



**Kinyajui v Republic (Criminal Revision E006 of 2023)
[2024] KEHC 13145 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CRIMINAL REVISION E006 OF 2023
FN MUCHEMI, J
OCTOBER 24, 2024**

BETWEEN

LIVINGSTONE WANYOIKE KINYAJUI APPLICANT

AND

REPUBLIC RESPONDENT

RULING

Brief Facts

1. The application for determination is dated December 11, 2023 seeks for orders to examine and revise orders issued on May 23, 2023 in Thika CM Criminal Case No. 693 of 2016.
2. The applicant was charged in Thika CM Criminal Case No. 693 of 2023 with six counts as follows:- Count I conspiracy to defraud contrary to Section 317 of the Penal Code, Count II making document without authority contrary to Section 357(a) of the Penal Code, Count III making a document without authority contrary to Section 357(a) of the Penal Code, Count IV forgery contrary to Section 350(1) of the Penal Code, Count V making document without authority contrary to Section 357(a) of the Penal Code and Count VI forgery contrary to Section 350(1) of the Penal Code.
3. The applicant pleaded not guilty and the matter proceeded for full hearing. The applicant argues that he was placed on his defence yet the document examiner's report was not availed to enable him properly cross examine the witnesses. The applicant argues that due to the unavailable document examiner's report he is being framed and humbly seeks this Honourable Court to call for the lower court file for perusal/examination to satisfy itself as to the correctness, legality or propriety of the subordinate court's orders pronounced.
4. The respondent states that the applicant was charged in Thika Criminal Case No. 693 of 2016 with six offences as stated earlier herein. The respondent further states that after the hearing of the prosecution case, the applicant was put to his defence, thus he had a case to answer. On 23rd May 2023, when the



matter came up for defence hearing, the applicant's counsel was not ready as he stated that he needed the document examiner report. The respondent states that from the record, the document examiner testified on 2nd February 2021 and produced his report. Furthermore, the applicant's counsel cross examined him extensively on his report.

5. The respondent states that on 22nd November 2022, the trial court made directions on the issue of the document examiner's report whereby the trial magistrate confirmed that the document examiner had testified and produced his report but the same is missing from the court file.
6. The respondent further states that the defence requested that if the report was not found, the document examiner and the investigating officer ought to be recalled. The prosecution thus informed the court that the two witnesses were not reachable through their last known contacts. The respondent argues that the trial court observed that the matter was old and could not start de novo hence directed that the matter proceeds from where it had reached. The respondent further argues that the instant matter is one of the oldest files having been initially registered in Kibera Law Courts and was over ten years old.
7. The respondent states that the applicant was ably represented by counsel during the trial and at no single point did the defence complain that they had not been supplied with any document or were not given fair hearing.
8. The respondent argues that the applicant is applying delaying tactics and is not keen to proceed with the matter. Furthermore, the applicant has not advanced any good reasons as to why the criminal proceedings should be stayed.
9. The respondent states that the defence has all along been ready to proceed with the defence and even proposed a date for defence hearing which date the court booked in the diary. Thus, the respondent argues that the applicant has failed to satisfy the extreme high standard for review of the trial court orders made on 23rd May 2023.
10. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

11. The applicant relies on Article 50(2)(k) of the Constitution and submits that the document examiner's report is part of the evidence that he intends to challenge however it is not possible to do so as the said document is unavailable. Thus, the applicant argues that he requires the document to enable him mount his defence.

The Respondent's Submissions

12. The respondent reiterates what she deposed in her affidavit and submits that the current application has not been brought in good faith and is meant to delay the trial. The respondent further submits that the applicant has failed to satisfy the extreme high standard of review of the trial court orders made on 23rd May 2023.

The Law

13. This court is empowered by Article 165(6) of the Constitution of Kenya to review a decision by a subordinate court. Article 165(6) provides:-

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.



14. The applicant has come to this Honourable court by way of review provided for under Article 50 of the Constitution. It provides:-

(2) Every accused person has the right to a fair trial, which includes the right:-

(q) If convicted, to appeal to, or apply for review by a higher court as prescribed by law.

15. Section 362 of the Criminal Procedure Code provides:-

The High Court may call 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.

16. Section 364(1) of the Criminal Procedure Code provides:-

1. In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to his knowledge, the High Court may”-

a. in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by section 354, 357 and 358, and may enhance sentence;

b. In the case of any other order other than an order of acquittal alter or reverse the order.

