



**Buol v Republic (Criminal Revision E123 of 2022)
[2023] KEHC 541 (KLR) (Crim) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL REVISION E123 OF 2022
LN MUTENDE, J
FEBRUARY 2, 2023**

BETWEEN

JOHN TONG BUOL APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. John Tong Buol, the Applicant, was arraigned following allegations of having obtained money by false pretence contrary to section 313 of the *Penal Code*. The particulars of the offence indicate that he obtained USD 160,050 from the complainant by falsely pretending that he would award the complainant a tender to supply 5 Million worth diesel to South Sudan, a fact he knew to be false. The offence was allegedly committed on diverse dates between 26th June 2018 and 22nd August 2012.
2. The Prosecution closed its case on 15th July, 2019. On 30th day of July, 2019 the court having considered evidence adduced placed the applicant on his defence. Despite the age of the case, the defence came up with various reasons seeking adjournment. The court accommodated the defence until 28th June, 2022, when it opined that the applicant had proven difficult and concluded that he had no evidence to adduce, therefore, set a date for Judgment.
3. Through an application dated 12th July, 2022, the applicant seeks revision of the order of the court dated 28th June, 2022, by Hon. R.A. Oganyo CM, and, to substitute it with an order granting the applicant leave to give his defence; and, to order a retrial before another Magistrate.
4. The application is premised on grounds that whereas the applicant intended to give sworn evidence, the trial court by directions of 28th June, 2022, proceeded to fix the matter for judgment without hearing him. That the applicant will suffer great prejudice if the judgment scheduled is delivered without



the appellant's defence, and, that unless the court intervenes, the applicant's right to fair trial will be jeopardized occasioning irreparable and immitigable harm.

5. The application is supported by an affidavit sworn by the applicant who deposes that in the course of trial he was experiencing health challenges characterized by difficulties in breathing. That despite his frail health, having maintained his innocence he intended to defend himself, but, on the 28th June, 2022, sickness took a toll on him rendering him unable to defend himself. That when the court declined the request for an adjournment by his advocate, Mr. Edward Muchai, he ceased to act for him, hence he sought an adjournment to instruct another advocate but the court proceeded to give a date for judgment, an action that undermined his right to fair trial. That his initial advocate, Mr. D.P. Kinyanjui also withdrew from proceedings following concerns of bias on the part of the court.
6. The Respondent filed grounds of opposition where Its stated that the impugned Ruling had not been availed and the application lacks merit. That the applicant seeks to arrest the judgment of the court through backdoor. That Article 50(2)(f) of the Constitution gives the court the discretion to proceed with a case where an accused person declines to take part in the proceedings or makes it impossible for the trial to proceed, and, that the applicant has not established a basis for a retrial.
7. The application was canvassed through written submissions. It is submitted that the court failed to give directions in flagrant violation of the provisions of Section 211 of the Criminal Procedure Code(CPC) which was in a blatant breach of the applicant's right to a fair trial. In this respect he relied on the case of Martin Makhakha v Republic(2019)eKLR where the Court of Appeal stated that:-

“ 19. The rights under section 211 of the CPC are crucial rights of an accused person in a trial that are meant to ensure fair trial. When they have been explained to an accused, he responds by electing to proceed as he wishes. His response ought to be taken down and ought to appear on the court record. The accused is then called upon to proceed in the way he has elected ...”
8. Further, that the court proceeded to fix the matter for Judgment without hearing the applicant's defence. And, having been left without an advocate, that he should have been given time to look for another advocate. The applicant buttressed the argument by quoting the case of AMR v Republic(2021)eKLR where the court quoted the case of Pett v Greyhound Racing Association (1968)2 All ER 545, where Lord Denning held that:

“It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task. ”
9. That the trial court was biased and lacked empathy for on 8th March, 2017, it declined the applicant's request to travel out of the country on account of his father's sickness; and, took into consideration extraneous matters following allegations that diplomatic relations between Kenya and South Sudan were strained hence there was no prisoner exchange and extradition arrangement.
10. Following the allegations raised, the applicant sought nullification of the entire proceedings so that the case could be heard by another magistrate.



