



**Kiprop v Republic (Criminal Revision E089 of 2023)
[2024] KEHC 5478 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5478 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E089 OF 2023
RN NYAKUNDI, J
MAY 21, 2024**

BETWEEN

SUSAN KIPROP APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Representation:

Mark Mugun for the state

M/s Isiaho & Company Advocates

1. The court has been called to determine an application dated 18th March, 2024 seeking reinstatement of this matter which was dismissed for want of prosecution.
2. The applicant has sought orders as follows:
 - a. Spent
 - b. That the orders of this court made on 12th March, 2024 dismissing the applicant's notice of motion dated 23rd August, 2023 be set aside.
 - c. That upon grant of prayer (b) above, the notice of motion dated 23rd August, 2023 be reinstated and heard on merit.
 - d. That costs of the application be provided for.
3. The application was anchored on ten (10) grounds together with a supporting affidavit sworn by Lauren M. Isiaho, an advocate of the high court of Kenya. The applicant wishes to have the suit reinstated for the following reasons:



- i. That the trial court issued orders on 12th March, 2024 dismissing the applicant's application dated 23rd August, 2023 for want of prosecution.
 - ii. That failure to attend court on the aforementioned date was not intentional but due to human error.
 - iii. That the dismissal amounts to the applicant being denied a right to be heard on her application dated 23/08/2023 to her detriment and that of justice.
 - iv. That the dismissal defeats the rules on natural justice of a party's right to be heard on merit, in this case the applicant.
 - v. That the mistakes of counsel ought not be visited on the applicant, an innocent litigant.
 - vi. That the best interest of justice will be served by affording the applicant a right to be heard on merit on her application dated 23/08/2023 instead of being condemned unheard.
 - vii. That no prejudice will be occasioned to the respondent should the orders sought issue as the Office of the Director of Public Prosecution will be heard on merit on the application to be reinstated.
4. I have perused through the application and the record. The twin issue for determination is whether the application is merited and secondly whether the criminal trial of the accused was conducted in accordance with notions of basic fairness.

The Law, Analysis & Determination

5. Having said that, I now turn to the question of reinstatement of the present application. I take note that the application was dismissed for want of prosecution for reasons that learned counsel for the accused person failed to appear and prosecute the matter twice.
6. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilba Ngunyo Isaac v Kembu Farm Ltd & another & another* [2018] eKLR ((JN. Mulwa J), which echoed the decision of the court in *Shah v Mbogo & Another* [1967] EA 116 (Harris J), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
7. Articles 48 and 50 of the *Constitution* guarantees every Kenya right to access to justice and fair hearing. Article 159 requires that justice shall be administered without undue regard to technicalities whereas Sections 3, 4 and 13 of the *Environment and Land Court Act* as read together with Section 1A, 1B and 3A of the *Civil Procedure Act* expects the court to strive towards substantive justice.
8. Should the applicant be barred from prosecuting the matter for mistake of counsel? I think not. I am guided by the words of Justice Hoffman in the case of *Films Rove International Ltd v Cannon Film Sales Ltd* [1986] All ER 772, where he held that; -

“..... A Fundamental principle is that.....the Court should take whichever course that appears to carry the lower risk of Injustice if it should turn out to be wrong.”



9. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice. This position is fortified in the case of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR, where the Court of Appeal stated:

We agree with those noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.

10. The rules of natural justice require the right to an independent and unbiased hearing and the right to be heard. One of the key features of procedural fairness is the right to participate. It includes an opportunity to respond to information that may adversely affect a person, and adequate and appropriate reasons for decisions. A person affected by a decision should have an opportunity to be heard before a conclusive decision is arrived at.
11. Article 50(1) on fair hearing requires that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Article 25 of the constitution provides that despite any other provision in the *Constitution* amongst the other listed fundamental freedoms and rights that shall not be limited is the right to fair trial (as provided for in Article 50 of the *Constitution*).
12. One of the most important fundamental rights introduced by the Constitution 2010 is the right against discrimination as espoused under Article 27. This Article calls for equality of all persons before the law, and the right to equal protection and equal benefit of the law.
13. In enforcing the said right to a fair hearing in a trial, it is the mandate of both the prosecutor and the trial judge or magistrate. The fact that the applicant herein has been locked out from being heard because of the mistake of counsel may create prejudice or disadvantage unless there is judicial enforcement of the rights to a fair hearing in Article 50 and which I refer to as equality of arms.
14. The criteria on equality of arms was considered in by the African Commissioner on Human Rights and Peoples Rights in *Frontier v Burundi* Communication No. 231 of 99 as exemplified on the following statement: -

“The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial.”

