



**Muriungi v Republic (Miscellaneous Criminal Application  
E020 of 2023) [2023] KEHC 23784 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23784 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
MISCELLANEOUS CRIMINAL APPLICATION E020 OF 2023  
AK NDUNG’U, J  
OCTOBER 18, 2023**

**BETWEEN**

**MARTIN MUGAMBI MURIUNGI ..... APPLICANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. This ruling disposes the notice of motion application dated 26/06/2023 seeking for the following orders;
  - i. Spent
  - ii. That this court call and examine the record of Nanyuki Magistrate Court Sexual Offence Case No.23 of 2023 for the purpose of satisfying itself as to correctness, legality and propriety of the subordinate court registering a new case which is Sexual Offence Case No. 23 of 2023 for the purpose of retrial instead of proceeding in the original file Sexual Offence Case No. 54 of 2018.
  - iii. That this court do order that Sexual Offence Case No. 23 of 2023 be closed and all orders therein be vacated.
  - iv. That the court be pleased to issue an order directing the court to resume with the retrial of Sexual Offence Case No. 54 of 2018 as opposed to having it retried as a fresh matter.
  - v. That the orders in Sexual Offence Case No 54 of 2018 ordering the release of the Applicant on bond of Kshs.200,000/- with one surety be maintained in the de novo trial.
  - vi. That since the surety has not been discharged, the Applicant be released forthwith on that cognizance.

In the Alternative, the Applicant prays that;



- i. This court call and examine the correctness, legality and propriety of the subordinate court finding in Sexual Offence Case No. 23 of 2023 that there was a likelihood of the Applicant interfering with the victim given no material was placed before the court to warrant that finding.
  - ii. That the court examine the correctness and legality of the lower court curtailing the Applicant's constitutional right to bail and the court do grant the Applicant bail on reasonable terms.
2. The application is supported by an affidavit sworn by the Applicant's counsel. It is deponed that the Applicant was charged with incest in Nanyuki CM Sexual Offences Case No. 54 of 2018 and on 02/08/2022, he was sentenced to 15 years imprisonment. The Applicant appealed the lower court decision vide Nanyuki High Court Cr Appeal No. E012 of 2022 and his conviction and the sentence were set aside and the court ordered that he be retried. Counsel averred that the import of the High Court order was that Sexual Offence Case No 54 of 2018 be reheard. That the Applicant was arraigned in court on 12/06/2023 but instead of resuming the trial in Sexual Offence Case No. 54 of 2018, a new file was opened being Sexual Offence Case No 23 of 2023 and the matter proceeded as if it was a new matter.
3. Further, that Applicant made an application to be released on bail but the trial magistrate denied him bail on account that there was a likelihood of him interfering with the victim. It is urged that the ruling was based on speculation since there was no evidence that was tendered to prove that he had contacted any witness. That the trial magistrate failed to consider that the Applicant had been initially bonded and attended court in Sexual offences Case No. 54 of 2018 hence this calls for this court to call upon the file for the purpose of satisfying itself on the correctness and legality of those two issues.
4. In opposing the application, the Respondent filed grounds of opposition dated 17/07/2023. Counsel averred that the Applicant did not demonstrate that the trial court committed any illegality, impropriety or acted incorrectly or irregularly in opening CMCR SO 23 of 2023 since a retrial order connotes a fresh hearing, and therefore, requires a fresh case file to be opened. It is urged that the Applicant has not demonstrated that the trial court committed any illegality in denying him bail and therefore the Applicant has not made any basis for this court exercise of its discretion in his favour hence, the application lacks merit and is an abuse of the court process and should be dismissed.
5. The Application was canvassed by way of written submissions. The Applicant's counsel submitted that the retrial ordered by this court did not connote charging the Applicant afresh because if it was so, it would mean that the trial of the Applicant was concluded yet the conviction and the sentence had been set aside by the High court. That a retrial is not a new trial but a continuation of the same trial. Reliance was placed on the Supreme Court decision in Hussein Khalid & 16 others vs Attorney general & 2 others (2020) eKLR where the court, inter alia, held that de novo hearing is a continuation of a trial and not a second trial. Therefore, the lower court erred by opening a new file.
6. As to the bail application, it was submitted that the Applicant throughout the trial was out on bond and he dutifully attended court. He urged the court to hold that the previous bond terms of Kshs.200,000/- with one surety were still applicable and that the Applicant do continue to enjoy the same bond terms. It is contended that the reasons advanced by the trial court that the Applicant was likely to interfere with the witnesses was not proved by the prosecution. It is the Applicant's case that the prosecution failed to place material before the trial court in support of their allegations and that according to the pre-bail report, none of the interviewees alleged that the Applicant had interfered or was likely to interfere with witnesses. Therefore, that the trial court was biased since the court denied



the Applicant bail based on speculative reasons as there was no evidence placed before her to prove compelling reasons to deny the Applicant bail.

