



**Office of the Director of Public Prosecution (ODPP) v (CM) (Criminal Revision E012 of 2024) [2024] KEHC 2732 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2732 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL REVISION E012 OF 2024**

**FR OLEL, J  
MARCH 12, 2024**

**BETWEEN**

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

**AND**

**CHIEF MAGISTRATE’S COURT, KANGUNDO LAW COURT (1) HON OLE  
KEIWUA (CM) ..... RESPONDENT**

**RULING**

**A.Introduction**

1. This review application was filed by the Applicant (ODPP) *vide* their letter dated 17<sup>th</sup> January 2023 (Ref.MKS/ADM/1/2024/(151), wherein they stated that on 29<sup>th</sup> December 2023, they file Kangundo Misc Application No E048 of 2023, seeking detention of a Murder suspect for 10 days in accordance with Article 49(f), (g) of the Constitution. The said application was place before Hon. Ole Keiwua (CM), who upon considering the same did grant orders allowing the police investigator to hold the suspect for ten (10) more days and thereafter directed that he be charged with the offence of Murder at High court Machakos.
2. On 8<sup>th</sup> January 2024, the applicant did cause a charge sheet to be filed being; Kangundo Cmcrc no e039 of 2024; *Republic v Stanley Muthiani*, where they opted to charge the said Accused person with the offence of Manslaughter contrary to section 202 as read with Section 205 of the Penal code. When the said matter was called out the trial court insisted that he issued orders that the suspect be charged with the offence of Murder. Further he had not seen any Appeal filed as against his ruling given in *Kangundo Misc cr Application no E048 of 2023*, and therefore proceeded to discharge the accused person under section 85(5) of the Criminal procedure Code, Cap 75 laws of Kenya.



3. It was the applicant contention that the conduct of the judicial officer did infringe and usurped the constitutional mandate of the Director of public prosecution as exclusively provided under Article 157(6) (a) – (e) of the constitution of Kenya 2010, They has scrutinized the police file at their county office in Machakos and the decision to charge guidelines were strictly adhered to by the prosecution counsel before arriving at the decision to charge the suspect with the offence of Manslaughter. It was therefore unlawful for the Judicial officer to overstep his mandate by dictating, what charges should be brought by the prosecution. The court was therefore urged to call for the original court file *Kangundo Misc cr no E048 of 2023 & Kangundo Cmcrr no E039 of 2024* and review/set aside the orders made there under as permitted under Section 362 and 364 of the Criminal procedure Code.
4. The respondent did not file any response to this review Application

## **B. Analysis of Law**

5. The powers of the High court on 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”.

6. 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 prejudiced 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.”
7. The objective of revisionary powers of the high court is to confer upon the said court a kind of paternal or supervisory jurisdiction over the subordinate court and/or tribunal, to correct or prevent miscarriage of justice. The main question to be considered is whether substantial justice has been done and whether any order made by the lower court should be interfered with in the interest of justice.
8. In *DPP v Stephen Lesinko* (2018) eklr, Justice Nyakundi did outline the principles which will guide the High court when examining the issues pertaining to Section 362 of the *criminal Procedure Code*. The guiding principles were identified as;
- (a) Where the decision is grossly erroneous;
  - (b) Where there is no compliance with the provisions of the law;
  - (c) Where the finding of fact affecting the decision is not based on evidence or it is as a result of misreading or non-reading of evidence on record;
  - (d) Where the material evidence on the parties is not considered; and
  - (e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores the facts and tries the accused of lesser offence.
9. It is true that on 8<sup>th</sup> January 2024, when the accused was presented to take plea in *Kangundo Cmcrr No E039 of 2024*, the trial Magistrate; Hon Ole Keiwua (CM) did give the following directions, to wit; “I gave directions that the suspect be charged for Murder. I have not seen an Appeal on the Miscellaneous application, Charges discharged under Section 89(5) of the *criminal procedure Act*, Cap 75 laws of Kenya.”
10. The office of the ODPP was created as an independent office under Article 157(1) of the *constitution* of Kenya 2010. Further under Article 157(6),(a),(b),(c) and 10 of the said *constitution*, the DPP has exclusive powers to institute and undertake any criminal proceedings as against any person, take over any criminal proceedings commenced in any court that has been instituted and/or discontinue the same at any stage before judgement.
11. In particular under Article 157 (10) of the said *constitution*, the DPP in undertaking his duties shall, “not require the consent of any person or authority for the commencement of criminal proceedings and in exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.”
12. It is obvious that by his decision dated 8<sup>th</sup> January 2024, the trial magistrate did err, when he directed that the suspect be charged with Murder. That decision was made without any legal basis and It is the DPP to exclusively determine what offence an accused person is to be charged with in court after examining the evidence availed by the investigating officer.

## Disposition

13. The review Application dated 17<sup>th</sup> January 2024, therefore has merit. The order issued on 8<sup>th</sup> January 2024, when the accused was presented to take plea in *Kangundo Cmcrr No E039 of 2024*, by trial Magistrate; Hon Ole Keiwua (CM) to the effect that he discharged the accused person therein under Section 89(5) of the *criminal procedure Act*, Cap 75 laws of Kenya are hereby set aside *ex debito justitiae*.



14. The accused Stanley Muthiani is to be summoned afresh and produced before Kangundo Chief Magistrate court - (II) to enable him take plea on the charges preferred by the prosecution.
15. It is hereby so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 12<sup>TH</sup> DAY OF MARCH, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 12<sup>th</sup> day of March, 2024.

In the presence of;

.....for Applicant

.....for Respondent

Sam Court Assistant