15. One can agree whole heartedly with these sentiments and the affidavit evidence by learned counsel Ms. Isiaho that judicial discretion must be exercised within the confines of the constitutional dictates on due process clauses. Leaned counsel has demonstrated sufficient cause as to why she was not present to prosecute the application dated 23rd August, 2023. The reasons for the delay and non-attendance on the material day have been carefully and dutifully demonstrated to call upon this court to reinstate the application. The instant application deals with questions arising as to an accused person's entitlement



to legal counsel of her choice or one to be provided for by the state if substantial injustice will occur in the circumstances of the case before the trial court.

16. That brings me to the second question on the right to legal representation conferred by Article 50 (g) & (h) of the Constitution.

17. The issue of legal representation was considered by none other than Lord Denning in *Pett v Greyhound Racing Association* [1968] 2 ALL E. R 545, at 549 where he stated: -

“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favor or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it everyday. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task.”

18. Therefore, the right to legal representation is important in realizing a fair trial and the constitution is clear in that regard. In the absence of it substantial injustice would be occasioned.

19. The importance of legal representation was also recognized by the African Commission in *Advocates Sans Frontiers (on Behalf of Bwampanye) v Burundi*, African Commission on Human Rights, Comm. No.213/99 (2000) when it observed that:

“...Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case...”

20. From the foregoing provisions, it is evident that legal representation is such an important aspect in ensuring a fair trial. The question of non-appearance by learned counsel for the accused person is squarely a mistake of counsel which ought not be visited upon an innocent litigant. In my considered view, to attain substantive justice, the accused person should be given a chance to pursue the revision by seeking the services of a different counsel, if at all the learned counsel on record is no longer interested in pursuing the matter.

21. The right to a fair trial conferred by Art 50 of the Constitution is broader than the list of specific rights set out in paragraphs 1, 2(a-q), 3, 4, 5, 6, 7, 8 and 9. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution 2010 came into force. In the instant application, what was at stake is the right to legal representation by Susan Kiprop who has a pending criminal case with a charge of threatening to kill contrary to section 223 (1) of the Penal Code. My reading of the record shows that initially the accused person had no legal representation until the 24th August, 2022 when the learned counsel Ms. Isiaho came on record. That material day the case proceeded to admit evidence of PW5 PC Mwaniki. At the close of that day’s proceedings learned counsel Ms. Isiaho moved the court to have PW1-PW4 recalled for cross examination for reason that the matter had proceeded in her absence. Learned counsel for the state vehemently opposed the application and urged the court to have it dismissed for reason of merit that the case had been in the system since 2018 and the legal representation has come in too late in time. In this context, I note my broad concurrence with the textualism of the constitutional provisions under Art 50 (g) & (h) which provides that the accused person has a right to choose and be represented by an advocate and be informed of this right promptly. In (h) the accused has a right to have an advocate



assigned to him/her by the state and at the state expense if substantial injustice would otherwise result and be informed of this right promptly.

22. The core of interpreting the bill of rights including that of right to a fair hearing fall within the ambit of Art 24 of the Constitution. Generally speaking, the rights in the bill of rights may be limited only in terms of law of general application to the extent that limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including:
- i. The nature of the right;
 - ii. The importance of the purpose of limitation;
 - iii. The nature and extent of the limitation;
 - iv. The relation between the limitation and its purpose; and
 - v. Less restrictive means to achieve the purpose.

23. A glance of the trial court record does not show that the accused person when arraigned in court was explained her rights to legal counsel as provided for in Art 50 2(g) and (h) of the Constitution. The court in *NMT alias Aunty v Republic* Criminal Appeal No. 44 of 2019 eKLR addressed this issue in the following language:

“That being the record the question which now begs an answer is what entails the right as provided in Article 50(2)(g) of the Constitution. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. Since the Constitution does not define the word ‘choose’ I will make reference to the Tenth Edition of the Black’s Law Dictionary on how the said word is defined. The said Dictionary does not expressly define the word ‘choose or choice’ but refers one to ‘Freedom of Choice’ (See page 294 thereof). At page 779 the Dictionary defines ‘freedom’ as follows: -