11. The Respondent argues that allowing or disallowing an adjournment is discretionary and the applicant has not established that the discretion was exercised in unjudicial manner. That Article 50(2)(e) of the Constitution enjoins courts to hear and conclude cases without unreasonable delay, and, having been placed on his defence in 2019, he was given an opportunity to defend himself on 28th June, 2022, but, he refused to give his defence. In that regard the applicant could not accuse the court of impropriety.
12. Based on the provisions of Article 50(2)(f) of the Constitution, which gives the court the discretion to proceed with a case where an accused person declines to take part in the proceedings or makes it impossible for the trial to proceed; it is argued that the procedure adopted by the court was procedural as the court could not be held at ransom by an accused person who was bent on frustrating trial.
13. On the question of alleged sickness, it is urged that medical documents attached to the affidavit are dated May, September, and October, 2021. That none of the documents is dated June, 2022, therefore, it is untrue, that the applicant's counsel ceased acting for the applicant following the court's refusal to grant an adjournment.
14. On the issue of the matter being transferred to another court, it is submitted that the applicant has not demonstrated that a fair and impartial trial cannot be heard before the trial court. That refusal to obtain an adjournment after being granted numerous adjournments by the same court does not connote bias on the part of the court.
15. I have considered the application, supporting affidavit and annexures thereto; grounds of opposition and rival submissions of both parties.
16. Supervisory jurisdiction of this court over the subordinate courts emanate from both the Constitution and Statute. Article 165(6) of the Constitution 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.

17. Section 362 of the Criminal Procedure Code (CPC) provides thus:-

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.

18. As stipulated, the jurisdiction in the instant case is limited to interrogation and rectification of orders made by the court out of some irregularity. The court must satisfy itself as to the correctness, legality or propriety of the proceedings and subsequent orders made by the trial court. Although it is contended by the Respondent that the application herein is solely intended to arrest the judgment through back door, interlocutory applications or appeal can be entertained by a superior court as long as it is demonstrated that there exist violations that are prejudicial such that they affect fair hearing of the matter. In the case of Joseph Nduvi Mbuvi v Republic(2019)eKLR, Odunga J. (As he then was) stated that:-

“ A strict reading of section 362 of the Criminal Procedure Code, however, does not expressly limit the High Court's revisionary jurisdiction to final adjudication of the proceedings. The section talks of “any criminal proceedings” . “Any criminal proceedings” in my view includes interlocutory proceedings.



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.”

19. The applicant complains that he was denied the right to be represented by counsel which was in breach of his constitutional right. Article 50(2)(g) of the *Constitution* provides that:-

Every accused person has the right to a fair trial, which includes the right—

- (g) To choose, and be represented by, an advocate, and
to be informed of this right promptly;

20. At the outset, the applicant instructed Mr. Otieno Advocate who was present during plea-taking. Subsequently he retained different counsels of his choice at different stages of trial. On 22/8/2013, the State/Prosecution was ready to continue with the course of trial but the applicant was not. On 4/2/2014, the prosecution was ready to proceed with two witnesses. But, the applicant sought an adjournment on the ground that his lawyer was held up in the traffic jam. The court indulged him and placed the file aside. Ultimately, Mr. Lagat turned up. He had just been instructed, therefore, sought an adjournment. The court appreciated the accused person’s right to be represented by counsel hence granted an adjournment.
21. The matter came up on 4/3/2014 as scheduled, the Prosecution had three (3) witnesses to testify but the applicant was not ready to proceed on the ground that his counsel was not present. He urged that his lawyer proposed to be heard on 15/7/2014. The court indulged him and granted an adjournment to the proposed date. On the stated date the applicant turned up at 11.00am and alleged that he had stomach problems. In the result the case was adjourned to 9/10/2014 when the applicant proceeded in person without mentioning any advocate.
22. On 18/3/2015 after two witnesses had testified on different dates, the applicant instructed Mr. Kinyanjui advocate who made appearance and sought an adjournment on the ground that he was indisposed and ought to have been on bed rest as some of his brain cells were dead. He indicated that he had not been practicing for one and a half months. The application for an adjournment was vehemently opposed by the Prosecution, but, counsel added that he had suffered heart attacks thrice, therefore, needed time to prepare for the case. The trial court considered the right of the accused to legal representation and having seen medical documents of the advocate granted the adjournment sought. The date given was the one proposed by Counsel Kinyanjui.
23. On the stated date, 10/6/2015, the Prosecution was ready to proceed, but, the applicant sought an adjournment on the ground that Mr. Kinyanjui was admitted in hospital, and, it was granted. Subsequently on 10th September, 2015, Counsel Kinyanjui appeared before Murigi CM (As she was then) who was seized of the matter, and made an application for release of the applicant’s passport to enable him travel out of the country on grounds that his father was ailing, an application that was dismissed on grounds that no medical evidence was adduced to confirm the alleged indisposition.
24. The learned magistrate who is seized of the matter took over on 20/2/2017, when the applicant notified the court that Mr. Kinyanjui was unwell and in hospital, hence the matter was adjourned to 28/2/2017. On the material date the applicant was represented by Mr. Nyangayo who made an application for release of the passport which was declined for reasons given. On 11/10/2018, the case did not proceed following an application that the defence counsel was unwell. In the result the defence was granted a



