



Koskei & another v Republic; Terigin (Interested Party) (Criminal Revision E074 & 073 of 2023 (Consolidated)) [2024] KEHC 8686 (KLR) (19 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL REVISION E074 & 073 OF 2023 (CONSOLIDATED)**

JRA WANANDA, J

JULY 19, 2024

BETWEEN

MICHAEL KOSKEI 1ST APPLICANT

JAMES KOECH 2ND APPLICANT

AND

REPUBLIC RESPONDENT

AND

EVERTO TERIGIN INTERESTED PARTY

RULING

1. As the title hereto confirms, this is a Ruling on two separate Criminal Revision Applications. Since the two Applications are similar having arisen from the same proceedings, by consent of the parties, the two were consolidated vide the orders made herein on 12/03/2024. This Ruling therefore determines both Applications.
2. The Applicants were charged in Iten Senior Principal Magistrate's Court Criminal Case No. 148 of 2017 with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code. There is also the alternative charge of creating disturbance contrary to Section 95 of the Penal Code. The trial had been already concluded and the case was only awaiting consideration of Submissions and delivery of Judgment when the instant Applications were filed.
3. The particulars of the charge are that on diverse dates between 24/02/2017 and 17/03/2017 at Segut village within Elgeyo Marakwet County, jointly with others not before Court, the Applicants wilfully and unlawfully damaged 285 erected fencing posts valued at Kshs 535,000/- the property of the complainant-Interested Party, Everton Ezekiel Terigin.



4. The Applications are the respective Notices of Motion dated 10/03/2023 and filed through Messrs Anassi Momanyi & Co. Advocates. The prayers sought are as follows:
 - i. [Spent]
 - ii. The orders of the Honourable Senior Principal Magistrate in Iten Senior Principal Magistrate's Court Criminal Case No. 148 of 2017 be revised and set aside.
5. In the Affidavits filed in support of the Applications, the Applicants deponed that the trial Magistrate declined to adjourn the defence case set for 8/03/2023 and instead of allowing the 2nd accused to conclude his testimony, prematurely and in the absence of the Applicants' Advocate, closed the defence case, that the trial Court never even allowed the defence to conclude its case but set the matter for Submissions on 15/03/2023, that the Applicants fear that their right to a fair hearing may be defeated by the premature closure of their case, that the Court ought not to have proceeded with the matter in their Advocate's absence, and that the decision was legally untenable and improper.
6. The Interested Party is represented by Messrs Omwenga & Co. Advocates and the State (Republic) is represented by Senior Prosecution Counsel, Ms Okok.

Respondent's Replying Affidavit

7. For the State (Respondent), Ms. Okok swore respective Replying Affidavits in which she recounted the happenings in the trial Court and gave a chronology of events in the matter up to and including the filing of this Application and termed the same as delaying tactics. She recounted how the Applicants have previously filed Application after Application in the case. She referred to an Application for re-opening of the prosecution case which was allowed by the trial Court, an Application before the trial Court for re-opening of the defence case, which was also disallowed by the trial Court and pursuant thereto, a Revision Application before the High Court which was allowed, an Application for recusal of the Magistrate and upon the same being dismissed, an Appeal before the High Court which was dismissed and pursuant thereto, yet another Appeal to the Court of Appeal, which is still pending.
8. Counsel submitted that the instant Application is a further tactic aimed at delaying proceedings which has been pending since the year 2017, that the trial Magistrate indulged the Applicants severally when they sought adjournments and properly exercised his discretion in closing the defence case as the same had not been concluded since 21/11/2019 when the Applicant was first placed on his defence and litigation has to come to an end, that the Magistrate did not err in any way and the Applicants have not demonstrated any valid reasons for setting aside or for revision of the Magistrate's orders, and that the Applicants' main aim is to cause injustice to the victim/.complainant by delaying the trial.

Interested Party's Replying Affidavit

9. The Interested Party also filed Replying Affidavits in which he stated that the Applicants have never been keen to have the case before the trial Court prosecuted and concluded and, that they have been employing delaying tactics. The Interested Party then also recounted the history of the case as had been also done in the Affidavit of Ms. Okok, highlighting the several adjournments and alleged delay tactics employed by the Applicants including the Applications and Appeal filed by the Applicants at the High Court and at the Court of Appeal. Like the Respondent, the Interested Party also contended that the Applicants have not demonstrated any grounds for setting aside and/or for revision of the impugned orders.



