



Director of Public Prosecution v Ndula & 8 others (Criminal Revision E294 of 2024) [2025] KEHC 10609 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10609 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL REVISION E294 OF 2024
SC CHIRCHIR, J
JULY 17, 2025**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION APPLICANT

AND

- WILBERFORCE NDULA 1ST RESPONDENT**
- BEATRICE ALSOSA OMUKUTI 2ND RESPONDENT**
- NATHANIEL MANYEVE AHAZA 3RD RESPONDENT**
- JOHNSON OMBAKA 4TH RESPONDENT**
- ERNEST AMBAKA LUKAYU 5TH RESPONDENT**
- PETER VULILU EJIMBA 6TH RESPONDENT**
- ELIZABETH MMBONE MASIDZA 7TH RESPONDENT**
- ANTONINA MUYOKA SANGURA 8TH RESPONDENT**
- BOYSE VENTURES LIMITED 9TH RESPONDENT**

RULING

1. What is coming up for determination is the Notice of motion dated 26.08.24. It seeks for a review of the lower court ruling in Kakamega ACC No. E011 of 2022, which disallowed the prosecution’s Application to call 10 more witnesses, to serve statements and inventory, and stay of proceedings in Kakamega ACC case No. E011 of 2022, pending the hearing of this Application.

The Applicant’s case

2. It is the Applicant’s case that the statements were inadvertently omitted during the disclosure stage; that the statements were recorded between 1/1/2022 and 12/1/2022, and that no prejudice will be



suffered by the respondent as the documents which form the basis of the proposed witnesses have already been served on them .

3. It is further stated that the witness statements are limited to the documents already served and are not a means of introducing new evidence or patch up the already adduced evidence. That the respondent will have adequate time to prepare for their defence and the statements are essential to , and integral part of the prosecution's case.
4. In the supporting affidavit sworn by the Joe Mwendwa an investigator with Ethics and Anti-Corruption Commission, he states that in the course of hearing of this case, it came to his attention that 12 witness statements had been omitted at the disclosure stage and hence were not served on the respondents. He states that the statements were recorded long before the hearing started and hence the prosecution is not attempting to patch up its case. That the said statement have already been served on the defence. It is finally stated that Pursuant to the Section 150 of the *Criminal Procedure Code* ,the Court may summon the witness, if it is apparent that the evidence of such a person would be necessary for the just decision of the case.

The 2nd Respondent's case

5. It is the 2nd respondent case that, the present application is a duplication of Kakamega High Court Criminal Revision Number E233 of 23 which sought similar orders and which Revision Application was compromised through the consent of the parties. That the said consent was conditional upon the applicant not seeking to bring more witnesses and that this application therefore constitutes an infringement of the said consent.
6. The 1st respondent further states that the application is defective as it does not call for the trial Court's records, and to that extent this court does not have jurisdiction to determine the Application.
7. It is further stated that this application was prompted by the applicant's failure to secure more adjournment in the case, that nothing prevented the applicant from bringing all the witnesses when it made a similar application under Kakamega High Court Revision Number 233 of 2023. That this application amounts to trial by ambush and an attempt to patch up the case whenever the prosecution realizes that its case is being weakened during cross- examination.

4th Respondent's case

8. It is this respondent's case that the present application constitutes an attempt to patch up the prosecution's case by adding more witnesses, that the applicant has not explained to the court why the statements were left out. He further states that he had already prepared for his defence and this application ,if allowed, will mean going back to do fresh preparation. He finally states that the applicant's act of piecemeal attempts to add witnesses frustrates the principle of fair and expeditious trial.

3rd , 5th 6th 7th 8th and 9th Respondents' case

9. The replying affidavit by the above respondents has been sworn by their advocate, one Edwin Ochieng Otongo. They state that the application is an attempt to delay and derail the conclusion of the trial in lower court; that there is no reason advanced for failure to file statements considering that it has been in their possession since the year 2021; That this is 2nd attempt to introduce new evidence.. It is further stated that the Kakamega High Court Revision Number E233 of 2023 which was also a Revision Application was allowed by consent on condition that the applicant was not going to bring in such applications, moving forward.



