



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Elabden v Republic (Criminal Revision E010 of 2023)  
[2023] KEHC 19169 (KLR) (Crim) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19169 (KLR)

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

**CRIMINAL**

**CRIMINAL REVISION E010 OF 2023**

**DR KAVEDZA, J**

**JUNE 22, 2023**

**BETWEEN**

**ALMUHABRAQIPALHAR ABBAS MUHAMED ZAIN ELABDEN .. APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The applicant filed the notice of motion dated January 5, 2023 seeking that the Milimani Chief Magistrate's Court Criminal cases no E4263 of 2020 and 1738 of 2020 be placed before a different trial magistrate for hearing and determination to their logical conclusion. He also prayed that the two files be called for purposes of satisfying the correctness and legality and propriety of proceedings in both files and the ruling delivered on November 22, 2022.
2. The application is grounded on averments on the face thereof and supported by an affidavit dated January 5, 2023, sworn by the applicant. the averments made are that: the applicant is the accused in E4263 of 2020 and a complainant in 1738 of 2020. On the other hand, the complainant in E4263 of 2020 is the accused in 1738 of 2020. Both files are placed before the same trial magistrate and could lead to a conflict of interest. It is irregular to have two files placed before the same trial magistrate where he is a complainant in one and an accused in the other. His right to a fair trial is likely to be infringed. On 22nd November 2022, the trial court placed the applicant on his defence without considering the written submissions on record. That the point of law raised in the submissions was that the matter is civil in nature and ought to be handled by a court of competent jurisdiction. He urged the court to revise the order placing him on his defence and find him to have a no case to answer.
3. In response, the respondent filed grounds of opposition dated March 3, 2023. The grounds raised are that the application is misconceived and unsubstantiated. The applicant is not prejudiced since the trial court is yet to make any orders on the matter. The applicant has not demonstrated that a fair



and impartial judgement cannot be conducted by the trial court. the applicant is engaging in forum shopping. The application is a delaying tactic and lacks merit.

#### **Applicant's submissions.**

4. Mr. Mbuvi learned counsel for the applicant submitted that the applicant is likely to be prejudiced as there is an apprehension that his demonour that may be presumed in one matter may affect the outcome of the other. This is because information obtained from one matter may be blindly applied to the other. He urged the court to have the two files be placed before different trial magistrates, in a bid to accord the applicant his constitutional right to a fair trial. He relied on the case of Republic v Silas Mutumwa Marimi & 2 others [2016] eKLR.

#### **Respondent's written submissions.**

5. The respondent did not file written submissions.

#### **Issues for determination.**

6. Having considered the application, the response, the written submissions and the applicable law, the issue that arises for determination is whether the applicant should be granted the revisionary orders sought.

#### **Analysis and determination.**

7. The power of this court in its revisionary jurisdiction is founded under Section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya which provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court to satisfy 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.

8. Article 165(6) of the Constitution provides that:

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.

9. On the merits of the application, the applicants sought a review of orders of the trial court issued on November 22, 2022 placing him on his defence in Milimani Chief Magistrate's Court Criminal cases no E4263 of 2020. He also sought to have E4263 of 2020 and 1738 of 2020 be placed before a different trial magistrate on account of prejudice that is likely to be suffered by the applicant.
10. On the 1<sup>st</sup> issue of the revision of the ruling delivered on November 22, 2022, the applicant argued that the court failed to consider his written submissions. He argued that the submissions were on a point of law that touched on the jurisdiction of the court to handle a civil claim in criminal proceedings.
11. The arguments raised that the court failed to consider his submissions are far-fetched. At that stage of the proceedings, the trial court is only called upon to decide whether the evidence presented by the prosecution is strong enough to require the accused to make a defence or not sufficient leading to an acquittal. In my view, what the court is required at that stage is to consider, without the defence case,



whether there is any need to hear the accused's version. This was the position of the court in *Festo Wandera Mukando v The Republic* [1980] KLR 103, where Trevelyan and Chesoni, JJ held that:

“...we once more draw attention to the inadvisability of giving reasons for holding that an accused has a case to answer. It can prove embarrassing to the court and, in an extreme case, may require an appellate court to set aside an otherwise sound judgement. Where a submission of “no case” is rejected, the court should say no more than that it is. It is otherwise where the submission is upheld when reasons should be given; for then that is the end to the case or the count or counts concerned.”

12. It is therefore premature for the applicant to move this court and ask it to set aside the ruling made by the trial Magistrate which placed him on his defence. The applicant in so doing is inviting this court to step into the arena of a Magistrate's court, peruse the evidence that was tendered before the said court and decide on whether or not the prosecution adduced sufficient evidence to warrant his being put on defence. If this court was to do so, it would be usurping the powers of the trial court, and dare I say I would be stringing along the court.
13. The second issue is whether the two matters should be heard by the same trial court. The potential for prejudice exists in any situation where a magistrate hears two matters involving the same parties both the accused and the complainant. This is the preconceived opinion or bias that may influence the impartiality and fairness of the trial court. The *Constitution* of Kenya provides for the right to a fair hearing under Article 50. This is meant to uphold the principles of justice and fairness. The aim is to prevent any real or perceived bias and maintain the integrity of the legal process.
14. The supreme court of Kenya upheld the Court of Appeal decision in *Judicial Service Commission vs Gladys Boss Shollei and Another* [2014]eKLR where it was held that the courts should apply the objective test of “reasonable apprehension of bias” which requires the judge to determine two issues thus, the ascertainment of the circumstances upon which the allegation of bias is anchored; and to use the ascertained circumstances to determine objectively the likely conclusion of a fair-minded and informed observer, on the presence or absence of reasonable apprehension of bias.
15. The principle of judicial impartiality requires judges and magistrates to approach each case with an open mind, free from any preconceived notions or biases. When the same magistrate hears multiple matters involving the same parties, it becomes more challenging to ensure that they maintain this necessary level of impartiality.
16. That being said, to promote the principles outlined above, it is only just to have one of the matters heard by a different court of competent jurisdiction. Considering that Milimani Chief Magistrate's Court Criminal cases no. E4263 of 2020 is at the defence stage, the same should conclude before the same court to its conclusion.
17. Consequently, I make the following orders:
  - i. The application for revision of the ruling that was delivered on November 22, 2022 in Milimani Chief Magistrate's Court Criminal Case No E4263 of 2020 is dismissed for lacking merit.
  - ii. Milimani Chief Magistrate's court criminal case no 1738 of 2020 is to be heard by a different court of competent jurisdiction within Milimani Law Courts.
  - iii. This ruling is to be served upon the Chief Magistrate Milimani Law Courts for reallocation of Milimani Chief Magistrate's Court Criminal cases no 1738 of 2020 Republic vs Alshareef Abdelrahim Hassan.



Orders accordingly.

**RULING DELIVERED VIRTUALLY THIS 22ND DAY OF JUNE 2023**

.....

**D KAVEDZA**

**JUDGE**

**In the presence of:**

**Habiba C/A**

Mr. Mutinda present virtually for the applicant

Mr. Mulama h/b for Mr. Otieno for the respondent