Further and/or Supplementary Affidavits

10. The Applicants and the Interested Party filed Further/Supplementary Affidavits but which basically, have merely reiterated or expounded on matters already touched on hereinabove.

Hearing of the Application

11. The Application was canvassed by way of written Submissions. Pursuant thereto, the Applicants and the Interested Party filed Submissions. Regarding the Respondent however, up to the time of concluding this Ruling, I had not come across any Submissions filed by or on its behalf.

Applicants' Submissions

12. Counsel for the Applicant submitted that this matter has been the subject of previous Applications both in the subordinate Court and before this Court, that one was an Application included that sought recusal of the trial Magistrate but which was disallowed by both Courts and which is now pending before the Court of Appeal, that the second one sought Revision on account of failure by the trial Magistrate to allow the Applicants enjoy their right of legal representation which Application was successful after a Revision Application filed at the High Court causing the Prosecution case to be re-opened and the third Application is the instant one. Counsel submitted further that the case before the subordinate Court was proceeding well until at some point when the Applicants' Counsel was not in Court and another Advocate held brief for him, that it was at that stage that they were informed by the said Advocate that they were going to be convicted unless they offered some inducement, that it is this information that prompted the Application for recusal but which was disallowed and is now pending before the Court of Appeal, that before the issue of recusal arose, the trial Magistrate had threatened and decided to proceed with the hearing of the matter irrespective of whether or not the Applicants' Counsel attended Court, and that this is what prompted the Application for Revision which was allowed. According to Counsel, the trial Magistrate has not hidden his disdain of the orders of the High Court halting further proceedings, and that the relationship between the trial Magistrate and the Applicants is so strained that there is no possibility of the Applicants getting justice.
13. Counsel submitted further that the Applicants' defence had been partially heard and that the 2nd Applicant had been stood down to enable him avail some documents which he wished to rely on, that however when the matter came up on 8/03/2023 for further defence hearing, the 2nd Applicant's witnesses were not in Court and he therefore sought adjournment but the same was declined in the absence of the Applicant's Counsel, and the trial Magistrate proceeded to close the defence case prematurely. Counsel contended further that the trial Court's decision was contrary to Section 211 of the Criminal Procedure Code, that the 1st Applicant's case had not been concluded since he had only been stood down while giving his evidence-in-chief and he had not been cross-examined or re-examined, that since Counsel for the Applicant was absent, the trial Court ought to have placed the matter aside and inquired about Counsel's whereabouts, that the Applicants were therefore denied legal representation contrary to the dictates of *the Constitution* and the earlier directions of the High Court on revision. He submitted that in the circumstances, this is a fit case for exercise of this Court's supervisory jurisdiction of Revision and cited the case of John Nduvi Mbuvi v R [2019] eKLR, the case of Prosecutor v Stephen Lesinko [2018] eKLR and other cases. In conclusion, he prayed that the matter be referred back to the subordinate Court for hearing before another Magistrate other than the one who has been handling it.



Interested Party's Submissions

14. Counsel for the Interested Party also recounted the history of the matter and submitted that this Court's jurisdiction on revision is limited to correcting a manifest error in the proceedings of the trial Court so as to ensure fair administration of justice, that the Court does not delve into the merits of the decision as it would do when exercising its appellate jurisdiction and it cannot be justified in substituting its own views on matters of fact or evidence before the trial Court. He cited the same case of *Joseph Nduvi v Republic* (supra) quoted in the case of *ODPP vs Felix Mwebwa Nyaga & Another, Chuka Criminal Revision No. E002 of 2021*. He submitted further that the Applicants have a duty to prove that the order made by the trial Court was improper and/or illegal. He cited Section 107 of the *Evidence Act* and the case of *Director of Public Prosecutions v Swazuri & 24 Others, Nairobi Criminal Revision No, E003 of 2023*.
15. Counsel contended that the Applicant has failed to establish that the impugned orders were incorrect, illegal or improper, that the Applicants have been given several opportunities to defend the charges against them but they have been indolent. According to Counsel, the Defendant's Counsel has not attended Court on various occasions and that the trial Court has been extremely lenient. Counsel suggested that the Applicants may be colluding with his Counsel to frustrate the case. He also contended that a criminal trial does not only entail the rights of the accused person since the Court is also under a duty to uphold the rights of victims. He cited Section 9 of the Victims Protection Act and also the case of *DPP v Jackson Cherono [2019] eKLR, Kabarnet Criminal Revision No. 1 of 2018*. In conclusion, he prayed that the Applicants should be condemned to pay costs of the Applications and cited Section 32 of the Penal Code for this prayer.