10. The respondents accuse the applicant of attempting to bring in witnesses in a piecemeal manner based on the trajectory of the case. It is further argued that it is an attempt to patch up the holes that have been exposed through cross-examination; that admitting the proposed witnesses may give rise to a need to recall the witnesses who have already testified leading to further delays on the trial. That the respondent were constitutionally entitled to have access to the said statements long before the trial.
11. The respondents further submit that an attempt to introduce a whopping 12 new witnesses 3 years into the trial is not only unconscionable but also inexcusable. It is further stated that the respondents have prepared their defence strategies based on the evidence already provided, and additional witnesses will interfere with this strategy as the respondents will not have time to interrogate them.

Applicants submissions

12. The Applicants counsel, while admitting that the disclosure is tenet of a fair trial under Article 50 (2) (J) of the Constitution, disagrees that the disclosure must be made in advance. It has relied on the case of *Thomas Patrick Gilbert Cholmondeley v Re* (Cr. Case number 116/2007) and *Thuita Mwangi and 2 Others v EACC and 3 others* (2013) eKLR. Where it was held that disclosure is a continuous process.
13. The Applicant further submits that the prosecutor is under the obligation to disclose all the materials it has and role of the court is to decide on the evidence adduced. The decision in the case of *Bukenya & Others v Uganda* (1972) EA 549 has been relied on, in this regard

Submissions by the 3rd 5th 6th 7th 8th and 9th Respondents

14. It is the respondents submissions that disclosure cannot be an endless process as was held in the case of *D.P.P. v David Mwiraria & 6 Others* but must meet certain criteria; that the Applicant has not satisfied the said criteria as it is the evident that the statement they wish to submit was always in their possession. The respondent have also relied on the Cholmondeley (*supra*) but argues that the circumstances on the said cases were different from the circumstances in the present case.

Determination

15. The powers of revision bestowed upon the high court are meant to check the correctness, legality and propriety of the decisions of the Subordinate Courts (see Section 362 of the *Criminal Procedure Code*).
16. The Applicant has moved this court to review the ruling of the trial court delivered on 31/7/24. The Ruling arose from the Application by the Applicant herein to introduce more witnesses. The said witnesses were not disclosed at pre-trial stage. The only issue for determination then is whether there are grounds for review.
17. From the ruling of the trial court it is indicated that 8 witnesses had already testified, when the Applicant sought to introduce 12 more witnesses. (The Application herein however refers to nine witnesses.)
18. The application is opposed by most the respondents. The upshot of the respondent opposition is that it amounts, to trial by ambush; that the respondents had already arrived at a strategy on their defence. That it is an attempt to patch up the prosecution's case due to some gaps which came up at cross-examination and finally that there is no valid reason that has been advanced as to why the statements nor witnesses were not declared at pre-trial stage.
19. I agree with the respondent that save to state that the omission was a case of inadvertence, there is no further explanation forthcoming from the Applicant. Mirriam- webster dictionary



defines inadvertence as “unintentional, not focusing the mind on a matter , inattentive” (see: <https://www.merriam-webster.com>) , while Collins dictionary defines it as “lack of attention, heedlessness, oversight, slip”(see: <https://www.collinsdictionary.com>). In other words, inadvertence is a genuine mistake, an oversight, unintended, but also an act of carelessness , inattention.

