



**Republic v Kipsang (Criminal Miscellaneous Application
E012 of 2023) [2024] KEHC 4201 (KLR) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL MISCELLANEOUS APPLICATION E012 OF 2023**

SM MOHOCHI, J

APRIL 15, 2024

BETWEEN

REPUBLIC APPLICANT

AND

LABAN KIPSANG RESPONDENT

RULING

Introduction

1. The Respondent, Laban Kipsang was charged on the 5th October 2020, with four counts of stealing and impersonation in Nakuru CMCR No. E165 of 2020 he was admitted to cash bail and his trial commenced on the on the 2nd of March 2021 the prosecution presented four (4) witnesses but only one (1) was allowed to testify owing to the fact the defence did not have witness statements of two witnesses in advance.
2. On the 25th August 2021 the Prosecution presented three (3) witnesses the Respondent was absent, warrants of arrest were issued and subsequently lifted on the 2nd of September 2021.
3. The trial magistrate scheduled two consecutive hearing dates for the 6th and 7th of March 2022.
4. On the 7th of March Mrs Morande Advocate was indisposed disrupting the hearing once more until the 14th July 2022 when the matter came up and the Respondent was absent as he had been arrested and arraigned in Kabarnet Law Courts, the surety withdrew.
5. The Respondent appeared after a long absence on 7th December 2022 where a new trial magistrate directed the matter to proceed from where it had reached and hearing was scheduled for 28th February 2023.
6. On the 28th February 2023 the prosecution was not ready they never had the file and never knew if witnesses had been bonded matter adjourned to the 28th of March 2023.



7. On the 28th of March 2023 at 9.00am the prosecution was not ready, later the prosecutor had her file but the investigating officer had disappeared the Court unilaterally closed the prosecution's case then later the prosecutor indicated she had one witness and the trial magistrate unilaterally re-opened the prosecution's case and PW2 testified.
8. On the 6th of June 2023 the trial continued with PW3 testifying and after cross-examination, the Prosecutor Mr. Ishmael requested for an adjournment, the defence conceded. The Court observed that the Prosecutions had two "last adjournments". There is no evidence that the investigating officer is on leave, in the circumstances, the prosecution's case is closed. The Court proceeded to deliver a ruling on a case to answer by stating that, I have had occasion to evaluate the evidence adduced thus far on prima facie basis, there is evidence connecting the accused to the commission of the offence he is placed on his defence pursuant to section 210 of the penal code.
9. The Respondent indicated that they shall give sworn evidence and the defence hearing was scheduled for the 18th July 2023. It is the unilateral closure of the prosecution's case that has given rise to this criminal revision by way of letter dated 13th July 2023 signed by Ismail Fahim prosecution counsel. The Trial is now in suspense.
10. The Applicant contends that the Court had no jurisdiction to close the prosecution's case and that the disregard of the fact that the only witness remaining was the investigating officer who was on leave and that they need not produce evidence of him being on leave.

Issue for determination

11. The issue for determination is whether the Applicant has established a case for revision based on the provisions of Article 165 (6) of *the Constitution* and under Section 362 of the *Criminal Procedure Code*.

The Law

12. The High Court power of revision is set out in Article 165 which provides:
 - (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 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.
13. Section 362 of the *Criminal Procedure Code*, empowers the High Court to call 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.
14. Section 364(1) of the *Criminal Procedure Code* provides: -

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 his 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 other 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 has had an opportunity of being heard either personally or by an advocate in his own defence.

15. It is therefore clear that the powers of revision under Section 362 of the *Criminal Procedure Code* are only to be invoked to enable this Court satisfy 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 Subordinate Court. Therefore, if the Court makes a decision which is wanting in its correctness, legality or propriety or the proceedings are irregular, this Court no doubt will step in and correct the same. That is my understanding of the position adopted in *Republic vs. Alice Chepkorir & Another* [2018] eKLR where the Court held that:

“it would also appear that the learned trial magistrate fell into anger to make a finding and conclusion not fully based on evidence before the Court but on assumptions and personal knowledge of the circumstances when she said in her ruling: “As at now there is no prosecution in Court. I am aware all the other three Courts are not sitting as at now. There are two prosecutors at this station at least one should be before this Court. This Court cannot be held at ransom...”

16. While the Trial Court is donated with powers to order the prosecutions to close their case, the Court cannot unilaterally close the prosecution’s case without affording them the opportunity to close and where they resist closing their case the Court ought then to record its reasons clearly before closing the case for the prosecution.
17. In this instance, this Court finds that the Hon. trial magistrate was in err to unilaterally close the prosecution’s case without affording them any hearing. In fact, the Court did not record a ruling on the Application to adjourn.
18. This Court equally notes that the trial magistrate had on 28th of March 2023 unilaterally closed the prosecution’s case and then reopened the same; this is not only irregular but illegal, the parties to criminal proceedings should be afforded ample and similar opportunity to ventilate their cases and the role of the Court should remain the impartial arbiter. It is only in exceptional cases where the conduct of the prosecution would warrant being compelled to close their case and where the prosecution resists closing then the Court would proceed to close the case.
19. That said, I believe the Applicant has made a case warranting revision and thus this Court sets aside the Trial Courts finding of “closing the prosecution’s case”
20. The prosecution’s case in Nakuru CMCR No E165 of 2020 shall be allowed to continue by calling the investigating officer to testify and produce evidence before the defence case may be presented.
21. This Matter shall be mentioned before the trial magistrate for fixing of a hearing date.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF APRIL, 2024.

MOHOCHI S.M

(JUDGE)

