



REPUBLIC OF KENYA



**Bushebi v Republic & another (Criminal Revision E259 of 2022)
[2023] KEHC 4102 (KLR) (Crim) (9 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4102 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL REVISION E259 OF 2022**

K KIMONDO, J

MAY 9, 2023

BETWEEN

JOSEPH BUSHEBI APPLICANT

AND

REPUBLIC 1ST RESPONDENT

CECILIA NYAMBURA 2ND RESPONDENT

RULING

1. The applicant is aggrieved by the order of the learned trial magistrate, Hon G Shikwe, PM, dated September 16, 2022 in Milimani Criminal Case 1315 of 2016.
2. The lower court disallowed the applicant's motion dated September 6, 2022 in which he sought to stay the hearing slated for September 8, 2022 until the prosecution supplied him with certain documents; and, that he be allowed to cross-examine the investigating officer about "the authenticity" of the complainant's statement. He also craved an acquittal on the ground of failure by the prosecution to supply him with evidence in advance and as earlier ordered in 2018.
3. Being aggrieved, he has applied for revision before the High Court. The request is contained in a Notice of Motion dated October 5, 2022 and supported by a deposition of even date.
4. The background is that the applicant and the 2nd respondent were charged in the lower court with 3 counts of conspiracy to defraud contrary to section 317 of the *Penal Code*; another count of stealing by directors contrary to section 282 of the Code; and, a further count for money laundering contrary to section 4 as read with section 16 (1) of the *Proceeds of Crime and Anti-Money Laundering Act*.
5. They pleaded not guilty. The case is still pending. To be precise, the trial has never taken off since the August 26, 2016 when the accused were first presented to court. The delays can be attributed to



- multiple interlocutory applications by the parties both in the lower court and in the High Court. For instance, the complainant’s counsel presented a motion dated April 4, 2017 in the lower court to have the complainant, a foreign national residing in Canada, testify through a video link. It was disallowed on February 15, 2018.
6. He then sought a revision at the High Court at Nairobi in HCCREV 36 of 2018. It was withdrawn on May 27, 2022 following a subsequent ruling in the lower court allowing the complainant to testify virtually. In the revision now before me, the applicant contends that the complainant’s identity cannot be authenticated in an online hearing; and, that the trial magistrate had no power to review the rulings of his colleague made on February 15, 2018 and March 9, 2018.
 7. The applicant filed submissions on January 25, 2023 in this revision together with a bundle of authorities. The 2nd respondent supported the position taken by the applicant as amplified in her submissions dated January 13, 2023.
 8. The revision is opposed by the prosecution through submissions dated January 27, 2023.
 9. On April 25, 2023, I heard further arguments from the applicant (in person) and learned counsel for the two respondents.
 10. I take the following view of the matter. In Part 1 of the applicant’s submissions titled Whether the criminal proceedings are regular, legal and proper in the absence of proper factual foundation, he argues that the prosecution is flawed partly because it “was commenced and is being maintained in the absence of a factual foundation or basis”. He contends, for instance, that the charge is defective because the police failed to record the personal complaint of the victim in an Occurrence Book or to take down his statement.
 11. I readily find that the submission is attempting to magnify the boundaries of this revision and must fail for two main reasons: Firstly, whether the charge sheet is defective; or, whether the entire prosecution is ill-founded falls within the province of the trial court to be determined at the appropriate stage and on the basis of tested evidence or materials. The trial has not even commenced. Secondly, this revision is limited to the correctness or propriety of the impugned decision by the learned trial magistrate dated September 16, 2022.
 12. Article 165 (6) of the [Constitution](#) confers the High Court with supervisory jurisdiction over all subordinate courts. Furthermore, and, by dint of sections 362 to 364 of the [Criminal Procedure Code](#), the High Court is imbued with wide powers to review the orders of the learned trial magistrate. However, not every decision of the subordinate court is amenable to revision; and, some of the decisions are best left to interlocutory appeals or even final appeals.
 13. That distinction is material to this revision. For instance, the applicant in his ill-fated motion in the lower court had craved for an acquittal on the ground of failure by the prosecution to supply him with evidence in advance and as earlier ordered in 2018. The prayer was denied. That part of the decision can only be challenged on appeal and not by way of the present revision.
 14. I must however sound a warning on interlocutory appeals: The Supreme Court in [Joseph Lendrix Waswa v Republic](#), Supreme Court Petition No 23 of 2019 [2020] eKLR, was emphatic that except in the clearest of cases, interlocutory appeals should not be entertained by the superior courts. The rationale is self-explanatory: Beyond causing delays, the accused person may eventually be acquitted and the grievances will be all water under the bridge. See also [Thomas Patrick Gilbert Cholmondeley v Republic](#), Court of Appeal, Nairobi, Criminal Appeal 116 of 2007 [2008] eKLR.



15. Like I stated earlier, the trial has not taken off. It follows that the earlier ruling and order by Hon P Ooko, PM was in the nature of preliminary directions on how the evidence of the complainant was to be taken. My view is that the trial is now in the hands of a new magistrate, Hon G Shikwe, PM and who is entitled to conduct the trial as per the directions in the impugned ruling of September 16, 2022.
16. I heard the applicant and 2nd respondent to be saying that the new trial court was reviewing or departing from the decision of a magistrate of co-ordinate jurisdiction. I am not so persuaded for the reason I have just given. The decision cited by the 2nd respondent in *George Gathuri Njoroge v Republic*, High Court, Nyeri Criminal Revision E011 of 2021 on that point can thus be distinguished.
17. As conceded by the applicant, the Judiciary has fully embraced technology in the filing and hearing of cases. As argued by the applicant, and the readings in items 7, 8, 10, 11 and 12 of his list of authorities, conducting a matter online poses certain practical challenges, for instance on identification of a witness testifying out of jurisdiction or dealing with certain types of evidence or exhibits.
18. But those bottlenecks can be ameliorated: For example, a foreign witness could testify from an embassy or a court location which can authenticate his identity. Even the different time zones can be resolved by requiring the witness to comply with Kenyan official working hours. It is for witness to do so because he is the one benefitting from not travelling to the Republic. I say so very carefully and obiter; and, without directing the trial court on the most efficient protocols or safeguards to reinforce the integrity of its proceedings.
19. I am alive that the applicant claims that the complainant may be dead; and, that the person who logged in at an earlier session was an impostor. I have no reliable materials before me to make any conclusion on that matter. Furthermore, those are evidential matters falling squarely within the purview of the trial court. It is not lost on me either that the underlying matter is a criminal charge, and, the burden of proof lies on the prosecution. What I disagree with is the applicant's contention that merely by conducting part or the whole of the trial virtually, the applicant will lose his right to a fair trial.
20. Lastly, under Article 50 (j) of the *Constitution*, an accused person is entitled "to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence". The key words are the evidence the prosecution intends to rely on. I concur with the learned trial magistrate that a set of the documents that the prosecution intends to rely on were supplied to the applicant on August 7, 2018.
21. The point to be made is that those documents may not comprise all the evidence, or even exculpatory evidence, held by the prosecution. An appropriate application for such additional documents or to call certain witnesses can be made to the trial court at the appropriate stages. Again, I say that very carefully.
22. For all those reasons, I find that the applicant's request for revision contained in the Notice of Motion dated October 5, 2022 is not merited. It is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2023.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of:

The applicant (in person).

Mr. Kiragu for the 1st respondent instructed by the office of the Director of Public prosecutions.



Mr. Momanyi for the 2nd respondent instructed by Momanyi Mogare & Company Advocates.

Mr. E. Ombuna, Court Assistant.

