



Director of Public Prosecutions v Milimani Chief Magistrate’s Anti-Corruption Court; Gideon & 4 others (Interested Parties) (Anti-Corruption and Economic Crimes Revision E002 of 2023) [2023] KEHC 19887 (KLR) (Anti-Corruption and Economic Crimes) (10 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19887 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES REVISION E002 OF 2023

NW SIFUNA, J
JULY 10, 2023

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

AND

**MILIMANI CHIEF MAGISTRATE’S ANTI-CORRUPTION
COURT RESPONDENT**

AND

KIOKO MIKE SONKO MBUVI GIDEON INTERESTED PARTY

FREDN OYUGI T/A YIRO ENTERPRISES INTERESTED PARTY

ROG SECURITY LTD INTERESTED PARTY

ANTHONY OTIENO OMBOK ALIAS JAMAI INTERESTED PARTY

**THE ETHICS AND ANTI-CORRUPTION COMMISSION INTERESTED
PARTY**

RULING

1. The Director of Public Prosecutions (DPP) the Applicant herein filed a revision Application the Motion dated 26th April 2023. The same is supported by the Supporting Affidavit Judy Thuguri prosecution counsel in the Office of the Applicant. The Application urged this Court to revision the orders contained in the Ruling of Hon P.O Ooko (Senior Principal Magistrate) delivered on 21/3/2023, in Milimani Anti-corruption Case No. 31 Of 2019 *Republic V. Mike Mbuvi Sonko Gidion & 3 others* where the 1st to 4th Interested Parties are accused persons. The is currently pending before the said magistrate and is scheduled for further hearing later this month.



2. The impugned Ruling declined to admit certain Equity Bank's bank account statements and account opening documents (numbering nine). In declining to admit into evidence the said documents, the learned magistrate stated that the said documents lacked certificates required under Section 106B of the *Evidence Act* Cap 80 Laws of Kenya. Also that they had not been authenticated by signature of the bank's officers.
3. The Application is brought under the provisions of Article 165(6) and (7) of the *Constitution* of Kenya, 2010 and Section 362 and 364 of the *Criminal Procedure Act* (Cap 75 Laws of Kenya), Section 65, Section 106B, as well as Section 176 and 177 of the *Evidence Act* (Cap 80 Laws of Kenya). In it the Applicant is sought the following orders:
 - a. That this Court be pleased to call for and examine the record of the criminal proceedings in Milimani Anti-corruption Case No. 31 of 2019 *Republic v Mike Mbuvi Sonko Gidion & 3 Others* (currently pending before the subordinate court) to satisfy itself as to the constitutionality, legality, correctness, propriety or regularity of the said proceedings and the said Ruling rendered on 21st March 2023.
 - b. That this Court be pleased to review, vary, reverse and/or alter the said orders of the said magistrate's orders that rejected the following nine (9) documents from Equity Bank- (i) Bank Account Statement for A/C No. xxxx, marked PMFI 37(b), (ii) Bank Account Statement for A/C No. xxxx, marked PMFI 38(b), (iii) Bank Account Statement for A/C No. xxxx marked PMFI 39(b), (iv) Bank Account Statement for A/C No. xxxx marked PMFI 56(g), (v) Bank Account Statement for A/C No. xxxx marked PMFI 57(g), (vi) Bank Account Statement for A/C No. xxxx marked PMFI 58(b), (vii) Bank Account Statement for A/C No. xxxx PMFI 59(a), (viii) Bank Account Statement for A/C No. xxxx marked PMFI60, and (ix) Bank Account Statement for A/C No. xxxx marked PMFI60(b).
 - c. That this Court be pleased to make any other order that it deems fit in the interest of justice.
4. The Application stated that it is based on the following grounds:
 - a. That the Learned Magistrate erred in law in finding that the admissibility criterion of the Bank statements marked as PMFI-37(b), PMFI-38(b), PMFI-39(b), PMFI-56(g), PMFI-57(g), PMFI-58(b), PMFI-59(a) and PMFI-60(b) (computer printouts) and Bank Opening document marked PMFI-59(a) was governed by Section 65(1), Section 66, Section 67, Section 68(1) and Section 69 of the *Evidence Act*, Cap 80 of the Laws of Kenya requiring that the said documents be certified.
 - b. That the Learned Magistrate erred in finding that the Bank Statements which are computer printouts were inadmissible on grounds that they were not certified yet the same were generated as computer printouts and were duly supported by electronic certificates prepared pursuant to section 65(8) and Section 106B of the *Evidence Act*, which certificates were admitted into evidence by court.
 - c. That the Learned Magistrate erred in law by failing to consider Section 65 of the *Evidence Act* in its entirety as the trial court only placed reliance on Section 65(1) of the *Evidence Act*, in isolation of subsections (5) and (8).
 - d. That the Learned Magistrate erred in law by failing to consider that the impugned documents were bankers books whose admissibility is governed by Chapter VII (Section 176 and 177) of the *Evidence Act* and should have therefore been admitted in evidence.



