



Office of the Director of Public Prosecution (ODPP) v Sure (Criminal Revision E178 of 2023) [2024] KEHC 1437 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL REVISION E178 OF 2023
FR OLEL, J
FEBRUARY 14, 2024**

BETWEEN

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION
(ODPP) APPLICANT**

AND

**PRINCIPAL MAGISTRATE COURT, KANGUNDO LAW COURT (2) HON
DAFFLINE NYABOKE SURE RESPONDENT**

RULING

A. Introduction

1. This review application is filed by the Applicant (ODPP) *vide* their letter dated 15th December, 2023 (Ref.MKS/ADV/REV/CORR (2)), wherein they stated that on 8th December 2023, there was a meeting called by the National council on Administration of Justice (NCAJ) at Savanna Lodge in Nguluni. The said meeting was to start at 9.30am and all prosecution counsel were in attendance and a notice to that effect had been issued to all parties, including the Respondent court.
2. Despite being aware as to why the prosecution counsel was absent from her court, the respondent went ahead and made adverse orders in various criminal matters which were listed before her, which action was repugnant to the rules of natural Justice. In light of the foregoing, the applicant requested that all criminal files, wherein adverse orders were made on 8th December 2023 be called and the proceedings therein be reviewed to ascertain the appropriateness of the orders made pursuant to provisions of section 362 and 364 of the *Criminal Procedure Code*.
3. The respondent did not file any response to this review Application



B. Analysis of Law

4. The powers of the High court in revision are contained in Section 362 through to 366 of the *Criminal Procedure Code* (cap.75). Section 362 specifically provides as follows: -

“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”.

5. What the High Court can do under its revision jurisdiction is stated under Section 364 of the *Criminal Procedure Code* Cap 75, which states as follows: -

“(1) in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may –

(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

(b) in the case of any other order than an order of acquittal, alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he had had an opportunity of being heard either personally or through an advocate in his own defence. Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.

(3) Where the sentence dealt with under this section has been passed by a Subordinate Court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than might have been inflicted by the court which imposed the sentence

(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.

(5) When an appeal arises from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.”

6. The applicant case is that they had a valid reason as to why their counsel was not in court on 8th December 2023. All prosecution counsels were attending an NCAJ meeting at Savanna Lodge In Nguluni, which meeting was starting at 9.30am and the trial court was well aware of this fact and ought not to have proceeded and issue adverse orders in various criminal matters listed on the said date for hearing/mention.

7. Under the current jurisprudential trend, the right to to fair administrative action and/or right to be heard is now constitutionally entrenched. The parameters for according this right to a deserving party have also been crystallized by case law. See *Richard Nchapi Leiyagu vs. IEBC & 2 Others* [2013]eKLR;



Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs. Abdul Fazaiboy*, Civil Application No. 33 of 2003; in which it was variously held, *inter alia*, that: the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law; the right to be heard is a valued right; and that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.

8. The matter where the alleged adverse orders were issued on 8th December 2023 are;



S/No.	Case No.	Parties	Comments As Relates To Proceedings Of 08.12.2023
1	MCCR E386/2020 No.	Republic – Vrs- Jane Ngina Mumo & Nicholas Mwanzia Sammy	Typed proceedings not complete. Hand written proceedings of 8/12/2023 Missing
2	MCCR E1165/2023 No.	Republic – Vrs- Moses Barongo Nyariera	Matter withdrawn at instant of complainant Isaac Kerima Nyariera
3	MCCR E1167/2023 No.	Republic – Vrs- Francis Kitele Peter	Complainant in court. Matter to be mentioned before court 3 on 13.12.2023 for it to be withdrawn
4	MCCR E1168/2023 No.	Republic – Vrs- Boniface Mutua Mutisya	Matter heard at 12.47pm in the presence of Ms Mwaura for ODPP. Complainant allowed to withdraw case
5	MCCR E1169/2023 No.	Republic – Vrs- Thomas Munyao Wang'ombe & Virginia Ntheu Nzioka	No proceedings of 8.12.23. But matter has hearing date for 7.03.2024
6	MCSO E049/2023 No.	Republic – Vrs- Amani Kajibwami	Matter allocated hearing date for 02.02.2024
7	MCSO No.45/2020	Republic – Vrs- Kelvin Kahindo Musyimi	Ruling read and accused is found to have a case to Answer. Defence hearing on 29.02.24
8	MICSO E020/2021 No.	Republic – Vrs- Benard Mutunga Kiio	Ruling read and accused is found to have a case to Answer.



			Defence hearing on 29.02.24
9	MCCR E864/2022	No. Republic – Vrs – Peter Wambua Musyoka	Ruling read and accused is found to have a case to Answer. Defence hearing on 29.02.24
10	MCCR E1244/2022	No. Republic – Vrs- Alex Muema Lumumba	Ruling read and accused is found to have a case to Answer. Defence hearing on 29.02.24
11	MCCR E590/2022	No. Republic – Vrs – Stephen Ndiga Mati	Ruling read and accused is found to have a case to Answer. Defence hearing on 18.04.24

9. Having review all the above files, I do find that no adverse orders were made that was detrimental to the applicants. There is therefore no basis upon which I can review the said proceedings

Disposition

10. The review Application dated 15th December 2023, therefore has no merit and the same is dismissed.

11. It is hereby so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF FEBRUARY, 2024. DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 14TH DAY OF FEBRUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

In the presence of;

Mr. Mongare for Applicant

No appearance for Respondent

Sam - Court Assistant

