



REPUBLIC OF KENYA



**Mwakalu & 4 others v Republic (Criminal Revision E286 of 2022)
[2023] KEHC 1179 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL REVISION E286 OF 2022
A. ONG'INJO, J
FEBRUARY 10, 2023**

BETWEEN

**LABAN MWANGWAI MWAKALU 1ST APPLICANT
NAFTAL MAGANGA 2ND APPLICANT
KATINI MAGANGA 3RD APPLICANT
RONALD MWAKALU 4TH APPLICANT
JUMA MWAKU 5TH APPLICANT**

AND

REPUBLIC RESPONDENT

RULING

1. The Applicants by an application dated September 19, 2022 sought that Voi Magistrates Court CR. Case. No. E728 of 2021 be stayed pending hearing & determination of the application herein. It was also sought that ruling and orders made by Hon. T. N. Sinkiyan (SRM) on July 26, 2022 be revised for they were in contravention of the applicants' constitutional rights.
2. The application is supported by the grounds on its face and affidavit of Mwazighe Micar Advocate sworn on September 19, 2022 to the effect that presence of complainant Pascal Musowa in court when PW1 was testifying and being cross examined breached the applicant's constitutional rights and order by trial Magistrate allowing him to testify should be reviewed.
3. In the ruling delivered by the trial Magistrate to that objection, she pointed out that the complainant was inadvertently in court during PW1's testimony in Chief and part of cross examination. The trial Magistrate said that the complainant had initially testified before consolidation of 2 cases and he was not aware he would be called to testify afresh and his presence in court was not out of ill will.



4. The trial court determined that the defence had the complainant's statement and that they would have an opportunity to test if his presence in court was going to influence the testimony he was going to give. The application is opposed on the grounds of opposition dated September 21, 2022 where chronology of events in CR. Case No. E728/2021, E1441/2021 and E1448/2021 were given that Complainant testified in CR. Case No. E728 of 2021 before the same was consolidated with the other 2 & that Mr. Mwazighe was representing the accused persons therein.
5. That when the matter was taken over by Hon. Sinkiyani (SRM) provisions of Section 200 *Criminal Procedure Code* were not complied with & 3 witnesses testified. However, the complainant did not know he would be required to testify again as he had already testified on 3/09/2021. It was argued that the presence of the complainant in court was inadvertent mistake that cannot be used to disqualify him from testifying.
6. Mr. Mwazighe Advocate filed written submissions on 14/11/2022 and argued that by allowing the complainant to testify the court went contrary to the letter and spirit of the *Constitution* i.e. article 50 of the *Constitution* of Kenya 2010. He said that allowing the Complainant to testify will prejudice the applicants as he had heard their line of defence in cross-examination and that he would seal loop holes in the prosecution's case.
7. It was further submitted that by being present in court during examination in Chief & cross examination of his witness, the complainant was at an advantage as opposed to the applicants. Mr. Mwazighe cited the holding in *Natasha Singh v CBI* (2013) 5 SCC 741 where it was held that it is duty of court in criminal proceedings to make sure that fair trial is not hampered or threatened in any manner as it is a constitutional as well as human right. It was argued that if the complainant is allowed to testify, it would lead to a miscarriage of justice.
8. This court has considered the application by applicants for revision and find that the court exercised its discretion to allow the complainant to testify after considering what happened on the material day in court.
9. The complainant was said to have testified in CR. Case No. E728 of 2021 before the same was consolidated with 2 other cases and so the court and prosecution needed to have informed him that in those circumstances he would be required to testify again. The defence will have an opportunity to test whether the complainant's testimony would deviate from his statement to the police or even his previous testimony in court in CR. Case E728 of 2021.
10. In the circumstances this court finds that the application for revision of the trial Magistrates order has no merit and is dismissed. The trial in the Magistrates court to proceed. Mention on 16/2/2023.

DATED, SIGNED AND DELIVERED THROUGH EMAIL, THIS 10TH DAY OF FEBRUARY 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Court assistant: Otolu

Mr. Sirima for the State

Mr. Mwazighe Advocate for the Applicant

HON. LADY JUSTICE A. ONG'INJO

JUDGE