5. The 1st, 2nd, 3rd, and 4th Interested Party, through their Advocates Mr Nyakundi and Ms Atukunda, opposed the Application by through replying affidavits and grounds opposition. Notably, The Honourable Attorney General representing the Magistrate's Court the Respondent, supported the Application and impugned the learned magistrate's decision, which Mr Ngumbi State Counsel described as erroneous. Similarly, the Ethic and Anti-Corruption Commission (EACC) through learned counsel Mr Wambugu supported the Application and seriously faulted the impugned decision, describing it as a misapplication of the law.
6. The Application was canvassed by way of written submissions, that parties on the directions of the court, later highlighted.
7. The 1st to the 4th Interested Parties in their opposition to the Application have maintained that the Application is misconceived as that the Applicant's grievance is not a proper subject of revision, but appeal.
8. Mr. Nyakundi for the 1st Interested Party in his oral arguments submitted that the High Court's supervisory jurisdiction is distinct from its appellate jurisdiction. That unlike appeals where the court has the power to review and re-evaluate the entire decision and arrive at its own finding and conclusion, that is not the case with revision. As that the scope of revision, as the Court does not deal with the merits of the decision, but it legality and correctness.
9. Ms. Atukunda for 3rd and 4th Interested Party fully associated herself with the sentiments of the 1st Interested Party's counsel. She submitted that the Application is irredeemably bad in law, and that it does not meet the scope and threshold of the revisionary powers of the Court.
10. She further submitted that the Application failed to demonstrate any illegality, incorrectness or impropriety of the decision of the magistrate. Further that her clients will suffer prejudice as a result of this Application in that this case was commenced four years ago. In the year 2019.
11. She argued that the Applicant is inviting this Court to micromanage the trial court and that which has not only disrupt the case, but will also delay it. And that which delay will lead to further delay, in violation of Article 50(2)(e) that requires that cases be concluded without unreasonable delay. That these Application is likely to interfere with the two years in Anti-Corruption matters.
12. In rejoinder Ms. Thuguri submitted that the Application demonstrates the illegality of the magistrate's decision, and non-compliance with the law. Further that the charges being on money laundering, bank statements are so crucial as to the movement of the money. That the right to a fair hearing does not solely belong to accused persons; by filing this Application the DPP is acting in the best interest of justice.
13. She maintained that since the subject documents were a banker's books, the learned magistrate erred in applying Section 106B, instead of Sections 176 and 177 by dint of which the rejected documents are admissible without the need for a certificate.
14. On this refer to our Authority No. 1- [Dpp v Mwiraria & 6 others](#)- Anti-corruption & Economic Crime Revision No. E013 Of 2021.
15. That unlike electronic evidence which under Section 106B of the [Act](#) is required to be accompanied with a certificate, a banker's books are admissible in evidence without a certificate. And that they were admissible without further proof of the original.
16. That therefore the learned magistrate in rejecting their production on the ground of want of a certificate, misinterpreted and misapplied the law, hence improperly rejected the evidence. State



Counsel Mr Ngumbi in supporting that argument maintained that those documents were computer printouts from the bank system, that under which under Section 65(5)(c) are primary evidence as opposed to secondary evidence. Reasoning that section 65 coming before Section 66 is still on primary evidence.

