Ogutu & another v Republic (Miscellaneous Criminal Application E077 of 2024) [2025] KEHC 10888 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10888 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS CRIMINAL APPLICATION E077 OF 2024

JM OMIDO, J

JULY 24, 2025

BETWEEN

ERICK OWUOR OGUTU ..... 1ST APPLICANT

STEPHEN OKAKA ..... 2ND APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

A. Background

1. The Applicants are presently facing trial vide Kisumu SPMC Criminal Case No. E021 of 2023 in which they are jointly charged in the first count with the offence of causing grievous harm contrary to Section 234 of the *Penal Code*, Cap 63 Laws of Kenya. The 2nd Applicant is in the second count charged with the offence of disobeying summons by the Independent Police Oversight Authority (IPOA) contrary to Section 31(1)(a) of the *Independent Police Oversight Authority Act*, Cap 86 Laws of Kenya (erstwhile Act No. 35 of 2011) in the second count.

2. It is instructive from the record of the criminal case before the trial court, which is before me, the Applicants denied the charges and the matter thereafter proceeded, with the prosecution closing its case on 18th April, 2024 after calling seven witnesses.

3. On 23rd January, 2024, the learned trial Magistrate, Hon. K. Cheruiyot rendered his ruling in line with Section 210 and 211 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya, and reached a finding that the two Applicants have a case to answer in respect of the first count and placed them on their defence. The second Applicant was acquitted on the second count.

4. Let us read the two provisions of statute:

   210. Acquittal of accused person when no case to answer

If at the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as the prosecutor and the accused person or his advocate may wish to put forward, it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.

211. Defence

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

5. In his ruling, Hon. Cheruiyot rendered himself as follows:

1. The prosecution have closed their case, the case now turns for the court to determine whether a prima facie case was made out against the accused persons or any of them sufficiently to warrant placing them or any of them on their defence.

2. A prima facie case has been defined as one on which a court could convict if the accused person fails to give an explanation when placed on his defence (see *Bhatt Ramanlal v Republic* [1969]. (The correct citation is [1957] EA).

3. The accused persons are jointly charged with causing grievous harm contrary to Section 234 of the *Penal Code* in count 1.

4. The second accused Stephen Okaka is separately charged with disobeying summons by IPOA contrary to Section 31(1)(a) of the *IPOA Act* in court.

5. The particulars of the offence in respect of the charge of disobeying IPOA summons are that on diverse dates between 20th September, 2019 and 21st November, 2019, the second accused person Stephen Okaka unlawfully disobeyed summons by IPOA.

6. However, at the hearing, there was no attempt at proving the disobedience. No summons were referred to that are alleged to have been disobeyed.

7. Specifically, PW7 Wilson Obong, an investigator with IPOA based in Kisumu who was the investigating officer in this case did not refer to the charge of disobedience of summons or the summons disobeyed and the date of disobedience.

8. Therefore, there is no sufficient evidence to mandate the court to place the second accused person on his defence in respect of the charge of disobeying IPOA summons.

9. The accused person has no case to answer in count II and is acquitted accordingly under Section 210 of the *Criminal Procedure Code* in count II.

10. In respect of the charge of causing grievous harm the court found that certain facts did emerge during the hearing which require the accused persons' explanation concerning this matter.

11. Therefore, the court finds and holds that the accused persons have a case to answer in count I on the charge of causing grievous harm contrary to Section 234 of the *Penal Code* and place them on their defence accordingly."

6. In line with the above provisions, a date for defence hearing was set for 6th June, 2024, with both Applicants intimating to the trial court that they would give sworn defences.

B. The Notice of Motion Dated 20th May, 2024.

7. The above ruling of the trial court triggered the filing by the Applicants of the application dated 20th May, 2024, expressed to be brought under Articles 6, 7 as read with 50(1), (2)(i) of the *Constitution* of Kenya, Sections 210, 211, 362, 364, 365 and 367 as read with 347(1)(b), (2) and 348(a) of the *Criminal Procedure Code*, Cap 75 Laws of Kenya, and all other enabling provisions of the law, which seeks the following orders:

a. [Spent].

b. [Spent].

c. That this Honourable Court be pleased to call for and examine the record of proceedings and ruling of the Honourable Court in Kisumu Senior Principal Magistrate's Court Criminal Case No. E201 of 2023, *Republic v Erick Owuor Ogutu & Stephen Okaka*, for the purposes of satisfying itself as to the correctness, legality and propriety of the finding of the court contained in its ruling delivered on 9th May, 2024, constituting its finding of a prima facie case made by the prosecution requiring the Applicants to be placed on their defence.

d. Any other orders this court may deem fit to grant.

8. The grounds upon which the application is premised are set out on its face, and are in precis as follows:That the prosecution witnesses' evidence constituted irreconcilable conflicting evidence which created overwhelming doubt, vitiating the prosecution case.The Applicants were not properly identified as the assailants who committed the offence of grievous harm and that the conditions were not conducive for an identification that was without fault.The decision of the trial court to place the Applicants on their defence was reached without evidence to support the same.The ruling and orders emanating therefrom places the Applicants in a position of immense prejudice.The resulting order that placed the Applicants on their defence was made in violation of their rights to a fair hearing.