20. The Respondents have correctly pointed out that the applicant had earlier filed a similar application before this court under Criminal Revision Number E233 of 2023 in which it sought to introduce one Rose Amiani as a witness. The omission of the said Rose was again, given, as a case of “inadvertence”. It raises the question: if the prosecution was diligent in their work, won't this omission have been picked up when Criminal Revision number E233/2023 was being filed? What I see is a serious case of indolence on the part of the prosecution.
21. The respondent have further submitted that it is an attempt to patch up the prosecution's case. However , I have read the proceedings so far recorded, and the respondent's assertion in my view, is not entirely true.
22. The respondent have further stated that pursuant to a consent entered into in Revision Application No. E233 of 2023 the applicant was barred from attempting to bring in more witnesses. However, none of the respondents have submitted the said consent in evidence and this court therefore not able to ascertain the terms of the alleged consent.
23. The respondents have further argued that their defence strategy was already in place. That they had spent time, money, and other unidentified resources to strategize, and the introduction of these witnesses is disruptive, as it would make them go back to the drawing board in as far as their strategy is concerned.
24. The respondents have further contended that full disclosure ought to have happened before commencement of the trial. Access to the prosecution's witnesses' statements, and documents the prosecution wishes to rely on is an element of fair trial. Article 50 (2) (j) provides that an accused person has “a right to be informed in advance of the evidence the prosecution intends to rely and to have reasonable access to that evidence. In my view the operative word is “in advance”. Thus contrary to respondent's assertion, it does not provide that it must be “before trial commences”.
25. Further, I am not convinced that the defence strategy was already in place. The prosecution's case was yet to be closed. From the various statements deposed to herein, it is evident that there were other prosecution witnesses who were yet to testify. Hence their strategy, which seem to assume that they would be called upon to defend themselves, cannot be said to have firmed up as they would have had to take into account the testimonies of the remaining prosecution witnesses when strategizing their defence.
26. Further, it is trite law that disclosure is a continuous process, that remains through out trial. In the case of *Thuita Mwangi and 2 others v EACC and 3 others* (2013) eKLR cited by both parties the court held interalia “the reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.”(Emphasis added).
27. The duty of disclosure was also highlighted in the case of *Thomas Patrick Gilbert Cholmondeley v Republic* [2008] KECA 319 (KLR) where it was held “We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the



prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.” (provisions similar to current Article 50 of the 2010 *Constitution*)

28. In a nutshell, disclosure is a continuous process during trial, subject to the defence being given ample time study the disclosed evidence and respond to it.
29. In considering the limits placed on disclosure , I have also taken into consideration the fact that the prosecution is entitled to amend the charge sheet before the closure of their case. (Section 24 of the *Criminal Procedure Code*.) That amendment may require additional evidence and hence further disclosure. Section 150 of criminal procedure code also gives the right to the court to summon witnesses . The implications of sections 24 and 150 of the *Criminal Procedure Code* is that disclosure throughout the trial is inevitable. In other words , there is really no limit to disclosure as the long as the prosecution’s case is not closed.
30. I have anxiously considered this application, the Applicant’s obvious indolence and the respondents concerns. But in arriving at the decision that I will indicate shortly , I have had to consider what is evidently a contest between procedural and substantive justice.
31. It is a procedural requirement that full disclosure is done during pre-trial stage of a case and this stage of proceedings has the effect of quickening the trial process. What then happens when parties , either out of genuine inadvertence or indolence fail to adhere to pre- trial requirements? Should the door be closed on them? Should substantial justice be sacrificed in the alter of procedural justice , even where a default in procedure does not cause any prejudice?
32. Past decisions are replete with the position that the primary duty of courts is to dispense substantive justice and I believe Article 159 (2) (d) of the *Constitution* acts as a constant reminder to the courts of this primary duty. This is not to belittle the place of procedural law or to mean that the court should look away in the face of gross violation of procedure. In this regard, I rely on the Supreme Court decision in the case of *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] KESC 6 (KLR) where in interpreting Article 159 (2) (d) stated “The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.”
33. The respondents herein will not suffer any prejudice. Once served with the proposed witness statements the documents, they can and indeed ought to be given ample time to study the statements before each of the said witnesses testify. Further the applicant has stated that the documents related to the proposed witnesses have already been supplied and that means they are already familiar with the documents.
34. Thus in the end, much as the Applicant has not sufficiently explained the reasons for omissions, the ends of substantive justice as aforesaid calls for the allowance of the application.
35. In conclusion, I hereby proceed to make the orders as follows:
 - a). That the applicant is hereby allowed to serve an inventory and witness statements, and to call the following additional witnesses.



1. Leonard Kipsanai
2. Victor Aywah Keyo
3. Beatrice Makungu
4. Joseph Maloba Chetechi
5. Samuel Wanjiru
6. Felix Nataly Mutethia
7. Ivy Scott
8. Joel Mwendwa
9. Nancy Kasenwa

b). Consequently, the trial court ruling of 31/07/2024 is hereby set aside.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ISIOLO THIS 17TH DAY OF JULY, 2025.

S. CHICHIR

JUDGE

In the presence of :

Godwin Luyundi- Court Assistant