Determination

17. From the Application, the responses and the parties' rival submissions, there are three issues this Court should determine. First whether the grievances raised in the Application fall within the province of revision. Secondly whether this Application meets the legal threshold for revision applications. Thirdly, whether this Court should disturb the impugned decision of the magistrate, and if not what orders are appropriate to make. I am principally supposed to determine whether the Applicant has established a case for revision under Kenyan law.
18. The Applicant's grievance is one of improper rejection of evidence. It being that the said documents comprising bank account statements and account opening documents were not electronic evidence, but a banker's books in terms of the definition Section 3 of the *Evidence Act* (Cap 80 Laws of Kenya).
19. In Kenya the High Court's power of criminal revision (revisionary jurisdiction) is provided for in Article 165 (6) and (7) of the *Constitution*, as well as Section 362 of the *Criminal Procedure Code*, as read together with Section 364 of the same. This power was aptly Odunga J (as he then was) in *Joseph Nduvi Mbuvi v Republic* [2019] eKLR, where he observed as follows:

“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.

“In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well.” Was this a Proper Case for Revision?
20. The 1st Interested Party's Advocate in opposing the Application stated that the Applicant should have filed an appeal instead seeking a revision. As rightly observed by my brother Musyoka J in *Serogo Alex & 3 others v. Republic* [2022] eKLR, an appeal turns largely on the merits of the impugned decision, while revision largely turns on technicalities relating to legality, propriety, regularity or correctness of the decision.
21. Under Kenyan law, a revision unlike an appeal, does not deal with the merits of the decision or proceeding. It is my considered view that revision just like judicial review, is not about the merits of the impugned decision or proceeding. But its “legality, correctness, legality, propriety or regularity”. The use of these words in the *Criminal Procedure Code* is in my view, deliberate.
22. The improper admission of an exhibit against the provisions of the *Evidence Act*, or its improper admission such as is alleged in this Application, is merit issue hence appropriate for contestation by way of an appeal rather than a revision. The impugning of the leaned magistrate's determination on



- admissibility of an exhibit, in my view, is a merit issue that should be ventilated through an appeal and not a revision.
23. Section 364(5) states that when an appeal lies from a finding, sentence or order, and no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed. A subordinate court's improper rejection of an exhibit such as alleged in this revision Application is an order or decision from which an appeal lies as of right to the High Court, hence cannot be ventilated by way of a revision Application just because the grievant has elected not to appeal.
 24. A Court will neither force or elect for a litigant a particular course of redress, hence a litigant need to exercise diligence and wisdom in electing a particular form of redress for his or her grievance; as choices have consequences. In criminal litigation parties and their advocates need to weigh the pros and cons, brighter side and the flip side, the merits and demerits, as well as the challenges and limitations of appeal and revision. This is elementary knowledge for any practicing lawyer. Litigation like a crocodile-infested river in which to navigate through, the swimmer litigant requires a modicum of skill, strategy and wisdom to navigate. It is not a picnic for holidayers. The expectation is even higher for the advocates involved in the litigation. Much is expected of them; including in this case the choice of whether to file an appeal or a revision application.
 25. I am of the firm view that, to determine whether the magistrate's impugned rejection of the listed nine exhibits, is a merit-based determination reserved for this Court's appellate jurisdiction other than its revisionary jurisdiction that is so specific, circumscribed, rigid in scope. With hardly any latitude or room for expansion or maneuver by semantics or the craft of interpretation. In revisions the Court's cloth is cut.
 26. It will be undesirable for the High Court a supervising Court to in the exercise or purported exercise of its supervisory function, descend into evidentiary admissibility contests in proceedings that are pending or on-going in subordinate courts. This will be an unconventional big brother syndrome not entertainable in a well-structured judiciary such as Kenya's.
 27. Legal proceedings are like a relay race, where superior courts like a subsequent partner in the race should wait to be handed the baton by the mate behind it, and should not in evidentiary matters reverse run (run backwards) to pick the baton. By being involved in those admissibility contests in the court below, the High Court gets conflicted in the event an appeal eventually emerges from that court, on the same evidentially issues that it already rendered itself on.
 28. Apart from that, the freelance and wanton revisions (especially interlocutory revisions), not only interferes with the decisional independence of subordinate courts, and the smooth running of their proceedings, but may in some extreme extents amount to arm-twisting of those courts. In [Joseph Nduvi Mbuvi v Republic](#) [2019] eKLR, Odunga J (as he the was) stated that the revisionary jurisdiction of the High Court, should not be used to micro-manage subordinate courts. This then brings me to the issue of interlocutory and post-trial revisions, which I have discussed shortly hereinafter.
 29. Before then, I need to distinguish an appeal from a revision. Revision unlike an appeal, is a discretionary remedy left to judicial discretion. Being a discretionary remedy, the revisionary power like any other discretionary power must be exercised judiciously, wisely, and in a manner that safeguards the rule of law, promotes legal rights, and serves the ends of justice and fair play. It must as of necessity balance the competing and often competing interests of the erstwhile disputants.