9. The application is supported by the affidavit of leaned Counsel for the Applicants, Mr. Jude Ragot, Advocate, sworn on 20th May, 2024. The affidavit restates and expounds on the above grounds.

10. The application is opposed and to that end the Respondent filed a replying affidavit sworn on 16th September, 2024 by Ms. Mercy Mutheu Muema, learned Prosecution Counsel on record for the State.

11. In her affidavit, Ms. Mutheu has made depositions that:The trial before Hon. Cheruiyot has been conducted in accordance with the principles of justice and the Applicants so far accorded a fair trial.The ruling of the trial court vide which the Applicants were placed on their defences was made on sound judicial principles and cannot in the premises be deemed to amount to a violation of the Applicants'

rights to a fair trial.The perceived inconsistencies in the prosecution case (if any) were considered by the trial court in reaching its findings.The Applicants retain an opportunity to address the issues presented vide the instant application during the defence hearing.The proper manner to challenge the ruling is by preferring an appeal.The court's revisionary jurisdiction has not been properly invoked.

C. Issues for Determination.

12. This court directed that the application be canvassed by way of written submissions. Both sides filed their respective submissions.

13. I have considered the application, the affidavit in support thereof, the replying affidavit, the submissions by the two parties and the record of the lower court. The following issues emerge for this court to determine:

    a. Whether the Applicants have placed before me tenable reasons and/or grounds that would warrant this court to exercise its revisionary jurisdiction under Section 362 of the *Criminal Procedure Code* in respect of the ruling of the trial court.

    b. What orders commend the Applicants' notice of motion dated 20th May, 2024.

14. I will determine the above issues in the order that I have set them out.

15. This court is clothed with supervisory jurisdiction over subordinate courts by virtue of Article 165(6) and (7) of the *Constitution* and Section 362 of the *Criminal Procedure Code*.

16. Let us read the provisions:

> Article 165 of the *Constitution*
>
> (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."
>
> Section 362 of the *Criminal Procedure Code*:
>
> 362. Power of High Court to call for records
>
> 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.

17. From the above provisions, the powers of revision of the High Court over the records of the courts subordinate to it are limited to the court satisfying itself of 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.

18. Section 364(1) of the *Criminal Procedure Code* provides that the High Court may, in revising an order of the lower court, other than an order of acquittal, alter or reverse the order.

19. What essentially this court has been asked to do is to consider the prosecution evidence before the trial court and reach a finding that no prima facie case has been established against the two Applicants on the first count and on that basis, set aside the trial court's finding and substitute the same with an acquittal of the Applicants.

20. The court, in the case of *Bhatt v Republic* [1957] EA 332 at 334 and 335 addressed itself as to what would amount to a prima facie case, as follows:

> " Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one "which on full consideration might possibly be thought sufficient to sustain a conviction." This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is "some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence". A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as Wilson, J said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence."
>
> (Underlined emphasis).

21. When a court in a criminal trial reaches the determination that a prima facie case has sufficiently been made out against an accused person, it is inadvisable at that stage to give reasons for that finding. A trial court is however required to give reasons where it reaches the finding that no prima facie case has been established to warrant an accused person being placed on his defence.

22. In the case of *James Nthuku Kithinji v Republic* [2020] eKLR, the court held that:

> " It has been held by various courts that it is not mandatory or even advisable for a trial court to give detailed reasons while placing an accused on his defence because to do so may cause embarrassment to the court when making the final determination."

23. The court, in the case of *Festo Wandera Mukando v Republic* [1980] KLR 103 held that:

> " ...we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of "no case" is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned."

24. The Court of Appeal was of a similar finding in the case of *Anthony Njue Njeru v Republic* [2006] eKLR where it observed as follows:

> "We wish to point out here that it is undesirable to give a reasoned ruling at the close of the prosecution case, as the learned Judge did here, unless the court concerned is acquitting the accused."

25. Ojwang, J (as he then was) in the case of *Republic v Kamiro Chege* [2006] eKLR, had the following to say on the issue:

> "Whenever the court rules that there is a case to answer and puts the accused to his defence, a detailing of its assessment of evidence could lead the accused to adopt a specific strategy of defence; and this could amount to a filling-in of gaps in the prosecution case."

26. The jurisprudence that results from the above decisions supports the stance that the learned trial Magistrate took, in that he did not give reasons as to why he placed the two Applicants on their defence on the first count; and proceeded to give reasons for the acquittal of the 2nd Applicant on the second count.

27. In my understanding the Applicants' urge that the evidence that was presented before the trial Magistrate was not sufficient to be a basis to place the two Applicants on their defence, and that the learned trial Magistrate erred in reaching the finding that the evidence sufficiently established a prima facie case in respect of the first count. Thus then, the Applicants are now asking the court to reassess, reevaluate and reconsider the evidence that was adduced before Hon. Cheruiyot and reach the finding that the two Applicants ought not to have been placed on their defence.