- i. The quality, state or condition of being free or liberated esp. the right to do what one wants without being controlled or restricted by anyone.
15. The Dictionary further defines ‘Freedom of Choice’ as ‘the liberty embodied in the exercise of one’s right’. The Second Edition of the *Law Dictionary* has the following to say about the ‘Freedom of Choice’: -
- Unfettered right to do what one wants when one wants as one wants, except where it infringes or prevents another from doing what that one wants, and do so on. Also excluded is doing something that would harm one’s self or another.
16. To choose hence connotes options and discretion. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one’s choice as embodied in Article 50(2)(g) of the Constitution therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one’s choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.
17. The right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2)(h) of the Constitution given that in many



instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution."

24. Similarly, the supreme court of appeal of South African in *Ramaite v State* [958/13] [2014] the court stated as follows:

"...a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.

If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice ..."

25. I consider given the constitutional edict right to counsel is a fundamental right in ensuring fair trial rights for an accused person, more so in an adversarial system in which the state invests massive resources to prosecute an accused person who is already disadvantaged for not knowing how the legal system works. Given the significance of the right to counsel for indigent class of a society, there is an obligation imposed upon the court to promptly inform an accused person of this right and based on the essential assessment, if substantial injustice will be occasioned legal counsel be provided to the accused at the state expense. The fundamental importance of this right is now beyond question and indeed given the principle of equality before the law is part of the Kenyan Common Law tradition. Fairness is an issue to be decided by a trial court on the facts of each case having regard to the particular circumstances of each individual case. At the heart of this application is whether the learned trial magistrate closing the door for legal representation for an accused person at any stage of the proceedings was likely to prejudice a right to a fair trial. The trial court has always to bear in mind that for justice to be done and seen to be done, right to legal representation infused with the right to dignity, equality before the law and right to access to court are the foundational values of our Constitution. In my considered judgment, the aim of the right to legal counsel in a criminal trial is to adequately to ensure that innocent people are not wrongly convicted because of the adverse effect of their ignorance of the law. There can be no equal justice where a man faces a trial without being afforded a reasonable opportunity to obtain



the assistance of a lawyer of his/her choice and during the intervening period, the court as of necessity must satisfy itself that the proceedings are not prejudicial to the accused person. A heavier burden rests on the prosecutor and the court to ensure that such a trial is fair in all respects. This view is especially relevant in this case where the unrepresented accused person was not allowed to engage her legal counsel of choice even at the tail end of the trial before final judgment is pronounced on the merits.

26. It is clear from the record that the learned trial magistrate did not explain to the accused her right to engage legal counsel of her choice or undertake an inquiry as to whether substantial injustice would be occasioned to warrant that entitlement of right be accorded the accused under (h) of the Constitution. In fairness to the trial judge she pushed the accused person to the limit by denying her an opportunity to have a legal representative of her choice to conduct the defence. It is evident from the record that the learned magistrate misdirected herself when she applied the doctrine of the case being a backlog to order for it to proceed without the input of legal counsel. Therefore, when considering the practical application of case management, courts must consider an array of factors but must be mindful of the rights to a fair trial entrenched in our constitution.
27. The threefold categorization of the interests protected by a speedy trial provision include the right to a fair trial, to have adequate time and facilities to prepare for a defence, to adduce and challenge evidence and a right to choose and be represented by an advocate at any stage of the proceedings. Therefore, the fact of the case being a 2018 docket is not reason enough to impair fair administration of justice. It follows that the proceedings before the learned trial magistrate must be reopened to ensure that the four witnesses who had testified in absence of legal counsel for the accused for purposes of cross examination on allegations made by the state. It is perfect true that this will impose some strain on the state resources to make available the witnesses but to that extent it is justified so as not to infringe the accused right to a fair trial. Moreover, such a blanket use of discretion cannot be justified under Art 50 of the Constitution.
28. In the result, the substantive application dated 18th March 2024 is hereby allowed and the impugned ruling by the learned trial magistrate not to have the accused person's legal counsel have the witnesses be re-called for cross examination be and is hereby set aside, and the file be remitted back to the court below for compliance with the orders of this court.

SIGNED, DATE AND DELIVERED AT ELDORET THIS 21TH DAY OF MAY 2024.

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R. NYAKUNDI

JUDGE

