8. The Applicants contend that the proper procedure for introducing exhibits was not followed. The complainants (PW-1 and PW-2) had already testified without identifying the exhibits in question, yet



- the investigating officer (PW-6) was permitted to produce them without prior marking or foundational testimony from the complainants.
9. This, they argued, amounts to an unfair ambush, as the defence was not given prior notice or opportunity to scrutinize the evidence.
 10. Citing the Court of Appeal decision in *Kenneth Nyaga Mwigie v Austin Kiguta & 2 Others* (2015), they emphasize that documents must first be marked for identification before production, and mere admission does not equate to proof.
 11. Further, they rely on *Director of Public Prosecutions v Marias Pakine Tenkewa* (2017), which outlines the standard steps for introducing exhibits, including marking, showing them to the defense, and laying a proper foundation through witness testimony.
 12. The Applicants asserted that the trial court's failure to adhere to these steps rendered the proceedings irregular and prejudicial. They also reference *Natasha Singh v CBI* (2013), where India's Supreme Court underscored that a fair trial is a constitutional and human right that must not be compromised.
 13. Invoking the High Court's revisionary powers under Article 165(6)-(7) of the *Constitution* and Sections 362 and 364 of the *Criminal Procedure Code*, the Applicants urge the court to correct this illegality. They argue that the Magistrate's ruling was improper and that the contested exhibits should be expunged from the record to ensure a fair trial.
 14. The Applicants maintain that procedural rules are essential to justice and that their breach warrants judicial intervention to prevent a miscarriage of justice. They humbly submit that the ruling be revised and the exhibits excluded.
 15. The Respondent opposed the Applicants' request to set aside the Wundanyi Trial Court's ruling of 12th September 2024, which allowed PW6 to produce gas cylinders and car seats as exhibits.
 16. The Respondent argued that the ruling was legally sound, as the prosecution has the constitutional authority under Article 157 of the *Constitution* to conduct criminal proceedings, including calling witnesses and presenting evidence, without external interference.
 17. Further, that the exhibits in question were already referenced by PW2 (the complainant) in earlier testimony and a Fire Inspection Report (Exhibit 3), contradicting the Applicants' claim that the items were unidentified.
 18. The Respondent emphasized that the Applicants had prior knowledge of these exhibits and ample opportunity to cross-examine PW2 but only raised objections when PW6 sought to produce them.
 19. Consequently, the Respondent urged the court to dismiss the Applicants' challenge and allow the trial to proceed unimpeded to ensure justice is served.
 20. The sole issue for determination is whether the Ruling by the trial court dated 12th September 2024 should be set aside.
 21. The High Court's revisional jurisdiction under Sections 362 and 364 of the *Criminal Procedure Code* is not intended to interfere with the trial court's discretion on matters of evidence unless there is a clear miscarriage of justice or illegality.
 22. The record shows that the exhibits in question (gas cylinders and car seats) were not entirely novel to the proceedings as they had been referenced by PW2 (the complainant) in earlier testimony and were captured in the Fire Inspection Report (Exhibit 3).



23. This demonstrates that the Applicants had prior notice of these items, contrary to their claim of being ambushed. Article 50(2)(j) of the Constitution guarantees the right to be informed of evidence, but this does not prescribe a rigid sequence for exhibit production.
24. The trial magistrate correctly exercised discretion in allowing PW6 to produce the exhibits, as investigating officers routinely tender evidence collected during investigations.
25. The Court of Appeal in Njuguna Mwangi & Another v Republic [2019] eKLR affirmed that trial courts have wide discretion in admitting evidence, and technicalities should not be used to obstruct justice.
26. While the Applicants cited Kenneth Nyaga Mwise v Austin Kiguta & Others on exhibit marking procedures, that civil case is distinguishable as criminal trials allow more flexibility in evidence presentation under Section 382 of the Criminal Procedure Code, which prohibits overturning decisions based purely on procedural irregularities unless they cause prejudice.
27. Notably, the Applicants will have full opportunity to challenge the exhibits' weight during defence hearing and final submissions, preserving their right to fair trial under Article 50.
28. The Respondent correctly highlighted that revision cannot substitute the trial court's assessment of evidence credibility, as held in Director of Public Prosecutions v Peter Onyango Odongo [2020] eKLR.
29. Since no constitutional violation or illegality has been demonstrated, and the trial court's decision was procedurally sound, the revision application is dismissed.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JUNE 2025 IN OPEN COURT AT VOI HIGH COURT.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent

