



ODPP v Josephat Kelungu c/o Equator Bottlers (Criminal Revision E097 of 2024) [2024] KEHC 6009 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL REVISION E097 OF 2024
RE ABURILI, J
MAY 23, 2024**

BETWEEN

ODPP APPLICANT

AND

JOSEPHAT KELUNGU C/O EQUATOR BOTTLERS RESPONDENT

(From the original criminal proceedings in the Chief Magistrate's County Court Criminal Case No. 75 of 2019 at Kisumu Hon E. Obina, SPM's directions of 3/5/2024)

RULING

1. This matter is before this court by way of a referral by the Hon. E. A. Obina, Senior Principal Magistrate on 3rd May 2024. The learned Magistrate is the trial magistrate who took over the conduct of Kisumu Chief Magistrate County Government Criminal Case No. 75 of 2019 *Republic v Joseph Kelungu C/ O Equator Bottlers*.
2. The accused is facing several counts under the [Food, Drugs and Chemical Substances Act](#) namely:
 - i. Manufacturing and offering unwholesome food for sale with visible suspended particles contrary to Section 3(c) as read with Section 36(1) of [Foods, Drugs and Chemical Substances Act](#) 254 Law of Kenya.
 - ii. Manufacturing and offering unwholesome food for sale with wrong labelling contrary to Section 4 as read with Section 36(1) of Food, Drugs and Chemical Substance Act 254 Laws of Kenya.
 - iii. Manufacturing food stuff without taking adequate measures to guard against contaminations thereof contrary to Section 131(2) as read with Section 133 of the [Public Health Act](#) Cap 242 Law of Kenya.



- iv. Selling unwholesome food to the prejudice of the purchaser which is not the nature contrary to Section 6 as read with Section 36(1) of *Food, Drug and Chemical Substance Act* Cap 254 Laws of Kenya.
3. Six (6) witnesses had testified before Hon. Onkunya who was transferred. The other remaining witnesses testified and the accused were placed on his defence by Hon Obina.
 4. Parties then filed written submissions on whether the accused should be acquitted or be convicted.
 5. The defence counsel submitted, among others, that his client's prosecution is a nullity because it was conducted by an unqualified prosecutor, one Mr. Oluoch who had been prosecuting County Government matters for many years, having been Gazetted under the defunct Local Government Act now repealed.
 6. The trial magistrate was in a dilemma on what to do next as he could not review orders of his predecessor or quash the proceedings hence the referral of the matter to this Court by way of Directions for guidance.
 7. Article 165 (6) and (7) of the *Constitution* confers this court with supervisory jurisdiction over subordinate courts, persons, body or authority exercising judicial or quasi-judicial functions.
 8. In the exercise of its jurisdiction under Article 165 (6), the High Court may call for the lower court file and examine the proceedings to satisfy itself on the legality or propriety of the proceedings.
 9. This supervisory jurisdiction in Criminal cases can be exercised by way of Judicial Review or Revision.
 10. Sections 362 – 364 of the *Criminal Procedure Code* too, empowers the High Court to exercise revisionary jurisdiction in criminal cases.
 11. In this case, the charge sheet dated 17th November 2020 was signed by an officer at the County Government of Kisumu and the prosecutor is named as Chief Inspector Oluoch.
 12. It is not clear whether the prosecutor is a police officer or not. In some instances, a person named Birir appeared prosecuting alongside Mr. Oluoch.
 13. This scenario continued before the City Court Magistrate until Hon. Obina encountered the objection after the close of the prosecution and defence case when the accused raised the objection as to the competence of his prosecution.
 14. In the case of *Kinoti & 7 Others v Chief Magistrate's Court Milimani & Others*; Constitutional Petition No. E495 of 2021 [2022] eKLR – Judgment, Mrima J rightly held that the prosecution of criminal offences in Kenya had to only be undertaken by lawful prosecutors being either the DPP or such other person exercising the delegated powers of the DPP under Article 157 (9) of the *Constitution* or the entitlements conferred with powers of prosecution pursuant to Article 157 (12) of the *Constitution* as long as the complainant who investigated its own complaint could not prosecute any offences arising from the complaint and the investigations. In this case, the Prosecutor is an employee of the County Government of Kisumu.
 15. The court also prohibited any court in Kenya from accepting or registering and or signing charge sheet other than those brought by the ODPP in any criminal prosecution.
 16. Thus, in view of Article 157 of the *Constitution*, the County Government or National Police Service has no power and authority to make any decision to prefer and institute charges in court and or prepare the charge sheet which they signed, against the accused person.