Interlocutory Revisions and Post-Trial Revisions

30. Article 165 (7) of the Constitution as read together with Sections 362 and 364 of the Criminal Procedure Code contemplates two types of revisions. Namely, interlocutory revisions and post-trial revisions. Interlocutory revisions are those that come in the intervening period when the trial is pending or in an on-going trial such as is the case of the current application. A post-trial revision is the one that comes after the trial has been concluded and a judgment rendered, or when the trial has been concluded and the case is pending judgment. The dynamics in these two revisions differ a great deal.
31. As for interlocutory revisions, they are on a razor edge. Hence they need to be dispensed sparingly, measuredly, and with a pinch of salt; and only in the most exceptional, or most deserving, or most desperate cases. But not in matter of coarsely as in the case of appeals; or philanthropically and leisurely.
32. In criminal cases, the scarce judicial resources and judicial time ought to be spent on trials and appeals, rather than revisions. Indeed, judicial careers are grown from trials and appeals, and it is unlikely that a judicial can be developed solely on revisions.
33. As for the legal practitioners and parties in criminal cases, there is need for them to re-think their increasing uptake of revision applications. Many of the applications for interlocutory revision for instance, are merely a manifestation of the impatient nature of humans, rather than a genuine pursuit of justice and the rule of law.
34. Interlocutory revision applications like interlocutory appeals, are largely disruptive in effect, and often serve to clog the criminal justice process, as well as prolong cases, by staggering and delaying their conclusion. They in the end engender a mammoth case backlog, hence in the end undermine the efficient case disposal and dispensation of justice.
35. The judiciary needs to develop some screening process for revision application, preferably at the registry level, but even at case management sessions. This will be to weed out improper revision applications such as the ones against refusal of adjournment, fixing of far dates, or other flimsy or non-priority or even non-justiciable lamentations, and grievances appropriate for appeal.
36. Indeed, not every lamentation should find its way into the revisionary jurisdiction. Notably, the power of criminal revision was never meant to be an omnibus for all manner of lamentations and grievances however rickety. Courts need to decry and dissuade the increasing trend of grievances appropriate for appeal being raised by way of revision application.
37. Some such as the instant one herein are essentially interlocutory appeals disguised as revisions. To these, courts have to be vigilant, and not only decline the, but discourage them as well.
38. Before I pronounce my final orders, I need to address Ms Thuguri's argument that even the prosecution is entitled to a fair trial. In response to this I need to clarify that whereas the Constitution has in Article 50(1) reserved for all a generalized right to fair trial, Article 50(2) is expressly accorded an accused such as the 1st to the 4th Interested Party, a right to an extensive, elaborate, and purposive menu of rights attendant to their right to fair trial. the Constitution has further ring-fenced the accused's right to a fair trial, by, and in Article 25 declared it a non-derogable right. With regard to the case at hand, the relevant off-shoots of this right are Article 50 (2) (k) on the right to adduce and challenge evidence, as did the 1st. 2nd, 3rd and 4th Interested parties. the Constitution has in so doing, jealously guarded an accused persons right to a fair trial; and the same can now not be sacrifice for expedience. Courts need to protect the integrity and sanctity of the judicial process, as justice must not only be done. It must also be seen to be done.



Orders

39. For the foregoing reasons, I find that the Applicant's revision Application dated 26/4/2023, is for dismissal. I therefore hereby dismiss it. Deciding otherwise will be a miscarriage of justice, and a mockery of the judicial process. Let the hearing of Milimani Anti-corruption Case No. 31 Of 2019 be proceeded with and be concluded in good time.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY 2023.

PROF NIXON SIFUNA

JUDGE

Present:

Ms Wangia with Ms Thuguri for the Applicant (the ODP), and also holding brief for Mr. Ngumbi State Counsel for the Respondent.

Mr. Cheruiyot for the 1st Interested Party, also holding brief for Ms. Atukunda for the 3rd and 4th Interested Party, and for Mr. Ogutu for the 2nd Interested Party.

Mr. Wambugu for the EACC the 5th Interested Party.

Adan - Court Assistant

