



**Sphikas & another v Kaluma & 2 others; Director, Criminal Investigations  
Department & 2 others (Interested Parties) (Criminal Revision  
E062 of 2021) [2023] KEHC 864 (KLR) (Crim) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 864 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL REVISION E062 OF 2021  
LN MUTENDE, J  
FEBRUARY 16, 2023**

**BETWEEN**

**CONSTANTINE GEORGE SPHIKAS ..... 1<sup>ST</sup> APPLICANT**

**DEBORAH ACHIENG ADUDA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GEORGE PETER OPONDO KALUMA ..... 1<sup>ST</sup> RESPONDENT**

**JOHN WAMITI NJAGI ..... 2<sup>ND</sup> RESPONDENT**

**FLORENCE SEYANOI KIBERA ALIAS DOROTHY SEYANOI**

**MOSCHION ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**DIRECTOR, CRIMINAL INVESTIGATIONS DEPARTMENT .... INTERESTED  
PARTY**

**CHIEF MAGISTRATE W. F. ANDAYI MILIMANI NAIROBI CHIEF  
MAGISTRATE'S COURT ..... INTERESTED PARTY**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... INTERESTED PARTY**

**RULING**

1. In the Ruling of this court dated July 25, 2022 I pointed out that the instant application was imperfectly drawn, therefore, what I can glean from it is that, Constantine George Sphikas and Deborah Achieg Aduda, victims in the Milimani Chief Magistrate's Court Criminal Case No 1134 of 2012, presided over by Hon WF Andayi, CM, seek revision of orders made by the trial court on



- December 14, 2020 and September 23, 2020, that was allegedly clarified by the court on November 24, 2020.
2. The substratum of the argument is that an order be granted directing the applicants to testify in the trial through video teleconference from Overseas, their current residence; that the applicant's having testified before, and are now required only for cross-examination, unlike the DPP whose attendance is necessary, being victims, their attendance is optional.
  3. That bad character documenting evidence of accused persons be presented at trial by the victims.
  4. That the trial court be obligated to accept evidence of the orders as set out in the Judgment dated June 3, 2019 of the Disciplinary Tribunal of the Law Society of Kenya Private Prosecution cause No 144 of 2012 and 200 of 2013 so that it can be binding on it, if the DPP fails to present such evidence.
  5. That the Ruling that ordered denovo hearing in 2019 be reversed/quashed and the trial file and denovo file be consolidated; all documentary evidence introduced prior to February 3<sup>rd</sup> - 5<sup>th</sup>, 2014, March 11, 2014; and March 20, 2014, during the testimony of Aduda be transferred and consolidated with, and, in the denovo file.
  6. That the victims' advocate to have access to the 'safe file' and the denovo file for purposes of preparation of the trial as per Section 9(1)(e) of the *Victim Protection Act*; and the victims to be allowed to apply and be issued by the trial court with summons and warrants for required witnesses including investigators as provided by Section 13(a) of the *Victim Protection Act*.
  7. The application is premised on grounds that; it is in the interest of justice that the rights of the victim to fair hearing should not be denied.
  8. The application is supported by an affidavit deposed by Constantine George Sphikas who deposes inter alia that: the Rulings dated December 14, 2020 and September 23, 2020 were improper as the victims have been defrauded; Kenya has adopted the concept of teleconference appearance by parties in matters, a concept accepted by the Chief Magistrate in the Ruling of December 14, 2020 as an option;
  9. That he is currently in Greece where there is a lockdown due to Covid-19, and getting out of the house requires police approval. That the DPP having approved the concept of witness teleconference there is no reason why parties cannot testify through video link.
  10. Deborah Achieng Aduda the 2<sup>nd</sup> applicant, swore an affidavit in support of the application where she reiterated what was deposed by the 1<sup>st</sup> applicant, but the purported affidavit was not signed by her.
  11. The application is opposed by the Respondents.
  12. The application was canvassed through written submissions. The applicants urged that the court declined to grant orders and allow teleconference evidence when it would be most appropriate and convenient in the case. That the applicants spent millions on arranging to attend court, the 1<sup>st</sup> applicant whose application was allowed, but, limited to judicial proceedings in a judicial set up in the foreign country would be impossible to enforce. That the applicant was in a restricted area and with the lockdown directions which could not access the courts or judicial set up in the foreign country. That the court summarily dismissed the 2<sup>nd</sup> applicant's application for teleconference without a reason and purported to amend the first ruling to give reasons in the second rulings which was an illegality.
  13. That the applicants are prevented from adducing evidence contrary to the admitted facts in the civil cases, and, that the judgment was resjudicata, and the criminal court is bound by the findings on facts and issues.