7. The Respondent's counsel on the other hand submitted that the right to bail under Article 49(1)(h) of *the Constitution* is not absolute and can be denied if there are compelling reasons. That the denial of bail was conditional in that the trial magistrate held that the Applicant was at liberty to seek for review of his bond terms once the victim and the key witnesses had testified since there was a likelihood that he might interfere with the victim who was his daughter. Counsel relied on the cases of KKK vs Republic (2017) eKLR and JB v Prosecution (2019) eKLR where in both cases, bail was denied due to the relationship between the Applicants and the victims. That the trial magistrate evaluated the material placed before her and balanced the rights of the Applicant and that of the victim in arriving at her decision. Therefore, there was nothing incorrect, illegal, improper or irregular in the trial court finding that would invite this court to exercise revisionary jurisdiction.
8. As to the opening of a new file, counsel submitted that section 200(4) of the Criminal Procedure Code empowers the High Court to set aside the conviction and the sentence and order a new trial hence the retrial that was ordered was a new trial. That once the judgment was delivered and the Applicant was sentenced in S.O 54 of 2018, that file was closed and retrial meant that a fresh trial was to be conducted. This also means that the security that was issued in S.O 54 of 2018 does not apply in the fresh trial. Further, that registration of a new matter is an administrative function of the registry and not a finding or order that is subject to revision powers of this court. There was therefore nothing incorrect, illegal, improper or irregular in the opening of a new file.
9. I have considered the application, the response by the Respondent and the rival submissions filed herein. This court's power of criminal review (called revision) is provided for in sections 362 and 364 of the Criminal Procedure Code, Cap 75, and extends only to –

“...the calling and examination of 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.”
10. The details of those powers of the High Court in revision are set out in section 364 of the Criminal Procedure Code which provides;
  - (1) In the case of a proceeding in the subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may –
    - a. in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;
    - b. in the case of any other order other than an order of acquittal, alter or reverse the order,
    - c. in the proceedings under section 203 or 296(2) of the Penal Code, the *Prevention of Terrorism Act*, the *Narcotic Drugs and Psychotropic Substances (control) Act*, the Prevention of Organized Crimes Act, the *Proceeds of Crime and Anti-Money Laundering Act*, the *Sexual Offences Act* and the *Counter-Trafficking in Persons Act*, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review.



- (2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.
- Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.
11. This power is also vested upon the High Court by Article 165(6) and (7) of *the Constitution* which provides;
- (6) 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.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
12. Under section 362 stated above, the court in an application for revision, is called upon to call for the record and inquire into the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court. In so doing, the court ought to scrutinize the record and upon satisfying itself that the matter properly falls for an inquiry under revision, reverse the orders made.
13. The Applicant has invoked this court revisionary power on two grounds; that the trial court erred in commencing with a new or fresh trial instead of proceeding with the old case, and secondly, in denying bail to the Applicant.
14. As to the first issue, it is apparent that this court vide a judgment delivered on 24/05/2023 in High Court Criminal Appeal No. E012 of 2022 did set aside the Applicant's conviction and sentence in Sexual Offences Case No. 54 of 2018 and ordered that the Applicant be retried before another magistrate. The court further ordered that the Applicant be placed in custody and be produced for plea taking within 14 days. The reason for ordering a retrial was based on the fact that section 200(3) of the Criminal Procedure Code was not complied with during the trial of the Applicant.
15. The Applicant's contention therefore is that the trial magistrate committed an illegality and impropriety for ordering a new file to be opened being Sexual offences Case No E023 of 2023, a new trial, instead of proceeding with the old matter being Sexual Offences Case No. 54 of 2018. It is contended that the order of this court for retrial did not connote the charging of the Applicant afresh in a new case file. That a retrial is not a new trial but rather a continuation of the same trial. Reliance was placed on the case of Hussein Khalid & 16 others.
16. The undisputable fact is that the Applicant was charged and tried in Sexual Offence Case No.54 of 2018 which case was concluded resulting in a conviction and a sentence of 15 years imprisonment. This means that the trial was concluded and closed. He appealed to this court vide Criminal Appeal No. E012 of 2022 and this court set aside the conviction and the sentence on account of noncompliance with section 200(3) of the Criminal Procedure Code. In its judgement in Criminal Appeal No. E012 of 2022, this court stated;

“I accordingly allow the appeal, set aside the conviction and sentence imposed and order that the Appellant shall be retried before another magistrate of competent jurisdiction other than B. Mararo on the charges as originally drawn against him. He shall be placed in custody



at the police station where the case was handled to be produced for plea taking within 14 days hereof”.