Determination

16. To enable this Court appreciate the Applicants' complaints, I called for the trial Court file and stayed the trial before the lower Court. The file was duly forwarded and I have carefully scrutinized it. I also granted the parties liberty to file written Submissions.
17. Regarding this Court's supervisory jurisdiction with regard to the powers of Revision, the same is provided under *the Constitution* in Article 165 (6) and (7) in the following terms:
 - "(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."
18. Section 362 of the Criminal Procedure Code, then provides as follows:
 - "Revision
 362. Power of High Court to call for records
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.”

19. The operative phrase in considering Applications for revision is therefore “correctness, legality or propriety” of any finding, sentence or order made by the lower Court.
20. The purpose and nature of the revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of Joseph Nduvi Mbuvi vs Republic [2019] eKLR in which he observed as follows:

“In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court’s revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.”
21. The issue that arises for determination in this matter is therefore “whether the Applicants have satisfied this Court that it should exercise its revisionary jurisdiction and direct the trial Court to re-open the defence case”.
22. In this instant case, the Applicants took plea on 13/03/2017, they pleaded not guilty and the matter proceeded to trial. The Prosecution called 6 witnesses but the Applicants then applied for recall of some of the witnesses. The Application was allowed by the trial Court and the said witnesses returned and testified. A 7th witness also testified and the Prosecution then closed its case. On 21/11/2019, the trial Court found that the Applicants had a case to answer and placed them on their defence. It will therefore be noted that taking of plea to the finding of a case to answer took almost 3 years. The circus then began.
23. The defence hearing was fixed for 17/12/2019 on which date the Applicants’ Counsel did not appear and, in his absence, the Applicants proceeded to testify. The matter was then fixed for Submissions on 7/01/2020 on which date an Advocate held brief for the Applicant’s Counsel and sought extension of time to file Submissions. This extension was granted and the matter fixed for Mention on 14/01/2020 on which date another Advocate held brief for the Applicant’s Counsel and instead of confirming filing of Submissions, sought time to call witnesses. The trial Court stuck to its guns and since the matter was now at the stage of Submissions, declined the application to call defence witnesses or re-open the case and fixed the same for Judgment on 3/02/2020. On the said date, the Judgment was not delivered because the 2nd Applicant was absent as he was said to be unwell. Pursuant thereto, the Judgment was deferred to 18/02/2020 but on which date, the 2nd Applicant was again absent and upon which the Court issued a warrant of arrest against him and fixed the matter for 25/02/2020. On the said date, the 2nd Applicant finally showed up and the warrants of arrest lifted. The Applicant’s Counsel was also present this time and informed the Court that he had filed an Application for Revision, namely, Eldoret High Court Criminal Revision No. 2 of 2020. In the circumstances, the proceedings were stayed pending determination of the Revision Application.