14. Further, that the victims had a right to adduce evidence of bad character when the accused gave their own good character evidence. That the applicants seek leave to adduce evidence in event the prosecution fails to call such evidence as Investigating Officers who swore affidavits in the various cases involving parties and the witnesses from Banks.
15. That the prosecution and accused conspired to have the matter start afresh when witnesses testified so as to have the case dismissed in their absence.
16. The 3<sup>rd</sup> Respondent submits that the instant application is untenable given the manner in which it has been tendered before the court.
17. The 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties submit that most orders sought could only be obtained from a Constitutional Court or through judicial review proceedings. But, that under Section 362 of the Criminal Procedure Code (CPC) it had to be shown that there exists an illegality, incorrectness and impropriety in respect of the court order. This threshold was however not met since the applicants failed to attach the impugned orders to enable the court and parties to apply their mind to issues raised. That the applicants had not proved specific errors that the trial court may have committed to warrant revision of the court orders.
18. That the trial court's dismissal of the application was not illegal, incorrect or improper that the application by the applicants were brought to court even before the trial started denovo. That there cannot be 2 parallel sets of criminal indictments moving simultaneously during trial. That there are sufficient provisions under the CPC which allow the trial court to summon witnesses. And, it had not been demonstrated that the 2<sup>nd</sup> Interested Party had failed to apply for summons for any witness. On the question of introducing prior trial records to the denovo file, it is argued that it has not been proved that witnesses cannot be found. That charges against other Respondents having been withdrawn leaving only the 3<sup>rd</sup> Respondent. It was necessary to have the matter heard denovo.
19. I have duly considered averments by parties herein. Revisional jurisdiction of the High Court which is provided for by the Constitution and Statute.
20. Article 165 (6) of the Constitution provides thus  

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
21. Section 362 of the CPC provides as follows:  

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.
22. From the provision of the law, revisional jurisdiction is limited to the High Court satisfying itself as to the correctness, legality or propriety of any finding or order of the subordinate court. This also includes the regularity of proceedings. In the case of Joseph Ndubi Mbuvi v Republic [2019] eKLR it was stated by Odunga J (As he then was) that:  

' 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 interests 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.'

23. It was pointed out by the 3<sup>rd</sup> Respondent that the impugned orders were not even availed for consideration. The application by the applicant did not seek an order calling for the record of the subordinate court, but, it brought to the attention of the court alleged an irregularity that required this court to exercise its supervisory jurisdiction upon the subordinate court.
24. As provided by Section 362 of the CPC, it behooved this court to call for the record of the court for purposes of examination of the same, and, in that regard it must reach a finding thereto.
25. The applicants, witnesses, for the State seek orders directing the trial court to find that they are entitled to appear and testify at trial by teleconference video from their current residence location overseas, contrary to the order made by the trial court. It was hence upon the applicants to demonstrate that the orders by the trial court were erroneous.

The applicants were obligated to satisfy this court of necessity of testifying through video-link and its suitability taking all circumstances into consideration. Section 63A (1) of the *Evidence Act* provides that:

Teleconferencing and video conferencing

- (1) A court may receive oral evidence through teleconferencing and video conferencing.

26. The provision of the law as couched expresses possibility. This gives the court the discretion to decide what should be done in that particular situation. This therefore does not exclude physical attendance by witnesses. A good instance may be where a matter involves identification and ultimate production of documentary evidence. In its ruling the court granted the 1<sup>st</sup> applicant leave to testify via teleconference while it opined that the 2<sup>nd</sup> applicant appeared prevaricating, hence the prosecution was required to make necessary arrangements. In this regard there is no iota of evidence that the court committed any irregularity in the circumstances.
27. It is worth noting that the application before the trial court was made at a time when the Covid-19 pandemic was at its peak, when restrictions on travel across continents was being enforced. Currently the restrictions have been replaced by some measures that contain spread of the virus. This would suggest that the applicants could make necessary arrangements in conjunction with the State/ Prosecution to appear in court either physically or teleconferencing of video conferencing depending on the prevailing circumstances. Whatever, the decision, the applicants being victims must work in tandem with the prosecution since criminal trials are controlled by the Director of Public Prosecution (See Article 157 of the *Constitution*). The State would not be barred from renewing the application depending on existing circumstances. The court in dealing with the application would be expected to determine the matter taking into consideration interest of justice.



28. On the issue as to whether proceedings and evidence in civil cases would be admissible; Section 34(1) of the [Evidence Act](#) stipulate that:

(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances —

(a) Where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;

and where, in the case of a subsequent proceeding—

(b) The proceeding is between the same parties or their representatives in interest; and

(c) The adverse party in the first proceeding had the right and opportunity to cross-examine; and

(d) The questions in issue were substantially the same in the first as in the second proceeding.

