



Shiels v Office of the Director Public Prosecution & 4 others (Constitutional Petition 2 of 2022) [2024] KEHC 12323 (KLR) (14 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION 2 OF 2022
SM GITHINJI, J
OCTOBER 14, 2024**

BETWEEN

SIMON HAROLD SHIELS PETITIONER

AND

OFFICE OF THE DIRECTOR PUBLIC PROSECUTION 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

MICHAEL OTIENO 3RD RESPONDENT

MARY AKINYI OKOTH 4TH RESPONDENT

ANTHONY OTIENO OKOTH 5TH RESPONDENT

RULING

1. For determination is the Notice of Motion application brought under Rules 19 and 23 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules 2013](#) seeking the following orders;
 1. Spent.
 2. That pending the hearing and determination of this Application this Honourable Court do stay any further proceedings in HCCR Case No. E8 of 2022 Malindi *Republic v Simon Harold Shiels*.
 3. That this Honourable Court do review this Court's Judgment dated and delivered on the 20th November, 2023 and any subsequent orders.
 4. That costs be provided for.



2. The application is supported by grounds on the face of the application and the supporting affidavit sworn by Simon Harold Shiels on even date. He deponed that on 22nd January, 2012 he was arrested and charged at the Malindi Magistrate’s Court in Traffic Case Number 67 of 2012 with a charge of causing death by dangerous driving, contrary to Section 46 of the Traffic Act. That the traffic case arose after he was involved in an accident with a motor cycle carrying his wife as a pillion as a result of which his wife died. According to him, the matter was adjourned severally at the behest of both the prosecution and the accused counsel.
3. He also deponed that on 12th April, 2022 his advocate representing him in the traffic case received a letter from the 1st Respondent dated 4th March, 2022 stating that the Principal Prosecution Counsel recommended withdrawal of the Traffic Case Under Section 87 (a) of the Penal Code and that proper investigations be conducted by SCCIO Malindi with a view of charging him with the offence of murder. He asserted that when the matter last came up in court, the 1st Respondent failed to withdraw the suit as anticipated in the letter of 4th March, 2022.
4. He contended that on 22nd May, 2022 he was summoned to the DCIO and upon availing himself, he was detained and informed that he was under arrest on charge of murder of his late wife. Further, that he was arraigned before the Malindi Magistrate’s Court under Misc. Criminal Application No. 8 of 2022 where the 1st Respondent sought for time for further investigations. He also contended that the officer falsely alleges that the traffic suit has never taken off since the charge was registered, that he interfered with prosecution witnesses and that he was a flight risk as his passport had been released under unclear circumstances.
5. According to him, he filed the present petition citing that the action of the 1st Respondent to charge him in HCCR Case No. E8 of 2022 (Malindi) *Republic v Simon Harold Shiels* over the same incident that caused him be charged in Traffic Case No. 67 of 2018 *Republic v Simon Harold Shiels* was a breach of his right to a fair trial as both matters were running concurrently at the time of filing this Petition.
6. He further deponed that this court in its judgment of 20th November, 2023 dismissed his Petition and according to him, there is sufficient cause to have the judgment reviewed as there is an apparent error on the face of the record and that there is sufficient reason to have the judgment reviewed.
7. The 1st Respondent in response filed grounds of opposition citing that the prayers sought cannot be granted as the applicant has failed to demonstrate discovery of new and important matter or evidence which is a basis for review; that the application is an abuse of the court process as the issues raised by the applicant have been dealt with by the court and that in the absence of new and important matter or evidence, the High Court became functus officio after delivery of its judgment that dismissed the Petition.
8. I have considered the application, the response thereto and the submissions filed by the parties; I find that the following issues are for determination;
 1. Whether this Court ought to stay any further proceedings in HCCR case No. E8 of 2022 Malindi Republic v Simon Harold Shiels; and
 2. Whether this court ought to review its judgment of 20th November, 2023.
9. In determining whether to stay proceedings in HCCR Case No. E8 of 2022, In the case of Kenya Wildlife Service vs James Mutembei (2019) eKLR, Gikonyo J quoted Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, that: “The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings



should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.” This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.” It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”.

10. As it is, the applicant alleges that the action of the 1st Respondent to charge him in HCCR Case No. E8 of 2022 (Malindi) *Republic v Simon Harold Shiels* over the same incident that caused him be charged in Traffic Case No. 67 of 2018, *Republic v Simon Harold Shiels* was a breach of his right to a fair trial as both matters were running concurrently at the time of his filing this Petition. Going by the supporting affidavit sworn by the applicant, he seeks stay of proceedings on the said ground. He asserts that the traffic case and murder case were running concurrently, but as things stand as of now, the traffic case was withdrawn and therefore the allegation that both matters were running concurrently is cured and cannot be a ground for staying the proceedings as of now, in HCCR Case No. E8 of 2022.
11. The rule is more exacting for a party requesting for a stay of proceedings. In particular, an Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case heard and determined on merits. The Applicant has not met this high threshold in this case.
12. In determining whether this Court ought to review the Judgment of 20th November, 2023, Section 80 of the [Civil Procedure Act](#) Cap 21 provides as follows: -

“ Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

13. Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 provides as follows: -

“ 1.

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or



order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

14. An applicant seeking orders for review must satisfy the court with the following;
- i. There is a new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order was made.
 - ii. There is some mistake or error apparent on the face of the record.
 - iii. Or for any other sufficient reason.
15. In the case *Republic v Public Procurement Administrative Review Board & 2 others* (2018) e KLR it was held: -
- “Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;
- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - (b) on account of some mistake or error apparent on the face of the record, or
 - (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
16. The applicant contends that he filed the present petition citing that the action of the 1st Respondent to charge him in HCCR Case No. E8 of 2022 (Malindi) *Republic v Simon Harold Shiels* over the same incident that caused him to be charged in Traffic Case No. 67 of 2018 *Republic v Simon Harold Shiels*, was a breach of his right to a fair trial as both matters were running concurrently at the time of his filing this Petition. I have taken time to peruse the lower court record on the traffic case and it reveals that the last time the suit was in court was on 28th October, 2021 and there are no further proceedings to show that the traffic case continued or is still pending. As such, it would only mean that the traffic case had been abandoned before it’s withdrawal, and the allegation that both matters were running concurrently is not correct.
17. Flowing from the foregoing, I am not persuaded that there is new and important matter or evidence which after the exercise of due diligence was not within the applicant’s knowledge or could not be produced by him at the time when the decree or order was made and that there is some mistake or error apparent on the face of the record to warrant this court to review the said judgment. In the end, I don’t find merit in the application dated February 15, 2024 and the same is dismissed with no order as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 14TH DAY OF OCTOBER, 2024.

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S.M. GITHINJI

JUDGE



In the Presence of; -

1. Petitioner
2. Ms Ochola for the 1st Respondent
3. Dr Khaminwa for the Petitioner

Dr Khaminwa; -Can I have a copy of the Ruling. I need it for purpose of Appeal. I pray for stay.

Ms Ochola; - We oppose stay of execution. The application was filed on 18/2/2024. The Court has determined on the issue. There is no need for a stay. I pray for a date of hearing of Criminal Case No. E008 of 2022.

Court; - There is a pending murder case which from experience cannot be determined within 6 months. Even if it commences, the appeal will still have a chance to be heard. It is not fair to stop the wheel of justice from motion in circumstances which may lead to unjustified delay in delivery of justice. On the ground the stay order is declined. Criminal Case No. E008 of 2022 be mentioned on 3rd March, 2025.

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S.M. GITHINJI

JUDGE

14/10/2024