24. The Application for Revision before the High Court was determined on 11/12/2020 when Hon. Sewe J allowed the same and directed that the defence case be re-opened. Pursuant thereto, the Applicants testified for a second time on 7/01/21, this time in the presence of their Counsel. While the 1st Applicant concluded his case, the 2nd Applicant was however, upon his request, stood down to give him time to produce some medical documents by which he intended to prove his alibi defence. Further defence hearing was then set down for 13/01/2021 on which date the hearing could not proceed because the Applicant's Counsel was again absent. The matter was then adjourned to 18/01/2021 on which date, the Applicant's Counsel came up with an Application for recusal of the trial Magistrate. The Application was heard and by the Ruling delivered on 30/03/2021, on which date the Applicants' Counsel was again absent, the trial Court dismissed the Application.
25. Dissatisfied with the dismissal of the Application seeking recusal, the 1st Applicant filed Eldoret High Court Criminal Appeal No. E020 of 2021. This Appeal was determined on 26/01/2022 when Hon. Ogola J delivered his Judgment dismissing the same. Thereafter, the case came up for defence hearing before the trial Court on 20/12/2022 but was adjourned because yet again, the Applicants' Counsel was absent. The same was fixed for 4/01/2023 on which date, it was adjourned because the Advocate holding brief informed the Court that the Applicants' Counsel was indisposed. The defence hearing was then fixed for 24/01/2023 on which date, yet again, the Applicants' Counsel was absent as he was said to be held up before the High Court. It is on this date that the trial Magistrate had enough, stood his ground and closed the defence case. He then fixed the case for Submissions on 15/03/2023. It is as a result of this action that the Applicants filed the instant Application for Revision.
26. From the above recitation and chronology, it is clear peradventure that the Applicants and/their Counsel have vowed never to allow the trial before the Magistrates Court to be concluded. From the time that they were placed on their defence, the Applicants have placed hurdles and roadblocks at every point turning the trial Court case into a "ping-pong" being tossed regularly from the Magistrate's Court to the High Court and back again. Considering the consistent and high instances of absenteeism from Court by the Applicant's Counsel, I am persuaded that the same has been deliberate and meant to grant the Applicants a window for alleging denial of the opportunity to be heard and/or to be to be represented by Counsel. This kind of conduct is abhorred and should not at all be encouraged in any civilized judicial system. Parties and/their Advocates should never be allowed to go to the extent of holding Courts at ransom and there is no way that any Court can accept to conduct its proceedings at the convenience or whims of litigants or their Counsel. Courts will lose their authority if they allow themselves to be dictated upon by parties in such manner.
27. I am constrained to believe that the purported complaint raised herein was clearly well calculated in advance and is nothing but an attempt to delay the trial before the Magistrate's Court. This Court refuses to be an accomplice to the Applicants' machinations. Litigation cannot be deferred perpetually and must come to an end at some point. I agree with the State and the Interested Party that the Applicants have failed to demonstrate that their rights have in any way been violated. They were given all the opportunity to participate in the trial but instead, chose "to play games around the Court" and to forestall the trial. On two occasions, first by the trial Court, and later by the High Court upon an Application for Revision, the Applicants were allowed to recall prosecution witnesses for cross-examination which they did. Undeterred, they still came up with an Application for recusal of the trial Magistrate and which when it was declined, appealed to the High Court which also declined it. I note that the Applicants have appealed further to the Court of Appeal against the decision of the High Court and which Appeal is still pending. Despite all these previous actions, the Applications have again come back to this High Court yet again seeking Revision. Just like the Applicants (as accused persons), the Interested Party (as the complainant/victim), too, has the right to a fair and expeditious



resolution of the case. The Applicants' continued and deliberate attempts to frustrate and delay the trial Court from concluding the case is unfair to the complainant and cannot be tolerated any further. It is unacceptable that the trial Court case commenced in the year 2017 and the Applicants were placed on their defence in the year 2019 but to date, the same has not been concluded, thanks basically to the delay tactics employed by the Applicants.

28. I note that in his Submissions, Counsel for the Applicants states that "the trial Magistrate has not hidden his disdain of the orders of the High Court halting further proceedings, and that the relationship between the trial Magistrate and the Applicants is so strained that there is no possibility of the Applicants getting justice". This statement exposes the real reason behind this Application as it demonstrates that despite the Appeal against recusal of the trial Magistrate having been dismissed, the Applicants are, in disguise, still attempting to re-argue the same Application for recusal. This I cannot accept. The issue of recusal is now Res Judicata and until and unless the Appeal before the Court of Appeal succeeds, that remains the position.
29. In the circumstances, I cannot find any improper exercise of discretion by the trial Court in its decision to close the defence case in light of the Applicants' obvious reluctance to prosecute the defence case.
30. It should always be recalled that the reversionary power of the High Court is not meant to be invoked to micro-manage the subordinate Courts. In respect to this caution, in the same case of Joseph Nduvi Mbuvi vs Republic (supra), Odunga J stated further as follows:

" 14. It is, however my view that the jurisdiction should not be invoked so as to micro-manage the Lower Courts in the conduct and management of their proceedings for the simple reason that if every ruling of the Lower Court and which went against a party were to be subjected to the revisionary jurisdiction of the Court, floodgates would be opened and the Court would be inundated with such applications thus making it practically impossible for the Lower Courts to proceed with any case to its logical conclusion."

31. For the foregoing reasons, I decline the invitation to order for re-opening of the defence case. Accordingly, both Applications fail and are dismissed. The lower Court file is hereby returned to the lower Court for conclusion of the case before the trial Magistrate.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JULY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Mr. Wainaina for Applicants

Ms Limo for Respondent

Ms Mbogaa h/b for Mr. Omwenga for Interested Party

Court Assistant – Brian Kimathi

