



**Musando v Republic (Criminal Revision E009 of 2024)
[2024] KEHC 5874 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL REVISION E009 OF 2024**

**A. ONG'INJO, J
MAY 23, 2024**

BETWEEN

DENIS OTIENO MUSANDO APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Application

1. The application dated 19th February 2024 was brought under Sections 362 and 364 of the *Criminal Procedure Code* Cap 75 of the laws of Kenya seeking that the Prosecution's Case in Mombasa Chief Magistrates Court Criminal Case No 1174 of 2018 be reopened for cross examination of the last witness.
2. The application is premised on grounds that the matter, Mombasa Chief Magistrates Court Criminal Case No 1174 of 2018, Republic v Denis Otieno Musando, the accused was charged with the offence of trafficking in narcotic drugs contrary to Section 4 (a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 4 of 1994.
3. Particulars of the offence were that on the 5th day of July 2018 at the Tahmeed Bus Company Parcel Office Mwembe Tayari in Mombasa County within the coast region jointly with another not before court was found trafficking in narcotic drugs namely heroin to wit 647.7 grams with a market value of Kshs 1,943,100/- by importation using hard cover books in contravention of the said Act.
4. That the matter proceeded before the trial court and several witnesses testified but later the prosecution was unable to secure their witnesses in court from 10th October 2019 to 22nd November 2023 when they brought their witnesses and on that day the defence applied for adjournment but the same was denied. That on the said hearing date the Applicant's Advocate was away attending his niece's funeral who was to be buried on 24th November 2023 at Obambo Village Kisumu West Sub-Location, Kisumu



- County. That the information was relayed to court but the proceedings went on and the prosecution proceeded with their last two witnesses and closed their case.
5. That the defence made a formal application for leave to recall and cross examine the Prosecution witness who testified on 22nd November 2023 in the absence of the Applicant's Advocate. That the Applicant was compelled by circumstances to file a formal application to have the orders of 22nd November reviewed, to stay further proceedings and arrest the ruling that was to be delivered on 14th December 2023. That although the ruling was deferred, cross-examination was denied hence the criminal revision herein as the court failed to consider the gravity and/or seriousness of the charge facing the accused person.
 6. The power of the High Court in revising orders for subordinate court and tribunal is provided under Article 165 (6) and (7) of the Constitution as well as Section 362 and 364 of the Criminal Procedure Code where the High Court may call for records of the subordinate courts or other inferior tribunals and examine its legality, correctness, propriety or regularity. The purpose of revision jurisdiction of the High Court is to enable the High Court in manifest cases to correct manifest irregularities of illegalities and give appropriate directions on the manner in which the trial should be proceeded with in the subordinate court. (See Joseph Mbuvi Nduvi v Republic (2019) eKLR).
 7. This court has considered the application for revision, the Respondent's oral submissions and the legal provisions under which the application was brought as well as records of the trial court. The issue for determination is whether the application is merited for the orders sought to be granted.
 8. This court has perused the trial court records and observed that on 22nd November 2023 when the matter came up for hearing, the Applicant informed court that he was not ready to proceed as his advocate, Mr. Mkan, was bereaved. However, the Prosecution stated that they had a witness who had come from Nairobi and spent the night in Mombasa but was not prepared to spend another night in Mombasa. The court then gave directions that the Applicant gets another advocate to hold Mr. Mkan's brief. That Mr. Bunde holding brief for Mr. Mkan Advocate requested for another date as he was not in position to proceed. The trial court ordered for the matter to proceed on the basis that Mr. Mkan had time to inform the prosecution of his intended absence considering it was an old matter. That the court proceeded with hearing of the said witness, PW11, who was cross examined by the Applicant, the Prosecution closed its case and ruling was reserved for 14th December 2023.
 9. According to the observation of this court, the Applicant was unrepresented and he was left with no choice but to cross-examine PW11. Mativo, J. in Joseph Ndungu Kagiri v Republic (2016) eKLR, made the following observation in respect to an unrepresented party: -

“Lord Denning in the celebrated case of *Pett v Greyhound Racing Association* decried the state of unrepresented parties in court when he stated that:

“It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour 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 every day. 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 trained for the task?”
 10. A formal application dated 7th December 2023 to reopen the Prosecution's case was filed on 11th December 2023 and served upon the Respondent who in turn filed and served a response dated 5th



January 2024 and filed on 8th January 2024. The trial court delivered a ruling dated 7th February 2024 dismissing the application to reopen the Prosecution's case. A ruling on a case to answer was then delivered on 21st February 2024 and a date was set for defence hearing.

11. In determining whether the Prosecution's case could be reopened and PW11 recalled for further cross examination, this court is guided by the following provisions: -

12. Section 150 of the [Criminal Procedure Code](#) which provides: -

“A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case:

Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable the cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of that person as a witness.”

13. Section 146(4) of the [Evidence Act](#) also provides: -

“The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have a right of further cross-examination and re-examination respectively.”

14. This court has established that the Applicant herein was unrepresented during the hearing of the last witness, the Applicant has a right to a fair trial which includes the right to be represented by an advocate of his choice as set out under Article 50(2)(g) of the [Constitution](#) and the court was required to ensure that this right was observed, and the Respondent did not demonstrate to court that prejudice will be suffered if the application is allowed.

15. This court finds that the application for revision is allowed. Orders of the trial court issued on 7th February 2024 are hereby set aside. The trial court should reopen the prosecution's case to allow Mr. Mkan Advocate for the Accused Person to cross examine PW11 and an equal right to the Prosecution to re-examine the witness before closure of the Prosecution's case. Mention on 11.6.2024 before the trial court for directions.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 23RD DAY OF MAY 2024

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Ms. Maina for the Republic – No appearance

Mr. Mkan Advocate for the Applicant – No appearance

Copy of the ruling to be served on the trial court.

HON. LADY JUSTICE A. ONG'INJO



JUDGE