29. In the case of [Abdi Adan Mohamed v Republic \[2017\] eKLR](#) the Court of Appeal sitting at Mombasa held that:

' The language of Section 34 is wide enough to encompass situations where the witness who had already testified is dead, or cannot be found, or is incapable of giving evidence, or is prevented by the accused person from attending court, or where his presence cannot be obtained without an amount of delay or expense which in all fairness would be unreasonable. In such a case the evidence recorded by the previous trial magistrate or judge is admissible in the trial by the succeeding magistrate or judge. To resort to previously recorded evidence under Section 34, the proceeding must be between the same parties as the previous proceeding and in criminal trial the parties are deemed to be the prosecutor and the accused person; the adverse party in the first proceeding had the right and opportunity to cross examine the witnesses; and the questions in issue were substantially the same in the first as in the second proceeding.'

30. It is notable that the trial courts reasoning was not erroneous in any way, the new party was not in the previous criminal proceedings and had not cross examined the applicants. The applicant was not dead nor was it impossible to attend court.

31. It is not in dispute that this matter has started denovo before the trial court and the applicants/victims are the complainants. The Prosecution Counsel in the process of leading evidence would not be barred from relying on the provision of the law if need arises as there would be no prejudice on the accused person who will have the opportunity to cross-examine the witnesses.

32. It is submitted that the victims could adduce bad character evidence and they did file an application in that respect that was dismissed by the Chief Magistrate. Their bone of contention is that the DPP also opposed the application. It was the trial courts finding that the evidence is admissible under Section 57



of the [Evidence Act](#), but, the application must come from the prosecution and, at the right time. The alluded to provision of the law provides thus:

- (1) In criminal proceedings the fact that the accused person has committed or been convicted of or charged with any offence other than that with which he is then charged, or is of bad character, is inadmissible unless—
  - (aa) Such evidence is otherwise admissible as evidence of a fact in issue or is directly relevant to a fact in issue; or
  - (a) The proof that he has committed or been convicted of such other offence is admissible under section 14 or section 15 of this Act to show that he is guilty of the offence with which he is then charged; or
  - (b) He has personally or by his advocate asked questions of a witness for the prosecution with a view to establishing his own character, or has given evidence of his own good character; or
  - (c) The nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution; or
  - (d) He has given evidence against any other person charged with the same offence:  
Provided that the court may, in its discretion, direct that specific evidence on the ground of the exception referred to in paragraph (c) of this subsection shall not be led if, in the opinion of the court, the prejudicial effect of such evidence upon the person accused will so outweigh the damage done by imputations on the character of the complainant or of any witness for the prosecution as to prevent a fair trial.

33. It is a duty of the State to call for such evidence when necessary. Where that fact is disregarded by the DPP, and, it is imperative that it be adduced pursuant to the provisions of Section 57(1) of the [Evidence Act](#); under the [Victim Protection Act](#), a victim who is allowed to actively participate in the trial where their personal interests are at stake, such evidence can be adduced, with leave of the court. It is urged that victims are apprehensive that the State will not act, if this will be the case, the prosecution case having not been closed, the victim can act accordingly. Therefore, the trial court would not be expected to shut out the victim from tendering relevant evidence left out by the DPP. (See the [Victim Protection Act](#)).

34. In the case of [Leonard Maina Mwangi v DPP and 2 others \[2017\] eKLR](#) Lesii J (As she then was) held that:

' I find that the victims right to participate in the trial process subsists, and is not passive, but active within the limits set. I find that the participation of the victim is non-derogable right under Article 25 of the [Constitution](#).'

35. It is also complained that the court committed an illegality in allowing proceedings to commence denovo. Following consolidation of charges, parties had to plead afresh. The applicants contend that they were not informed of the courts directions and query why the prosecution did not oppose the application. What transpired having been procedural step taken in the interest of justice and fair trial, the consolidation of matters having been necessary following indictment of another accused person, there was no illegality. The court acted within the law.



36. The upshot of the above is that since the matter is being heard denovo both questions of fact and issues of law will be determined as if there had not been a trial at the first instance, therefore, it will be improper for this court to reach a conclusion of existence of purported irregularities that are yet to arise. In the premises, the application is unmeritorious. Accordingly, it fails and is dismissed.

37. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Ms. Ajuang for Applicants

Mr. Wanjigi Njagi-2<sup>nd</sup> Respondent

Ms. Gitau for 3<sup>rd</sup> Respondent

Ms. Kibathi for State/ Respondent

**Court Assistant -Evanca**

