



REPUBLIC OF KENYA



KENYA LAW
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**King v Republic (Criminal Revision E003 of 2025)
[2025] KEHC 10395 (KLR) (11 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL REVISION E003 OF 2025**

**M THANDE, J
JULY 11, 2025**

BETWEEN

PHILIP ANDREW KING APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. The Applicant was with one Ann Kinanu Kaburu charged in Malindi Criminal Case No. E609 of 2023 with the offence of affray contrary to Section 92 of the *Penal Code*. By a ruling dated 19.12.24, the trial magistrate found that the said Ann Kinanu Kaburu had no case to answer and acquitted her. The trial Magistrate stated that the facts disclosed a prima facie case against the Applicant for the offence of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. Invoking the provisions of Section 179 of the *Criminal Procedure Code* (CPC), the trial Magistrate found that the prosecution had established a prima facie case against the Applicant for the offence of assault.
2. In his Application dated 14.1.25, the Applicant seeks the following orders:
 1. Spent.
 2. That the Honourable Court be pleased to stay the proceedings in Criminal Case No. E609 of 2023 *R v Anne Kannu & Philip Andrew King*: continued prosecution and essentially placing the 2nd accused person, Philip Andrew King on his defence pending the hearing and determination of this Revision, inter partes.
 3. That for purposes of hearing of this Revision, the Honourable Court be pleased to call for: peruse and examine the record of proceedings in Criminal Case No. E609 of 2023 *R v Anne Kannu and Philip Andrew King*: for purposes of satisfying itself as to the correctness legality or propriety of the Orders/Ruling issued on the 19th December, 2024 by Hon James Ong'ondo – Senior Principal Magistrate.



4. That the Honourable Court be pleased to review, vary, reverse, set aside and or alter the orders rendered by the Honourable James Ong'ondo-Senior Principal Magistrate on 19/12/2024 placing the 2nd accused person, Philip Andrew King on his defence, and substitute the decision by ordering his acquittal under section 210 [Criminal Procedure Code](#) of the offence of Affray as charged under Section 92, jointly with Anne Kananu.
 5. That the Honourable Court be pleased to issue such further and other appropriate orders that may be just and in the interest of justice including and not limited to investigating the integrity and propriety of the trial court.
 6. That costs of this application be provided for.
3. The grounds upon which the Application is premised are that in reaching his finding, the trial Magistrate erroneously invoked the provisions of Section 179 of the [CPC](#). The Applicant contends that the trial Magistrate completely misdirected himself in invoking Section 179 of the [CPC](#) as the offence of affray does not in itself consist of any particulars that would constitute assault, as a minor offence. The Applicant contends that the trial Magistrate knowingly misapplied the law leading to a glaring legal and factual error causing injustice and impeding his rights. Further, that the offence of assault is not a minor offence to constitute a cognate offence to affray. The Applicant argued that the penal consequence of affray is imprisonment for one year while that for assault is imprisonment for 5 years. Additionally, that the offence of affray is categorized under Part 2 of Chapter IX as relating to unlawful assembly, riots and against public order while assault is an offence relating to injury to person. As such, the 2 offences are completely unrelated.
 4. The Applicant further contends that the decision of the trial Magistrate is a gross violation of his constitutional rights and an abuse of the criminal justice system. Further that it would be a travesty of justice to subject the Applicant to further trial by placing him on in his defence for the offence of assault yet he was charged with the offence of affray. He contends that this amounts to an unfair trial. He further claims that the acquittal of Ann Kinanu Kaburu while he was placed on his defence is both absurd and discriminatory as there was overwhelming evidence that he was injured during the incident.
 5. The Respondent opted not to file any response to the Application and left it to the Court's determination.
 6. The record shows that the Applicant and Ann Kinanu Kaburu were charged with the offence of affray contrary to Section 92 of the [Penal Code](#). The particulars of the offence are that on 1.6.23 at Dream of Life area in Malindi subcounty within Kilifi county, they jointly took part in a fight in a public place within the said area. At the close of the prosecution case, the trial Magistrate in a ruling dated 19.12.24 acquitted the said Ann Kinanu Kaburu under Section 210 of the [CPC](#). For the Applicant however, the trial Magistrate invoked the provisions of Section 179 of the [CPC](#) and found that the prosecution had established a prima facie case against the Applicant for the offence of assault.
 7. Section 179 of the [CPC](#) provides:
 1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
 2. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.



7. The connotation that can be drawn from the above provision is that a court may convict a person on a minor and cognate offence where such person is charged with a more serious offence. Put differently, a court can only convict a person for a minor offence even though the person was not charged with it, where the evidence establishes the ingredients of that minor offence. A court may not however convict an accused person of a more serious offence even if the evidence establishes such offence. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.
8. *Black's Law Dictionary*, Tenth Edition defines a cognate offense as:

A lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category.
9. The offence of affray with which the Applicant was charged, falls under Chapter IX of the *Penal Code* which provides for offences relating to unlawful assemblies, riots and other offences against public tranquillity. Section 92 of the *Penal Code* provides that any person who takes part in a fight in a public place is guilty of a misdemeanour and is liable to imprisonment for one year. On the other hand, the offence of assault falls under Chapter XXIV of the *Penal Code* which provides for offences relating to assaults. Section 251 provides that any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years. It is quite clear that the offence of assault is quite distinct from that of affray. It is not a minor and cognate offence.
10. The Court of Appeal had occasion to consider the import of Section 179 of the *CPC* in *Kalu v Republic* (2010) 1 KLR, and had this to say:

With the greatest respect to the learned Judge there was no law which would authorize a judge on appeal to convict a person with an offence with which that person was never charged. All the provisions of the *Criminal Procedure Code* which are under the heading:-“Convictions for Offences Other than Those Charged” and beginning with Section 179 up to Section 190 deal with situations in which a court is entitled to convict on a minor and cognate offence where a person is charged with a more serious offence. Thus it is permissible to convict a person charged with capital robbery under Section 296(2) of the *Penal Code* for the offence of simple robbery contrary to Section 296(1) of the Code. It is also permissible to convict a person charged with murder under Section 203 of the *Penal Code* with manslaughter under Section 202 as read with Section 205 of the *Penal Code*. That is because the offence of manslaughter, for instance, is minor and cognate to that of murder. But where there is no charge of murder at all, and the only charge available on the record is that of manslaughter, it would be courageous for a trial court to convert that charge into murder simply because the evidence on record proves murder.
11. In the present case, there was no charge of assault which as shown above is quite distinct from the offence of affray with which the Applicant was charged. Duly guided by the Court of Appeal in the cited case, I find that the trial Magistrate misdirected himself by converting the minor charge of affray to that of the more serious offence of assault simply because he found that the evidence on record established the offence of assault. Accordingly, placing the Applicant on his defence for the more serious and unrelated offence of assault while he was charged with affray, clearly occasioned the Applicant prejudice and violated his right to a fair trial as guaranteed under Article 50 of the *Constitution*.
12. In the end, I find that the Application is merited. The decision of the trial Magistrate dated 19.12.24 placing the Applicant on his defence is hereby set aside. I substitute therefore an order acquitting



the Applicant under Section 210 of the *Criminal Procedure Code* of the offence of affray contrary to Section 92 of the *Penal Code*, with which he was charged in Malindi Criminal case No. E609 of 2023.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 11TH DAY OF JULY 2025

M. THANDE

JUDGE