(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.

17. The revisionary jurisdiction of the High Court was discussed by Odunga J in a persuasive decision of Joseph Nduvi Mbuvi vs Republic [2019] eKLR:-

“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.”

18. Similarly Nyakundi J in Prosecutor vs Stephen Lesinko [2018] eKLR outlined the principles which will guide a court when examining the issues pertaining to section 362 of the Criminal Procedure Code as follows:-

a. Where the decision is grossly erroneous;

b. Where there is no compliance with the provisions of the law;

c. Where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;



- d. Where the material evidence on the parties is not considered; and
 - e. Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.
19. The above provisions convey jurisdiction to this court to exercise revisionary powers in respect of orders of the subordinate courts. This court is therefore possessed of the requisite jurisdiction to hear and determine this application.
 20. The applicant herein was charged in Thika Criminal Case No. 693 of 2016 with six offences being Count I conspiracy to defraud contrary to Section 317 of the Penal Code, Count II making document without authority contrary to Section 357(a) of the Penal Code, Count III making a document without authority contrary to Section 357(a) of the Penal Code, Count IV forgery contrary to Section 350(1) of the Penal Code, Count V making document without authority contrary to Section 357(a) of the Penal Code and Count VI forgery contrary to Section 350(1) of the Penal Code. The applicant took plea on 23rd November 2016 and pleaded not guilty to the six offences. The matter proceeded for hearing and on 2nd February 2020, PW1, Clalex Mwongera a document examiner gave his testimony and produced his report dated 16th October 2012 as P.Exh 1. The counsel for the applicant one Mr. Prof. Wangai proceeded to extensively cross examine the witness. From the record, it is evident that the document examiner tendered his evidence and defence counsel extensively cross examined the witness using the said document. Furthermore, the instant case was instituted in 2012 being Kibera Criminal Case No. 5010 of 2012 and later transferred to Thika Law Courts on 26th January 2016 following the High Court orders dated 5th August 2015. Thus, as was noted by the court, the criminal case is an old one and requires to be expeditiously disposed of. On further perusal of the record, the applicant has always been represented by an advocate who thoroughly cross-examined the document examiner on his report on 31st October 2022. After the document examiner had testified and was cross examined, the trial court on perusal of the court file noted that the report was missing from the file. The trial court proceeded to give its ruling on 22nd November 2022 and considered that the matter was old and a delay in concluding the matter was at a much higher risk of causing miscarriage of justice. The trial court declined to have the matter start de novo taking into consideration that the prosecution witnesses could not be reached through their last known addresses for the case to be heard afresh. Thus, the trial court directed that the matter proceeds from where it had reached.
 21. On 23rd May 2023, counsel for the applicant stated that he was not ready to proceed because of the document examiner's report. However, he later said that he would proceed with the case even if the said document was not in the court file. He proceeded to request for a date for defence hearing which was granted. It is clear from the record that he had his day in court as regard the document examiner's report. It is not known as regards the record shows who removed the report from the record after it had been produced as an exhibit. I have perused the record and noted that all the relevant evidence regarding the missing document is on record. The defence counsel's cross-examination and responses by the witness have been recorded. It is unfortunate that the document went missing.
 22. It is noted that the defence counsel consented to proceed with the case despite the fact that the document went missing. This decision was based on the fact that the defence had exhausted cross-examination on the document. The same counsel is still on record for the appellant in the said case. As such, I am of the considered view that the absence of the missing document will not prejudice the defence case and that fair trial under Article 50 of the Constitution will be achieved. The applicant has not met the threshold of Sections 362 and 364 of the Criminal Procedure Code.



23. At the conclusion of the case before the honourable magistrate, there is a possibility that the appellant or the respondent could prefer an appeal. For this reason, the respondent is directed to obtain a certified copy of the document examiner's report and have it placed on record for purposes of prosecuting an appeal, in the event that it is preferred.
24. As such, I find that the orders made by Hon. Kurumbu Resident Magistrate on May 23, 2023 are in order and shall remain in place. The Thika Criminal Case No.693 of 2016 shall proceed for defence hearing forthwith. This application is not successful and is dismissed with no order as to cost.
25. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF OCTOBER 2024.

F. MUCHEMI

JUDGE

