



Director of Public Prosecutions v Kinyua (Criminal Revision E107 of 2024) [2024] KEHC 6170 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6170 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL REVISION E107 OF 2024
TW CHERERE, J
MAY 23, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

MOSES KAIRITHIA KINYUA RESPONDENT

RULING

1. The brief facts of this revision are that Respondent was charged in Maua CM Criminal Case No. 2911 of 2029 with the offence of stealing by servant contrary to section 281 of the [Penal Code](#).
2. Of the four witnesses who have testified for the DPP, PW4 was an auditor who testified on 26th October 2021 and tendered a report dated 31st December 2019 PEXH. 3. The record demonstrates that the said witness was cross-examined and re-examined.
3. Subsequently, and more particularly on 01st December 2021, the DPP amended the charge sheet and applied to recall PW4. The record demonstrates that unable to get PW4 for further cross-examination, the DPP supplied the defence with a different auditor's report on 08th November, 2021. Defence counsel Mr. Ngugi objected on the ground that there was already another audit report on record and that Respondent would be prejudiced by the new report.
4. By ruling dated 17th November 2022, the learned trial magistrate agreed with the Respondent and dismissed the application for introduction of the new report.
5. The dismissal prompted the DPP to file the notice of motion dated 15th February, 2024 seeking for the following orders: -
 1. spent



2. That this Honorable Court be pleased to review, set aside and/or vary the ruling dated 17th November 2022 by the Maua Chief Magistrate's Court in Maua Criminal Case No.2911 of 2019: Republic vs Moses Karithia Kinyua
3. That an order in the nature of revision do issue calling for the record and examination of the proceedings of Maua Criminal Case No.2911 of 2019: Republic vs Moses Karithia Kinyua for purposes of this court satisfying itself as to the correctness, legality or propriety and regularity of the said proceedings.
4. That this Honorable court be pleased to direct the trial court in Maua Criminal Case No.2911 of 2019 to allow the applicant produce/adduce the auditor's report dated 02nd September 2022 as part of its evidence

That the costs of this application be borne by the respondent.

6. The application was supported by the affidavit of Christine Wambui Mugo and based on the following grounds: -
 - a. That the respondent was charged with the offence of stealing by servant contrary to Section 281 of the [Penal Code](#).
 - b. That the applicant intended to rely on a qualified accountant's report to prove their case
 - c. That however, the complainant was duped by unqualified accountant called Fridah Nkatha who testified half way and thereafter eloped to Uganda
 - d. That this rendered the first report inadmissible
 - e. That this necessitated the complainant to seek services of qualified accountant.
 - f. That however the respondent advocates opposed the production of the second auditors report
 - g. That the court vide a ruling dated 17/11/2022 ruled that the applicants had been given sufficient time to put their house in order but they failed
 - h. That this ruling did not take into account the law appertaining the matters in issue therefore rendering it (the decision) illegal
 - i. That the court did not take into account that it did not conduct a pretrial conference that would have ironed out the issue of admissibility of evidence.
 - j. That the failure to conduct a pretrial conference rendered the trial illegal
 - k. That it is in the interest of justice that the ruling dated 17/11/2022 be reviewed
 - l. That if this application is not allowed, the applicant stands to suffer injustice.
7. The application was opposed by the Respondent vide a replying affidavit dated 06th May,2024 in which he avers mainly that the Applicant seeks to introduce new and additional evidence that is aimed at removing the lacunae and filing gaps in evidence and that the additional evidence is an afterthought and is likely to cause miscarriage of justice.
8. I have considered the application in the light of the affidavits on record and annexures thereto which include the proceedings and the impugned ruling in Maua Criminal Case No.2911 of 2019.
9. What I gather from the supporting affidavit is that the DPP intends to substitute the evidence by PW4 on grounds among others that the witness was not a qualified auditor.



10. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case (See *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mobamad & 3 others* [2018] eKLR).
11. From the spirit of the foregoing authority, I find that the trial magistrate's finding that the introduction of new evidence would prejudice the Respondent was well founded.
12. There being no material to demonstrate any incorrectness, illegality or impropriety in the ruling dated 17th November, 2022, I find no reason to interfere with the orders issued therein.
13. In the end, the notice of motion dated 15th February, 2024 seeking revision of the trial court's orders issued on 17th November, 2022 is disallowed.

DELIVERED AT MERU THIS 23rd DAY OF May 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

For Applicant - Ms. Rita Rotich (PC-1)

For Respondent - Mr. Ngugi for Gikonyo & Ngugi Advocates