17. Gleaned from this excerpt, the court was alive to the fact that the order for a retrial connotes a new trial all the way from plea taking and through all the motions that go with trial.

18. What constitutes a new trial has been discussed by our courts in various cases.

Mativo, J (as he then was) in *Kenya Anti-Corruption Commission vs. Michael K. Gituto* [2015] eKLR while dealing with de novo hearing cited the case of *Kajubo vs. The State* and expressed himself as hereunder:

“Starting the case de-novo entails re-calling all the witnesses. “The Latin Maxim “De Novo” connotes a ‘New’, Fresh”, a ‘beginning’, a ‘start’ etc. In the words of the authors of Black’s Law Dictionary, De Novo trial or hearing means trying a matter a new, the same as if it had not been heard before and as if no decision had been previously rendered...new hearing or a hearing for the second time, contemplating an entire trial in same manner in which the matter was originally heard and a review of previous hearing. On hearing ‘de novo’ court hears matter as court of original and not appellate jurisdiction. That a trial de novo could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter, or rather, in a more general sense, the parties are at liberty, once more to reframe their case and restructure it as each may deem it appropriate. The consequence of a retrial order or a de novo (a Venire De Novo), is an order that the whole case should be retried or tried a new as if no trial whatsoever has been had in the first instance.”

19. Similarly, in *Catherine Wanjiku Kagua vs. Chinga Tea Factory & Another* [2016] eKLR the same Judge stated;

“...From the above definition, for a matter to be tried de novo would mean considering the matter anew, as if it had never been heard. The foregoing makes it clear that a de novo trial should examine the evidence before it afresh. Obviously since a retrial has been ordered and the case is to be heard de novo, the plaintiff must reprove his case as if there has been no earlier trial. It is crystal clear from the above authorities that the plaintiff must prove his/her case afresh though previous evidence in an abortive trial is admissible as long as the ends of justice are met. There is nothing one can add to the above explanation. The fact is very clear that a de novo trial must be started from the beginning as if a trial had never taken place and the matter decided on its merits. It is also clear that the expression “new trial” trial de novo, ‘retrial’, ‘fresh hearing’, ‘trial a second time all have the same meaning. Thus, it is my considered opinion that the appellant cannot rely on the earlier evidence but he must adduce fresh evidence and since the issue of liability was resolved in the test case, the only issue the appellant will have to adduce evidence is on the issue of assessment of quantum of damages.”

20. GV Odunga J (as he then) was on his part in *Stephen Kikumu Mutisya v Republic* [2019] eKLR stated;

“From the foregoing decisions it is clear that once an order for hearing de novo is made the hearing must start afresh. Whereas pursuant to the decision of the Court of Appeal in *David Mutune Nzongo vs. Republic* [2014] eKLR the failure to plead afresh is not fatal to such proceedings, it is clear that the evidence adduced in the earlier trial has no place in the judgement arising from the proceedings undertaken pursuant to an order for de novo



hearing. Where therefore an accused person requests that a de novo trial starts pursuant to section 200 of the Criminal Procedure Code and that request is granted, the accused takes the risk that the prosecution will have another bite at the cherry and may reframe its case and restructure it as it may deem it appropriate. Where therefore the evidence adduced at the hearing de novo is inconsistent with the evidence adduced in the nullified proceedings, no party can fall back on the same with a view to impeaching the credibility of the witnesses.”

