



**Nyagah v Republic (Criminal Revision Application  
E288 of 2023) [2024] KEHC 8983 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8983 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL REVISION APPLICATION E288 OF 2023**

**LM NJUGUNA, J**

**JULY 24, 2024**

**BETWEEN**

**FRANCIS MWANIKI NYAGAH ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Notice of motion Against order of Hon. S. Ouko in Runyenjes  
MCCR No. 664 of 2019 given on 25th October 2023.)*

**RULING**

1. The applicant filed a notice of motion dated 27<sup>th</sup> November 2023 under certificate of urgency, being aggrieved and dissatisfied with the order of Hon. S. Ouko in Runyenjes MCCR No. 664 of 2019 given on 25<sup>th</sup> October 2023. Through the revision, the applicant seeks the following orders:
  - a. Spent;
  - b. That this honourable court be pleased to recall file no. Runyenjes MCCR No. 664 of 2019 for revision;
  - c. That this honourable court be pleased to vacate and/set aside the ruling by Hon. S. Ouko on 25<sup>th</sup> October 2023, rejecting the application for adjournment;
  - d. That this honourable court be pleased to vacate and/set aside the ruling by Hon. S. Ouko on 25<sup>th</sup> October 2023 rejecting the issue of summons to police Constable Fredrick Kiprop;
  - e. That this honourable court be pleased to issue an order compelling the DCI Headquarters to conduct a digital forensic audit on the applicant's mobile phone to retrieve text and WhatsApp messages from April 2019 to September 2019 for court production purposes and issue an electronic certificate;



- f. That this honourable court be pleased to issue an order to re-open the defense case and compel the lower court to give a hearing date;
  - g. That this honourable court be pleased to issue stay of proceedings pending the conduct of digital forensic audit by DCI; and
  - h. That this honourable court be pleased to issue any further orders as it may deem fit and just.
2. It is the applicant's case that the trial court ordered the DCI to conduct a forensic audit on his phone's SMS and WhatsApp record and issue a certificate of electronic evidence. That even after he took his phone to one Constable Fredrick Kiprop of Runyenjes DCI office who forwarded the phone to DCI headquarters, the audit was not done. That he spent significant resources following up on the request at DCI Headquarters to no avail, thus necessitating his application for an adjournment, which the court denied. He further prayed for summons to issue to the said Constable Fredrick Kiprop to explain why the audit was not conducted but the court denied this application.
  3. That the evidence sought through the audit would have helped his defense but he was denied an adjournment to allow him prepare accordingly. He stated that sections 307 and 308 of the Criminal Procedure Code allows an accused person to examine any witness not previously summoned to give evidence on the trial if that witness is in attendance, yet the trial court failed to accord him his right to fair hearing under Article 50 of *the Constitution*. That the actions of the trial court went against the rules of natural justice and he urged the court to exercise its powers as accorded to it under Article 165(b) of *the Constitution* and sections 362 and 364 of the *Criminal Procedure Code* to revise the findings of the trial court.
  4. The application was unopposed and none of the parties complied with the court's direction to file written submissions.
  5. The issue for determination is whether the orders of the trial court should be revised.
  6. 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.”
  7. 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”.

8. In a bid to determine the issue herein, I have perused the trial court proceedings. On 10<sup>th</sup> May 2023, counsel for the applicant told the court that he was not ready to proceed with the defense hearing on that day. He prayed for orders that Safaricom PLC supplies records of 2 phone numbers registered by it and that the DCI be ordered to conduct a forensic audit of the said records. The orders were granted as prayed. The matter came up again on 24<sup>th</sup> May 2023 when the applicant’s advocate informed the court that the DCI Embu office had told him that it was not able to conduct the audit requested and that the same would only be done at DCI headquarters.
9. He requested that the order that had been issued be re-issued to DCI Headquarters and the court amended the order as such. On 12<sup>th</sup> June 2023, the applicant informed the court that he was not ready to proceed with his defense hearing since his advocate was not feeling well. As regards, the investigation, he stated that the DCI headquarters requested for a note from the investigating officer. When the matter was mentioned on 11<sup>th</sup> July 2023, the applicant’s advocate stated that they were having challenges at DCI headquarters who had already received the phones to be examined. He urged the court to give the defense hearing a date in September. On 11<sup>th</sup> September 2023, the matter was taken out since the court was on leave.
10. On 25<sup>th</sup> September 2023, the applicant’s advocate sought an adjournment stating that the DCI headquarters had informed them that they had backlog and the audit had not yet been done. The application for adjournment was opposed by the respondent who stated that there had been too many adjournments in the matter. The court gave a last adjournment in the matter. On 25<sup>th</sup> October 2023, the applicant’s counsel stated that he was not ready to proceed as the DCI were uncooperative. It is on this same day that the applicant’s advocate prayed for summons to issue to Constable Fredrick Kiprop to explain why the audit was not conducted.
11. The court gave the impugned ruling which is the subject of the revision herein. The applicant’s advocate decried the ruling, stating that he had come on record a few months prior and that the ruling is unfair. The application for adjournment by the defence was declined and accused was forced to proceed regardless and closed his defence in light of the trial court’s previous order denying further adjournments. The matter was set down for judgment.
12. The applicant stated that his right to a fair hearing under Article 50 of *the Constitution* was denied. However, from a perusal of the trial court proceedings, the court accorded him the orders he needed and accommodated him on many occasions as narrated hereinbefore. It is not possible for this court to give fresh orders to the DCI to produce the audit since the trial court had already issued a similar order.
13. The trial Court cannot be held to have proceeded in error. The application has not been brought within the parameters set out in section 362. The applicant has not satisfied this Court that the order that was made by the learned magistrate was either incorrect, illegal or that there was procedural impropriety on the part of the Court in making the impugned orders.
14. In the end, I find that the application lacks merit and it is hereby dismissed.
15. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF JULY, 2024.**

**L. NJUGUNA**

**JUDGE**



..... for the Applicant

..... for the Respondent