- last adjournment. When the matter came up on 25/10/2018. The applicant notified the court that he had instructed another advocate who was not present. The court gave him up to 2:28 pm to avail the advocate, and, having failed to do so he proceeded with the case which was heard afresh. Evidence of three witnesses was recorded.
25. When the matter came up on 10/1/2019. Mr. Kinyanjui reappeared and applied for witnesses who had testified to be recalled. In the result, the case was adjourned. On 7/5/2019, the case could not proceed because Mr. Kinyanjui notified the court that he was bereaved. When the matter came up on 7/6/2019, the Prosecution availed PW1 for further cross examination by Mr. Kinyanjui who argued that he believed the matter was to start afresh. Consequently, he threatened to withdraw from the matter, if the matter did not start afresh. That notwithstanding, he appeared on 15/7/2019, and proceeded with the matter. After the accused was placed on his defence, Mr. Kinyanjui sought to be provided with a copy of proceedings an application that was allowed on 30/7/2019. When the matter came up on 19/9/2019, Mr. Kinyanjui was alleged to be sick and the court granted a last adjournment to 30/10/2019. On the stated date Mr. Kinyanjui was not ready to proceed and the court granted the final adjournment. On the next hearing date, 18/11/2019, Mr. Wanjohi holding brief for Mr. Kinyanjui notified the court that he was withdrawing from acting for the applicant. The court took note of the conduct of the defence all along but granted the applicant time to instruct another advocate.
26. Mr. Njenga who was retained by the applicant did appear before the court on 5/2/2020, and was granted time to seek further instructions. However, both the applicant and his lawyer did not turn up, an act that necessitated issuance of a warrant of arrest against the applicant. Subsequently both of them turned up on 31/8/2020 and alleged that they were not aware of the date. Nevertheless, the warrant of arrest was lifted. On the 1/4/2021 Counsel Njenga sought time to conduct a pre-trial with his client and witnesses and he was indulged. This resulted into the matter being adjourned to 28/6/2021. On that date Mr. Njenga was said to be in the High Court and the matter was adjourned to 11/8/2021. On the stated date the applicant was alleged to be unwell and the court sought to see medical documents but adjourned the case to 25/8/2021 when he did not turn up. Both the applicant and Mr. Njenga turned up on 5/10/2021 and the court sought to see a medical report in respect of the applicant that he did not have. Subsequently the applicant appeared on 28/6/2022 when an adjournment was sought on grounds that counsel did not call the applicant to notify him of the defence hearing date, and, that when he requested him to go for a pre-trial meeting he did not. He urged that the applicant had Covid-19. The application was vehemently opposed by the Prosecution, and the court granted the adjournment to 2.30pm. They turned up at 3:20pm but were not ready to proceed, therefore, the court gave a date for judgment.
27. Taking this background information into consideration, it is apparent that counsels retained by the applicant were treated with excessive consideration in the course of proceedings to the advantage of the applicant, and, disadvantage of the complainant/victim. The applicant was not only afforded the right to counsel, but, also granted the liberty to change them on a whim.
28. A trial ought to proceed so as to be determined without undue delay. Article 50(2)(e) of the [Constitution](#) provides thus:-
- Every accused person has the right to a fair trial, which includes the right— to have the trial begin and conclude without unreasonable delay;
29. Section 9(1)(b) of the [Victim Protection Act](#) provides thus:-
- A victim has a right to —have the trial begin and conclude without unreasonable delay;