28. With respect, I am of the persuasion that the exercise of the court's revisionary powers does not include revision of merit decisions. As we have seen above, revision in exercise of the court's supervisory powers is limited to the court 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.

29. A decision to the effect that a prima facie case has been made out against an accused person is a merit decision. Remembering that the trial court is at that stage not required not to give reasons for the decision to place an accused person on his defence, it would be impossible for this court to revise the said decision on in its merits (where there are no reasons given), as doing so would be speculative of the reasons of the trial Magistrate.

30. My view is similar to that of the court in the case of *Muriuki (130358) v Kiprotich* (Criminal Revision E209 of 2022) [2022] KEHC 16208 (KLR) (Crim) (7 December 2022) (Ruling), wherein the court held:

> "The second ground the Applicant has raised in seeking to have the finding and orders of the court martial (revised) is that the prosecution never produced any or any sufficient evidence upon which the court martial could rely in making a finding that a prima facie case had been established against the applicant sufficient enough to have him be placed on his own defence. The Applicant has gone ahead to bring out the evidence of each of the prosecution witnesses.
>
> In essence, what the Applicant is asking this court to do is to re-evaluate the evidence before the court martial in order to come up with a different finding. These, to me are matters that would properly be handled on appeal should the applicant's case reach that stage. The court

sitting on its revision jurisdiction, cannot delve into the detailed analysis of the evidence presented at the trial. And for good reason. Were the court to go deep in the analysis as urged, only for the matter to proceed on to appeal, the court would be put in an embarrassing situation of re-determining the same issued it had already determined by way of revision."

(Underlined emphasis).

31. In the case of *Rai & 5 others v Republic* (Criminal Revision E026 of 2024)[2024] KEHC 11363 (KLR) (Crim)(30 September 2024) (Ruling) the court held that:

> " Revision as a process does not delve into the merit of the impugned decision. Similarly, unlike an appellate court where parties challenge the decision made the revision court cannot replace or alter findings of a trial court with its own findings, this power is vested on the appeal court."

32. The case of *Muriuki* (supra), spells out that the High Court on revision, must exercise restraint and limit itself to matters that strictly fall under Section 362 of the *Criminal Procedure Code*, so that it does not micro-manage business that is the reserve of the trial court. The court stated as follows:

> " The court must also deflect any attempts by parties inviting it to micromanage the trials before the subordinate courts and tribunals, also for the very same reason of possible embarrassment in case of appeal. And also no the fact that the subordinate courts and tribunals, are independent institutions which ought to be aided and facilitated to exercise their independence in the manner in which they exercise both their constitutional and statutory mandates."

33. Addressing itself to the same issue, the court in the case of *Republic v James Kiarie Mutungei* [2017] eKLR, the court held that:

> " .....function of the court under Section 362 of the *Criminal Procedure Code* as read with Section 364 is to enable the court to scrutinize and examine the correctness of facts of a subordinate court or tribunal so as to make a finding on legality or propriety. Legality means lawfulness, strict adherence to law, correctness and propriety ordinarily having the same meaning... The interference under Section 362 by this court on revision can only be justified if the impugned decision is grossly erroneous, to justness appropriateness and suitability to trial..."
>
> (Underlined emphasis).

34. It was held in the case of *Republic v Samuel Gathuo Kamau* [2016] eKLR, that:

> " Needless to say, that supervisory jurisdiction is exercised as may be provided by law – by way of appeal, revision, etc. it does not include on any perceived power to make a decision on behalf of a subordinate court which that court ought to make."
>
> (Underlined emphasis).

35. Having said so much, it is clear that this court cannot exercise powers of revision of the lower court's merit decision, such as the finding that a prima facie case has been made out against an accused person, and substitute the same with its own finding.

36. Further, this court cannot purport, in exercise of revisionary powers, to proceed to exercise the constitutional and statutory mandates of the trial court by evaluating the evidence adduced in the trial, or considering the defences of the Applicants. It will amount to usurpation of the trial court's powers and/or mandate for me to consider the evidence before it and make findings and a determination of the same, if this court proceeds to interfere with the ruling of the trial court, by revising it.

37. The upshot is that the Applicants have not demonstrated to this court how the ruling and decision to place them on their defence is incorrect, illegal or one that was made without propriety. The result I then reach is that the Applicants' motion by notice dated 20th May, 2024 lacks merit and is hereby dismissed.

38. I hereby direct that the trial court's file be placed before Hon. Cheruiyot on 7th August, 2025 for directions, so that the trial proceeds apace. The Applicants are ordered to appear before the trial court on that date.

39. This file is hereby closed.

40. Orders accordingly.

DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 24TH DAY OF JULY, 2025.

JOE M. OMIDO

JUDGE

For the Applicants: Mr. Ragot.

For the Respondent: Ms. Muema.

Court Assistants: Mr. Ngoge & Mr. Juma.