17. The judgment by Mrima J however was clear that the orders would not apply to the already previously instituted charges or criminal proceedings. The judgment was rendered on 23rd May 2022, exactly 2 years ago. I however beg to uncouple from the above latter position by my brother Judge on account that the holding did not take into account the holding by the Supreme Court in *DPP v Okemo & 4 Others* Petition No. 14 of 2020 [2021] KESC 13 (KLR) (CRM) rendered on 5th November 2021 by Ouko, SCC SCJ in extradition proceedings that:
- “6. Under the current Constitutional dispensation, the power to prosecute any conduct of a criminal nature is the exclusive preserve of the Director of Public Prosecution. This is subject to the provisions of Article 157 (6) (a) regarding a court martial, and any legislation that may be enacted by Parliament pursuant to Article 157(12) of the *Constitution*. Such legislation must however be consistent with the preceding sub-article of the Main Article.”
18. From the above holding which binds this court and all other courts in this country, for this court to sanitise the charge sheet and prosecution of the accused in Kisumu Chief Magistrate County Court Criminal Case No. 75 of 2019, it must be satisfied that the Foods, Drugs and Chemical Substances Act was either enacted post 2010 and that therein is a provision conferring Prosecutorial powers on the officer of the County Government, or that there is a provision in that Act which came into effect post 2010 Constitution.
19. Mwongo J dealt with a similar scenario in the case of *Republic v Wanguru Law Court Criminal (Revision) No. E124 of 2021 [2023] eKLR Judgment on 7th March 2023*. The Learned Judge after reviewing various provisions of the law and the *Constitution* in a case where the lower court dismissed the ODPP’s objection to prosecute by A Public Health Officer stated that there was no provision in the *Public Health Act* granting Prosecutorial powers to the Health authorities that had been legislated by Parliament pursuant to Section 157(12) of the *Constitution*.
20. In this case, the *Foods, Drugs and Chemical Substances Act*, Cap 254 Laws of Kenya was enacted in 1965 and commenced on 11th May 1965. It has been revised severally latest being 2013. However, the definition of “authorized officer” under Section 2 means a medical officer of health, a public health officer or any suitably qualified person authorized in writing by a Municipal Council for purposes of the Act. And for purposes of Section 35 of the *Act* on prosecution, ‘authorized officer’ includes the clerk of a Municipal Council.”
21. There is no provision on prosecution of offences which is post 2010 Constitution. Section 35 on prosecution falls under Part IV on legal proceedings. It provides that:
- “(1) An authorized officer may take out proceedings for an offence under this Act or the Regulations before any magistrate having jurisdiction in the place where any article sold was actually delivered to the purchaser or where the sample was taken.
2.”
22. The above Section was a revision of the Act vide Act No. 20 of 1989.
23. For the reasons that the County Government officials under the *Foods, Drugs and Chemical Substances Act* have no power to initiate charges and prosecute offences under the Act for want of authority from the ODPP or the legislation Post 2010 conferring such authority, I hereby make the following orders:



1. The charge sheet and proceedings in Kisumu Chief Magistrate's County Court Criminal Case No. 75 of 2019 are hereby revised, set aside and quashed.
2. The Kisumu County Public Health Officer or any 'authorized officer' as defined under Section 2 of the *Food, Drugs and Chemical Substances Act* is hereby prohibited from undertaking powers of framing and filing of any charge sheets or conducting any criminal prosecution in criminal proceedings in the name of the Republic against any person without authority of the Director of Public Prosecutions or legislation enacted Post 2010 Constitution.
3. Any delegated Prosecutorial powers purportedly being exercised by the Public Health or other Kisumu County Government official are hereby declared null and void in view of Article 157 (12) of the *Constitution* and Section 57 (4) of the *Office of Director of Public Prosecutions Act*.
4. The Director, Public Health, County Government of Kisumu is directed to hand over the investigations file relating to this matter to the ODPP Kisumu Regional Office for appropriate directions under Article 157 of Constitution and the *ODDP Act*.
5. The trial of the accused person in Kisumu Criminal Case No. 75 of 2019 is declared mistrial and the accused is discharged. The charges and proceedings having been quashed, the lower court file is closed and any security for bond to be returned to the accused or if surety, to be discharged.
6. This Ruling to be typed and submitted to the trial court and the ODPP as well as the County Government of Kisumu, Office of County Attorney respectively.

24. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024

R. E. ABURILI

JUDGE