30. Looking at the background facts provided of the case, the court was required to balance between the rights of the accused and the victim. An indepth look at what transpired was evidence of the applicant having acted intentionally to secure adjournments. The trial court acted, and rightly so, by granting orders in the interest of justice in an endeavour to resolve the matter before it. Clearly, the applicant was not denied legal representation.
31. The applicant complains that the trial court was biased. I belaboured to capture the history of the matter herein that culminated into the impugned ruling of the 28/6/2022.
32. As pointed out, the initial application seeking permission to travel out of the country was made before the court that was presided over by Murigi CM (As she then was) who declined to grant the order sought. Subsequently, the same application was made before the instant judicial officer who delivered a ruling giving considered reasons that informed the decision. No appeal was proffered against the Ruling, therefore, the court cannot be alleged to have been biased on that ground.
33. The applicant contends that the court lacked empathy. Empathy in judging is inconsistent with the law because it does not help resolve issues raised according to the law. Courts are concerned with legality not morality. In the circumstances, the learned magistrate cannot be faulted for having reached a decision that was not appealed.
34. It is also argued that there was non-compliance with Section 211 of the CPC. The Prosecution case was closed on the 15/7/2019 in the presence of the applicant and his counsel, Mr. Kinyanjui, who notified the court that he would be filing submissions. When the matter came up for Ruling on 30/7/2019, the trial court found that the applicant had a case to answer and placed the applicant on his defence. The applicant was represented by Mr. Kinyanjui, who immediately applied to be furnished with photocopies of hand-written proceedings, and, proposed a date for defence hearing. The record of the court reads thus:-

“Ruling.

Having heard the five prosecution witnesses, I am satisfied that he has a case to answer. I put him on his defence.

R. A Oganyo (Mrs) CM

Mr. Kinyanjui: I suggest 19th September, 2019. May we be furnished with photocopies of hand-written proceeding.”

35. Section 211 of the CPC provides thus:-
 1. At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).
 2. If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material



evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

36. The applicant argues that the trial court was required to give directions and explain to the applicant the options available in giving defence. In the cited case of *Makhakha (Supra)* the Court of Appeal stated thus:-

“18. Section 211 of the Criminal Procedure Code requires that the rights of an accused person be explained to him at the close of the prosecution case and when he is being put on his defence. These rights are:

- (a) The right of remaining silent and saying nothing.
- (b) The right to make an unsworn statement from the dock in which event the accused is not liable to cross examination by the prosecution.
- (c) The right to give sworn evidence from the witness box in which event the accused becomes liable to cross examination by the prosecution if the prosecution wishes.
- (d) The right to call witnesses if the accused so wishes.

19. The rights under section 211 of the CPC are crucial rights of an accused person in a trial that are meant to ensure fair trial. When they have been explained to an accused, he responds by electing to proceed as he wishes. His response ought to be taken down and ought to appear on the court record. The accused is then called upon to proceed in the way he has elected. The record before us indicates that the appellant was represented by counsel who filed written submissions at the close of the prosecution case maintaining that the appellant had no case to answer. Subsequently the trial magistrate delivered his ruling on 10th March 2015, in which he ruled that the prosecution had established a prima facie case against the appellant and that the appellant would be put on his defence. On the same day the appellant indicated his intention to appeal against the trial court’s ruling and sought typed proceedings, and an order was duly made for him to be supplied with typed proceedings.

20. We are therefore satisfied that that there was no failure of justice, as the trial court did not proceed with the defence but ordered that since the appellant had filed an appeal the court would await the outcome of the appeal. The appellant’s complaint that his rights under section 211 of the CPC were violated lacks merit as it was premature for the court to comply with section 211 of the CPC the defence hearing having been held in abeyance to await his appeal.”