21. In *Republic v Richard Mwathi Nyambura & another* [2016] eKLR R. Lagat-Korir held that;

“The legal consequence of declaring a mistrial was a termination of the proceedings. The same were nullified and ceased to have any legal effect. The trial that commenced before me was in a legal sense a de novo trial. Black’s Law dictionary, 9<sup>th</sup> Edition defines a trial de novo as “a new trial or retrial in which the whole case is gone into as if no trial whatsoever had been heard in the court below...In this trial I consider that in starting the trial de novo, the parties committed themselves to a new start and the court did proceed as if no other trial had been held in the matter. Strictly speaking, the record of the earlier trial is preserved only because the court is one of record. It is not kept to aid in the new trial where a case starts de novo. There would have to be exceptional and justifiable circumstances for reference to be made to the past record for example where exhibits were produced and remained in the file. In this case, the defence wishes to produce the recorded evidence of Owen Gitau Wahu taken before Ochieng J in the 1<sup>st</sup> trial. Owen Gitau has testified in the present trial as PW3. It is my considered view that the trial having started de novo, the proceedings before Ochieng J. ceased to be of any legal effect and cannot be adopted as part of the record of the present proceedings.”
22. The trial now facing the Applicant is in light of the above exposition of the law, a new trial and therefore the trial court did not error in opening a new file as the Applicant was to be retried afresh.
23. I distinguish the instant case from the decision by the Supreme Court in *Hussein Khalid & 16 others vs Attorney general & 2 others* (2020) eKLR. In that case the court summed up what was before it in the following words:-

“We have to make it clear that we are, in this case, addressing a plea for de novo hearing after all parties have been heard and closed their case awaiting judgement, and after entry of judgment as opposed to when a hearing is ongoing before closure of defence case.

[27]. This is because unless hearing is concluded and judgment reserved, new evidence can be availed in course of a criminal trial, as long as the defence is afforded time to defend their case as we stated in *Hussein Khalid & 16 Others vs The Attorney General & 2 Others*, SC Petition 21 of 2018;”
24. This is clearly distinguishable from our instant suit whereby the criminal trial was already concluded but on appeal, the conviction and sentence were nullified due to procedural legal fault on the part of the trial magistrate. In effect, a mistrial was declared and the court on appeal considering the circumstances obtaining and for reasons clearly stated in the Appeal Judgment ordered a new trial to be conducted.
25. The next issue was on denial of bail. The Applicant contention was that the trial magistrate denied him bail on account that there was a likelihood of him interfering with the victim. That that ruling was based on speculation since there was no evidence that was tendered to prove that he had interfered with the witnesses. It is contended that the trial magistrate failed to consider that the Applicant had been initially bonded and attended court in Sexual Offence Case No. 54 of 2018.



26. Bail pending trial is now a constitutional entitlement in all criminal offences. It will be denied only for compelling reasons; and any conditions that the court might impose, again by constitutional edict, must be reasonable. Article 49(1) (h) of *the Constitution* of Kenya, 2010 provides;

every accused person has a right-

“(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

27. “Compelling reason” is not defined in *the Constitution* or in any law that this court is aware of. The term is also not defined in Black’s Law Dictionary, Tenth Edition. However, the term “Compelling need’ is defined there as –

“A need so great that irreparable harm or injustice would result if not met.”

A note following that definition states –

“Generally, courts decide whether a compelling need is present based on the unique facts of each case.”

28. Compelling reason therefore, in this court’s view, is a reason that must militate against granting the accused bail, such as proven likelihood of him/her not attending court, interference with witnesses, harm to witnesses or to himself/herself, and the like. The important word here is proven. It is not just a matter for the discretion of the court. He who seeks to deny an Accused person his constitutional right to bail pending trial must therefore place evidence before the court as would establish, on balance, the compelling reason urged. It is not enough to merely allege without evidence.

29. The trial magistrate while denying the Applicant bail relied on the applicable law and the pre-bail report. The magistrate noted that the pre-bail report indicated that the victim expressed that her life was threatened. The court further noted the father/daughter relationship between the Applicant and the complainant.

30. I did not have the advantage of reading the pre-bail report for the same was not attached by the Applicant herein. Suffice to note that the decision by the trial magistrate on the question of bail was a decision based on merit finding by the trial court. This is not a decision amenable to the revision powers of this court. No basis is laid to warrant this court to call for the record of the criminal proceedings before the trial court for the purpose of satisfying myself as to the correctness, legality or propriety of the finding on bail and as to the regularity of the proceedings before the court.

31. Based on the above, if the Applicant was aggrieved by the denial of the application for bail, an application that was properly before the court and was heard on merit, the recourse open to the Applicant was to lodge an appeal against the said decision not a revision application as has been done herein.

32. With the result that the Notice of Motion filed herein fails in its entirety and is dismissed.

**DATED SIGNED AND DELIVERED AT NANYUKI THIS 18<sup>TH</sup> DAY OF OCTOBER 2023**

**A.K. NDUNG’U**

**JUDGE**

