



Joel alias Nyamweya v Republic & another (Judicial Review Miscellaneous Criminal Application E111 of 2023) [2024] KEHC 1428 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1428 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
JUDICIAL REVIEW MISCELLANEOUS CRIMINAL APPLICATION E111 OF 2023
TA ODERA, J
FEBRUARY 5, 2024**

BETWEEN

JAMES OMAGWA JOEL ALIAS NYAMWEYA APPLICANT

AND

REPUBLIC 1ST RESPONDENT

**THE SENIOR PRINCIPAL MAGISTRATE'S COURT, OGEMBO 2ND
RESPONDENT**

RULING

1. The Applicant, James Omagwa Joel alias Nyamweya, filed a Notice of Motion dated 11.12.2023 through the firm of Gogi & Associates Advocates for the following orders:
 - A. An Order Of Certiorarito remove unto this Honourable Court and quash the entire proceedings, rulings, decisions and orders of PLEA of own guilty entered in MCSO E091 of 2022 At The Senior Principal Magistrate's Court at Ogembo and the resulting sentence thereby.
 - B. That a retrial is ordered in MCSO E091 of 2022 At Senior Principal Magistrate's Court At Ogembo.
 - C. The costs of the Application.
2. The grounds on the face of the application are that the conviction of the ex-parte Applicant infringed on his constitutional right to be heard thereby subjecting him to human indignity and treatment. The Respondent rushed the proceedings and the lack of interpretation from the English language to a language that the ex-parte Applicant was proficient in, was malicious. The ex-parte Applicant was subjected to an administrative process that was not procedurally fair, for which no written reasons were given and which charges were not explained to him together with the seriousness thereof. His right to a fair trial was violated as he was not informed of his right to have legal representation and he was not warned of the consequences of pleading guilty to the charges facing him. The Respondents failed to observe the values and principles of public service set out in Article 232(1) of [the Constitution](#) of Kenya.



Therefore, the ex-parte Applicant's conviction was illegal, unlawful, null and void, the Respondents' actions were unfair, discriminatory, arbitrary, inconsistent, contradictory, malicious and capricious and offended the presumption of innocence and thus illegal, had an improper motive and/or for selective extraneous purpose.

3. The Application was supported by a Statutory Statement dated 11.12.2023. The Applicant reiterated the reliefs in the Notice of Motion Application. The Applicant set out grounds similar to those in the Notice of Motion Application.
4. In addition, the Applicant swore a Verifying Affidavit on 11.12.2023. He deponed that on 30.9.2022, he was presented before the Ogembo Senior Principal Magistrate's Law Courts MCSO No. E091 of 2022 to answer to the charge of defilement contrary to Section 8(1) as read with 8(3) of the [Sexual Offences Act](#), Act No. 3 of 2006 and an alternative count of committing an indecent act with a child contrary to Section 11(1) of the [Sexual Offences Act](#), Act No. 3 of 2006. He deponed that he was not asked which language he understood; the charge and facts were read out to him in the English language which language he did not comprehend; he was not warned of the implications of pleading guilty; the seriousness of the offence was not read out to him especially bearing in mind that he had just turned 18 years and technically a minor who needed guidance. Therefore, the procedure of entering the guilty plea and ensuing conviction was unprocedural, manifestly malicious, unlawful, unconstitutional, inconsistent, contradictory and ultra vires to the provisions and procedure of the law. He deponed that the Respondents' decisions are irrational, an abuse of power, oppressive, punitive and grossly unlawful. Attached to the Verifying Affidavit is the charge sheet in Ogembo SPMCSO No. E091 of 2022, Certificate of Birth No. 3543126 for James Nyamweya, a letter from St. Peter's Keberesi High School dated 6.3.2023, an admission letter to St. Peter's Keberesi High School bearing a stamp dated 27.5.2021 and an online result slip for the Kenya National Examinations Council for Omagwa Nyamweya James.
5. The Respondent filed submissions in response dated 18.12.2023. The application was conceded on the following grounds: -
 - i. The applicant was never warned of the seriousness of the offence.
 - ii. The trial magistrate ought to have asked the accused the language in which he understands fully & ought to have indicated in the proceedings the language in which the applicant elected to use.
 - iii. The trial magistrate ought to have informed the accused of his right to legal representation.
6. Mr. Justus Ochengo thus urged the Court to allow a retrial instead of an acquittal.
7. Ms. Gogi for the Applicant sought for the application to be allowed and a retrial to be ordered.

Determination

Although prosecution conceded to the application, a cursory observation reveals that the Applicant is seeking for orders of certiorari. No leave was sought before filing the substantive notice of motion as required under Section 9(3) of the [Law Reform Act](#). An application leave to file Judicial review should be filed within 6 months from the date of the order or decree or proceedings made. In this case, that would be 6 months from 3.10.2022.

Section 9(3) of the [Law reform Act](#)[22] provides as follows:-

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be



granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."

The present application was filed over 12 months after accused was sentenced and without leave of the court. In the case of *Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996 Justice Waki held that:

"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

8. The ex-parte applicant herein proceeded to file the substantive application without leave and thus denied this court an opportunity to interrogate whether the application was fit for judicial review or not.
9. In the persuasive case of *Republic v Chief Magistrate Milimani Commercial Courts & 2 others Ex Parte Fredrick Bett* [2022] eKLR 14. Justice A.K Ndungu held that "The chamber summons dated 8th October 2021 has sought substantive judicial review reliefs without the applicant seeking leave to institute judicial review proceedings. In view of the foregoing, the application is thus fatally defective for flouting clear statutory provisions. I hereby strike it out with costs to the respondents."
10. I therefore find that the application herein is fatally defective. I need not delve into the merits and demerits of the application in the circumstances. I proceed to strike out the application dated 11.12.23.

DATED, DELIVERED AND SIGNED AT KISII THIS 5TH DAY OF FEBRUARY 2024.

TERESA ODERA

JUDGE

In the presence of:

Ms. Gogi for the Applicant

Mr. for the Respondent.

Oigo - Court Assistant

