



**Republic v Kathumi (Criminal Revision E089 of 2024)  
[2024] KEHC 5599 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5599 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL REVISION E089 OF 2024  
LM NJUGUNA, J  
MAY 22, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**JOSPHAT KARIUKI KATHUMI ..... RESPONDENT**

**RULING**

1. The applicant filed the revision application herein dated 11<sup>th</sup> April 2024 under certificate of urgency, being aggrieved and dissatisfied by the order of Hon. M.N. Kinyua in Embu Chief Magistrate’s Court Criminal Case No. E058 of 2024 given on 11<sup>th</sup> April 2024. Through the revision, the applicant seeks the following orders:
  - a. Spent;
  - b. Spent;
  - c. That this honourable court be pleased to call for the record in Embu Chief Magistrate’s Court Criminal Case No. E058 of 2024 for purposes of satisfying itself on the correctness, legality and propriety of the orders to release the exhibits pending completion of investigations by the applicant; and
  - d. That the court issues any other orders it may deem fit.
2. In the supporting affidavit sworn by PC Christopher Karumba, it was deposed that he is investigating a possible charge of obtaining goods by false pretenses contrary to section 313 of the *Penal Code*. It was his averment that while investigations were ongoing, the respondent moved the court seeking release of the said exhibits. That there are other complainants in the matter, who were also claiming ownership of the said exhibits and that the investigations are at an advanced stage. That, regardless, the court ordered release of the exhibits to the respondent.



3. The respondent filed a replying affidavit in which he deposed that he is the owner of a construction site at Dallas Estate in Embu. That one Caroline Wambui Irungu offered to sell cement to him at a cheap price and he told her to deliver the cement and he would pay her on delivery. That while he was away from the construction site, at around 10:43AM, his foreman informed him that 220 bags of cement had been delivered and he sent Kshs.173,800/= through Mpesa to Caroline Wambui Irungu's number-0757707376. That at around 12:54PM, he was informed that another 250 bags of cement had been delivered and he sent Kshs.197,500/= to the same number.
4. That in the evening, his foreman called to tell him that 2 men had gone to the site claiming the cement for non-payment but he informed them that he had paid the supplier. That soon after, the DCI contacted him over the issue and they impounded the remaining cement as he had already used some of it. That they told him they are still investigating the case and after one month, there was no progress and the place where the cement was stored was still locked.
5. He stated that the cement will go to waste if it is not used for a long period and he is apprehensive that he will lose a chance to utilize it before the investigations are completed. That when he moved the court for the now impugned orders, the court ordered release of the cement on condition that the DCI officers take photographs of the same within 3 days after which the respondent may access and utilize the cement and that he remains available to police whenever required. According to him, if the cement is released it will not hinder the police from finding the criminals including Caroline Wambui Irungu and it will not hamper the investigations.
6. The application was canvassed by way of written submissions.
7. The applicant submitted that by the time the orders of the trial court were being given, the SCCIO was yet to complete investigations and that it was their intention for the cement to be used as exhibits in the case. That if the cement is released to the respondent, it would be to the detriment to its owners who will be denied access to justice. That it is its intention to apprehend the suspects and charge them with the offence but the cement will be an exhibit in the case. It urged the court to review or set aside the order.
8. The respondent submitted that the reasons adduced in the supporting affidavit to the application are not enough since the deponent only states that releasing the cement will jeopardize the investigations. That details of Caroline Wambui Irungu's phone numbers were given to the police to aid in the investigations. That the trial court made provision for the DCI officers to photograph the evidence which can be used for future prosecution.
9. He stated that the perishability of cement is a fact and that the cement will go to waste if it is not released to him in the manner prescribed by the trial court. That the applicant does not have a sustainable claim against the respondent since there are other parties involved and the crime was committed by someone else. That there is no need to call for the record of the trial court as provided for under sections 362 and 364 of the *Criminal Procedure Code*.
10. The respondent also submitted that the applicant merely stated that if the cement was released to him, it would be to the detriment of its owners but the issue of ownership was not raised in the trial court. That in light of this court's supervisory jurisdiction, the applicant is barred from making new argument since the court can only consider the record of the trial court as is. That there has been a significant delay in completing investigations and it would be unfair to let the applicant carry out the investigations at its own pace.
11. The issue for determination is whether the revision application has merit.



12. The jurisdiction of the high court in criminal revisions is laid down under section 362 of the *Criminal Procedure Code* which states:

“The High Court may call for 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.”
13. The intention of a revision is to prevent a miscarriage of justice through calling for and reviewing the correctness, legality or propriety of a subordinate court’s record. In the Malaysian case of *Public Prosecutor vs. Mubari bin Mohd Jani and another* [1996] 4 LRC 728 at 734, 735 it was held:

“The powers of the High Court in revision are amply provided under section 325 of the Criminal Procedure Code subject only to subsections (ii) and (iii) thereof. The object of revisionary powers of the High Court is to confer upon the High Court a kind of “paternal or supervisory jurisdiction” in order to correct or prevent a miscarriage of justice. In a revision the main question to be considered is whether substantial justice has been done or will be done and whether any order made by the lower court should be interfered with in the interest of justice...If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion...This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case”.
14. In the circumstances narrated herein, the applicant, through the DCI office apprehended more than 400 bags of cement while undertaking investigations into a potential crime of obtaining goods by false pretenses contrary to section 313 of the *Penal Code*. The respondent stated that he indeed paid for the cement but he paid the supplier he knew as Caroline Wambui Irungu. It was his case at trial that he owns a construction site and he needs to use the cement but the applicant has apprehended the cement for purposes of investigations. He submitted that it has been 2 months since the alleged investigations began and he has not been updated on any progress. He stated that the cement will be rendered unusable if it continues to be locked up with the applicant investigating at its own pace.
15. In its replying affidavit at the trial, the applicant stated that investigations are still ongoing and it is their intention to apprehend Caroline Wambui Irungu, whose details they had received. That the complainant was one Brian Muthuri of Ebo hardware in Gakwegori who alleged that it is the said Caroline Wambui Irungu who placed the order for the cement. That the respondent paid a total of Kshs.387,750/= for the cement through Mpesa to Caroline who then went missing.
16. There is the pending issue of ownership of the cement, which was raised through this revision application when some other parties claiming ownership of the cement sought to be enjoined in the revision. The court determined the matter through its ruling delivered on 15<sup>th</sup> May 2024, finding that it is a matter to be placed before the trial court since this court’s supervisory jurisdiction would not allow it to entertain the said application. Moreover, and considering that the issue of ownership of the cement is in issue, it can only be determined before a civil court and not through criminal proceedings. Therefore, the trial court lacks jurisdiction to determine ownership of the cement, it is therefore also not properly constituted to order release of the cement, and neither is this court.
17. In the circumstances, I find that the application herein has merit. The trial court erred in ordering that the cement be released while lacking jurisdiction to do so. Therefore, the trial court’s ruling by Hon.



M.N. Kinyua in Embu Chief Magistrate’s Court Criminal Case No. E058 of 2024 given on 11<sup>th</sup> April 2024 is hereby set aside

18. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22<sup>ND</sup> DAY OF MAY, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Applicant

..... for the Respondent