37. In the case of *Muthiani v Republic* (Criminal Appeal E005 of 2021) [2021] KEHC 121 (KLR) that is persuasive, Majanja J considered Section 211 of the *CPC* and stated as follows:-

“From the above provision, it is clear that the court has a mandatory duty to again explain the substance of the charge and also inform the accused of the right to give evidence on oath in which case he or she will be liable to cross-examination, or to make a statement an unsworn statement. The court is also obligated to ask the accused whether they have any witnesses



to examine or other evidence to adduce in their defence, and the court shall then hear the accused and their witnesses and other evidence.

9. While the record does not have a verbatim record of the explanation and information in respect of section 211(1) above being given to the Appellant before being placed on his defence, I note that from the record, the Appellant's counsel stated that the Appellant was to give a sworn statement. This, in my view, is a confirmation that the trial magistrate met the requirements under section 211 of the CPC otherwise Appellant's counsel, who I presume must have been well versed with procedure, would have objected. The Appellant, who knew that he was placed on his defence and that he was going to give sworn evidence, chose to not do so and elected to remain silent and await judgment. I find that once the Appellant has been placed on his defence, the trial court was not obligated to rehash the provisions of section 211 of the CPC since this had already been done once he was placed on his defence earlier.
10. Failure to record the exact words of section 211 of the CPC did not prejudice the Appellant and if at all there was such an omission, then it is curable by section
11. Such an error is curable under section 382 of the Criminal Procedure Code which provides;

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

39. Conspicuously, the record shows that Section 211 of the CPC was not recorded as having been complied with after the trial court placed the applicant on his defence. It could be assumed that the advocate interjected and sought to be supplied with proceedings, having suggested the defence hearing date. The trial court lamented severally of the applicant's conduct which was strongly inclined towards delaying determination of the matter, that was rightly so, but, proceeded to grant the defence an adjournment.
40. After Mr. Njenga hastily withdrew from the matter, the applicant declined to proceed. In the result the court stated as follows:-

“My Ruling of 28/6/22 still stands. The accused is proving difficult to take the stand and present his defence case. This court thereby takes it that he has no defence to offer. In light of age of the case I will find that the accused has no defence to offer. He has had very many



opportunities in the past to be represented by counsels of his own choice but he keeps falling apart with them. Reasons wherefore I will deliver my judgment on the 22nd July,2022.”

41. What the court omitted to do was to explain the mandatory requirement of the provision of Section 211 of the CPC. The court was obligated to do so and record the response or conduct of the applicant prior to making the next decision. This was an irregularity and miscarriage of justice. However, failure to comply with that provision of the law per se thus not call for nullification of proceedings because the record speaks for itself.
42. It is proposed that the matter be allocated to another magistrate. Section 81(1) of the CPC provides thus:-

Whenever it is made to appear to the High Court—

- a. That a fair and impartial trial cannot be had in any criminal court subordinate thereto; it may order—
- (i) That an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;
 - (ii) That a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;
 - (iii) That an accused person be committed for trial to itself.

43. I have afore found that there was absolutely no evidence of bias against the applicant on the part of the learned trial magistrate who exercised discretion judiciously.

44. Section 364(1)(b) CPC which provides for the power of this court on revision enacts as follows:

- (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 its knowledge, the High Court may—
- (b) In the case of any other order other than an order of acquittal, alter or reverse the order.

45. The upshot of he above is that I call to this court the order of the trial court dated 28/6/2022 declaring the applicant as having no defence to offer, which I set aside and direct the trial court, presided over by Hon. R. A. Oganyo CM to comply with the provisions of Section 211 of the CPC. To that effect, I direct the applicant and his counsel on record, to appear before the court on 23/2/2023 for directions, where after, they will be given three (3) days for hearing when the applicant will be expected to present his case and call witnesses, if any. In default, the court will be at liberty to deem the defence case as having been closed, and, retire to write judgment on evidence adduced.

46. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 2ND DAY OF FEBRUARY, 2023

L. N. MUTENDE

JUDGE

In the Presence of:



Applicant

Mr. Nick Omari.

Ms. Adhiambo for ODPP

Court Assistant - Mutai

